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Before the
Federal Communications Commission
Washington, D.C. 20554

GEN Docket No. 90-498

In the Matter of

Louisiana Region Public
Safety Plan

ORDER

Adopted: December 19, 1990; Released: December 31, 1990

By the Chief, Private Radio Bureau and the Chief Engineer:

1. On July 20, 1990, Region 18 (Louisiana) submitted its public safety plan to the Commission for review. The plan sets forth the guidelines to be followed in allotting spectrum to meet current and future mobile communications requirements of the public safety and special emergency entities operating in its region. On October 2, 1990, Louisiana filed revisions to the plan, based on conversations with the Commission's staff.

2. The Louisiana Plan was placed on Public Notice for comments 55 FR 43033 (Oct. 25, 1990). The Commission received no comments in this proceeding.

3. We have reviewed the plan submitted for Louisiana and find that it conforms with the National Public Safety Plan. The plan includes all the necessary elements specified in the *Report and Order* in Gen. Docket No. 87-112, 3 FCC Rcd 905 (1987), and satisfactorily provides for the current and projected mobile communications requirements of the public safety and special emergency entities in Louisiana.

4. Accordingly, IT IS ORDERED that the Public Safety Radio Plan for Louisiana IS ACCEPTED. Furthermore, licensing of the 821-824/866-869 MHz band in Louisiana may commence immediately.

FEDERAL COMMUNICATIONS COMMISSION

Ralph A. Haller
Chief, Private Radio Bureau

Thomas P. Stanley
Chief Engineer

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-600

In the Matter of

Competition, Rate Deregulation
and the Commission's Policies
Relating to the Provision of
Cable Television Service

MEMORANDUM OPINION AND ORDER

Adopted: December 17, 1990; Released: December 31, 1990

By the Commission:

1. On July 31, 1990, the Commission released and submitted to Congress a *Report* in the above-captioned proceeding. The *Report* examined issues concerning rate regulation and competition in the cable television industry and offered related legislative recommendations. The Commission prepared and submitted the *Report* pursuant to Section 623(h) of the Cable Communications Policy Act of 1984, which required this submission not later than six years after the enactment of the Cable Act -- by October 28, 1990.[1]

2. The Wireless Cable Association, Inc. ("WCA"), has submitted a petition for limited reconsideration of that *Report*. Although WCA does not dispute any of our factual findings, it requests the modification of certain legislative recommendations contained in the *Report*. Specifically, WCA argues, as it previously had done in comments filed in this proceeding, that legislation should be recommended providing alternative multichannel video service providers with access to programming services regardless of whether cable operators have cognizable interests in these services. Because the recommendations in the *Report* are not Commission actions against which reconsideration lies, we are dismissing WCA's petition.

3. Petitions for reconsideration are governed by Section 405 of the Communications Act of 1934.[2] The *Report* in this proceeding sets forth the results of the Commission's factual assessment of the cable industry and makes legislative recommendations to Congress based on this assessment. Congress may adopt, reject or modify these legislative recommendations. The *Report* does not bind any party or person to a particular course of action, [3] nor does it alter the Commission's rules or policies in any manner.[4] Recommendations of the type contained in the *Report* do not constitute the type of "order, decision, report, or action" to which Section 405 applies, and thus the *Report* does not constitute a Commission action against which reconsideration lies.

4. Further, the time for submission of the subject *Report* has now passed, and, as a practical matter, the *Report* itself has already been subject to review as part of the legislative process.[5] In that process, the WCA arguments have also been specifically reviewed and considered. In light of these factors, we do not find further consideration of the matters raised by WCA to be either necessary or appropriate at this time.

5. Accordingly, IT IS ORDERED that the petition for limited reconsideration filed by the Wireless Cable Association, Inc., IS DISMISSED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] 47 U.S.C. § 543(h).

[2] Section 405(a) states:

> After an order, decision, report, or action has been made or taken in any proceeding by the Commission, . . . any party thereto, or any other person aggrieved or whose interests are adversely affected thereby, may petition for reconsideration . . . .

47 U.S.C. § 405; *see also* 47 C.F.R. § 1.106 (Commission rule implementing Section 405).

[3] *Cf. Public Utilities Commission of the State of California*, 4 RR 2d 498, 501 (1965) (dismissing petition for rehearing of public notice announcing submission of tariff filings), *aff'd*, *Public Utilities Commission of the State of California v. US and FCC*, 356 F.2d 236 (9th Cir. 1966), *cert. denied*, 385 U.S. 816 (1966).

[4] *Cf. Infinity Broadcasting Corporation of Pennsylvania*, 3 FCC Rcd 930, 936 n.18 (1987) (holding that under Commission Rule 1.106, a public notice summarizing enforcement standards reflected in other declaratory rulings has no independent legal significance and is therefore not a final action against which reconsideration lies), *remanded in part on other grounds sub nom. Action for Children's Television v. FCC*, 852 F.2d 1332 (D.C. Cir. 1988).

[5] *See, e.g.*, H.R. Rep. No. 682, 101st Cong., 2d Sess. 102-106 (Sept. 6, 1990).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-540

In re Applications of

MOUNTAIN-HIGH BROADCASTERS, INC. (hereafter "Broadcasters")	File No. BPH-890426MH
CHARISMA RADIO CORP. (hereafter "Charisma")	File No. BPH-890504MA
BENCHMARK COMMUNICATIONS CORPORATION (hereafter "Benchmark")	File No. BPH-890504ME

For Construction Permit
for a New FM Station on Channel 283A
in Highlands, North Carolina

HEARING DESIGNATION ORDER

Adopted: October 26, 1990; Released: January 2, 1991

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.

2. *Benchmark*. Information before us indicates apparent misrepresentations by Benchmark to the Commission. Specifically, on March 25, 1988, Benchmark filed an application for extension of time to construct Station WCCJ(FM) at Chatom, Alabama. In a *Letter to Benchmark Communications Corporation from Larry D. Eads*, 8920-MW (January 19, 1989), Benchmark's request for extension of its construction permit was denied. Mr. Eads, Chief, Audio Services Division stated, in pertinent part:

> We must also point out, however, that there appear to be several misrepresentations with respect to construction progress made by Benchmark in this case. Specifically, while Benchmark claimed in its March 25 application that tower and mobile home to be used for studios and offices were on site with equipment installation progressing, these statements appear to be untrue. There is still no tower at the site, and no trailer arrived at least until (by Benchmark's own admission) May 16, 1988. Additionally, Benchmark claimed that the power company had begun installing a service line to the site, when no such line was in place yet, over nine months after the claim was made. We remind Benchmark that truthfulness is a key element of character necessary to operate a broadcast station in the public interest. *See In the Matter of Policy Regarding Character Qualifications in Broadcast Licensing*, 102 FCC 2d 1179 (1986); *recon. granted in part*, 1 FCC Rcd 421 (1986). *See also FCC v. WOKO*, 329 U.S. 223 (1946), and *Leflore Broadcasting Company, Inc. v. FCC*, 636 F.2d 454 (D.C. Cir. 1980). However, given the denial of the subject extension application and consequent cancellation of the WCCJ(FM) construction permit, we do not believe that further action is warranted at this time.

Accordingly, an appropriate issue will be specified in this proceeding.

3. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

4. Data submitted by the applicants indicate there would be significant difference in the size of the areas and populations which would receive service from the proposals. Consequently, the areas and populations which would receive FM service of 1 mV/m or greater intensity, together with the availability of other primary aural services in such areas, will be considered under the standard comparative issue for the purpose of determining whether a comparative preference should accrue to any of the applicants.

5. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

> 1. (a) To determine in connection with the matters discussed in paragraph two, above, whether Benchmark made misrepresentations to the Commission, was lacking in candor in its dealings with the Commission or attempted to deceive or mislead the Commission;
>
> (b) To determine, in light of the evidence adduced pursuant to issue (a) above, whether Benchmark possesses the basic qualifications to be a Commission licensee.
>
> 2. To determine which of the proposals would, on a comparative basis, best serve the public interest.
>
> 3. To determine, in light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

6. IT IS FURTHER ORDERED, That a copy of each document filed in this proceeding subsequent to the date of adoption of this Order shall be served on the counsel of record in the Hearing Branch appearing on behalf of the Chief, Mass Media Bureau. Parties may inquire as to the identity of the counsel of record by calling the Hearing Branch at (202) 632-6402. Such service shall be addressed to the named counsel of record, Hearing Branch,

Enforcement Division, Mass Media Bureau, Federal Communications Commission, 2025 M Street, N.W., Suite 7212, Washington, D.C. 20554. Additionally, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall also be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Federal Communications Commission, Room 350, 1919 M Street,. N.W., Washington, D.C. 20554.

7. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

8. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Petition for Rule Making to Modify Commission Policies Established in CC Docket No. 84-1299 Relating to Separate Satellite Systems, Including the Prohibition on Carrying Traffic Interconnected With the Public Switched Message Network	RM 7562

ORDER EXTENDING COMMENT PERIOD

Adopted: December 20, 1990; Released: December 21, 1990

By the Chief, International Facilities Division:

1. On December 3, 1990 the Commission issued a public notice of a petition for Rule Making in the above-captioned matter filed by Pan American Satellite (PAS). On December 5, 1990, the Commission issued a "corrected" public notice which specified that interested parties have 30 days within which to respond.

2. On December 18, 1990, Columbia Communications Corporation (Columbia) filed a motion requesting an extension of time until January 31, 1991 for the submission of comments in the above-referenced petition for Rule Making. Columbia states that the issues raised in PAS's petition are of fundamental importance to the U.S. separate international satellite industry and that interested parties need more than 30 days within which to gather relevant data and to prepare their responses. In addition, Columbia believes that an extension is merited since the principles of many interested parties will be unavailable for consultation during the two weeks immediately preceding the current filing date due to the Christmas and New Year holidays. Columbia also notes that a grant of the requested extension of time would clear up the confusion that has arisen as to whether the current deadline is 30 days from December 3, 1990 or December 5, 1990.

3. Extensions of time are not routinely granted and the proximity of a filing date to a holiday is generally not a sufficient reason for an extension. *See* 47 C.F.R. §1.46(a). In this case, we agree with Columbia that the issues involved are of such magnitude that the current deadline might not afford interested parties sufficient time. The issues presented in PAS's petition are not only of importance to the separate satellite industry, but affect the future of the entire international satellite industry. The fact that the Christmas and New Year holidays coincide with the current filing deadline further lessens the likelihood that interested parties could adequately address the issues presented. We therefore find good cause to grant the requested extension of time.

4. Accordingly, IT IS ORDERED, pursuant to the authority set forth in Section 1.46(b) of the Commission's Rules and Regulations, 47 C.F.R. §1.46(b), that all interested parties will have until January 31, 1991 to file comments and until February 15, 1991 to file reply comments in the above- captioned matter.

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

PR Docket No. 90-480

In the Matter of

Amendment of Parts 13 and 80 of the
Commission's Rules to implement
the Global Maritime Distress and
Safety System (GMDSS) to improve
the safety of life at sea.

ORDER

Adopted: December 24, 1990; Released: December 26, 1990

By the Chief, Private Radio Bureau:

1. On October 25, 1990, the Commission released a *Notice of Proposed Rule Making* (*Notice*) [1] proposing to implement the Global Maritime Distress and Safety System (GMDSS) in the Commission's Rules.[2] This proceeding proposes to incorporate the Final Acts of the Conference of Contracting Governments to the International Convention for the Safety of Life at Sea, 1974 on the Global Maritime Distress and Safety System, London, 1988, (1988 IMO Conference) into the Commission's Rules. It also completes the series of proceedings implementing the Final Acts of the 1987 World Administrative Radio Conference (WARC) for Mobile Services, Geneva, 1987 (1987 Mobile WARC). The proposed rules would apply to all cargo ships of 300 gross tons and over that navigate internationally or in the open sea and all passenger ships that carry more than twelve passengers regardless of size and navigate internationally or in the open sea, *i.e.*, ships subject to either the Safety of Life at Sea (SOLAS) Convention or Title III, Part II of the Communications Act of 1934, as amended (Communication Act). The due dates for comments and reply comments are January 7, 1991, and February 6, 1991, respectively.

2. Subsequent to the release of the *Notice*, the U.S. Coast Guard (USCG) and the Radio Technical Commission for Maritime Services (RTCM) filed separate requests for an extension of time for filing comments and reply comments to June 7, 1991, and July 6, 1991, respectively. American Mobile Satellite Corporation (AMSC) filed a letter supporting the extension of time requested by the USCG. Additionally, the Radio Electronics Officers Union in conjunction with the American Radio Association and on behalf of the AFL-CIO Maritime Committee (hereinafter, ROU) requested to extend the comment and reply comment dates to September 9, 1991, and October 14, 1991, respectively.

3. In its request, the USCG indicates that in view of the significant changes proposed, additional time is necessary to review the proposals and prepare well documented pleadings in response to the *Notice*. [3] RTCM, a non-profit organization concerned with maritime matters, notes that the issues raised in the *Notice* will impact " . . . all elements of the maritime telecommunications community including sales and service dealers, manufacturers, common carriers and other service providers, governmental authorities concerned with maritime safety at sea, and operators of ships of all sizes -- whether or not they are directly subject to mandatory carriage of GMDSS equipment and/or systems."[4] It indicates that the extension of time would allow it to coordinate effectively the diversity of views and prepare meaningful recommendations.[5]

4. ROU, on behalf of organizations representing radio officers and workers in the maritime trade and allied fields, states that it does not have the personnel available with the required technical and practical expertise to provide valued comments within the current time period for comments.[6] It notes that the unions expect to complete a survey in 4-5 months regarding on-board maintenance requirements for vessels operating in "Desert Shield."[7] Both RTCM and ROU argue that there is no logical reason to mandate severe time restrictions for comments and reply comments. They note that the earliest date, February 1, 1992, is for voluntary compliance with the GMDSS provisions. They argue that the mandatory compliance dates of February 1, 1995, for new ships and February 1, 1999, for all ships, provides sufficient time to address fully the complex technical matters regarding implementation of the GMDSS in the United States. Finally, RTCM and ROU note that domestic regulations regarding the GMDSS are constrained by existing provisions contained in the Communications Act.[8] They argue that because changes to the Communications Act are not imminent, a delay in the comment period is reasonable.[9]

5. We have carefully considered the requests for an extension of time and their supporting arguments. We conclude that a reasonable delay to June 7 and July 6, 1991, for comments and reply comments, respectively, is appropriate. We agree that the amendments set forth in the *Notice* are significant and represent sweeping technical changes to the present distress and safety system for the maritime community. We find, however, an extension of the comment and reply comment period to September 9 and October 14, 1991, respectively, as requested by ROU is excessive. This additional time would extend the comment and reply comment period to almost 12 months from the release of the *Notice*. Although implementation of the GMDSS on a voluntary basis will be impaired if changes in the Communications Act are not made, we continue to believe that concluding this proceeding within a reasonable time frame will provide the maritime community the necessary advance notice concerning the new GMDSS requirements. We must ensure sufficient time for U.S. ship owners to plan for the implementation of the GMDSS while permitting an adequate time for the views of the maritime community to be developed. Consequently, we believe that a 5 month extention to the comment and reply comment dates strikes the appropriate balance. No further extensions are contemplated.

6. In view of the foregoing, IT IS ORDERED that the requests of the USCG and RTCM for an extension of time to file comments and reply comments to June 7 and July 6, 1991, respectively, IS GRANTED.

7. IT IS FURTHER ORDERED that ROU's request to extend the comment and reply comment period to September 9 and October 14, 1991, IS DENIED.

8. IT IS FURTHER ORDERED that the period for filing comments and reply comments in the above-captioned proceeding is extended to and includes June 7, 1991, and July 6, 1991, respectively.

FEDERAL COMMUNICATIONS COMMISSION

Ralph A. Haller
Chief, Private Radio Bureau

FOOTNOTES

[1] 5 FCC Rcd 6212 (1990).

[2] The GMDSS will change international distress communications from Morse code and manual operation to automated, or semi-automated, communications using satellite and digital technologies. By incorporating advanced communications techniques and using ship-to-shore communications links, the GMDSS will significantly improve the safety of life and property at sea throughout the world. These changes will affect ship and coast station equipment and operations worldwide. Internationally, the GMDSS will be phased in from 1992 to 1999.

[3] USCG at 1.

[4] RTCM at 2.

[5] RTCM at 4.

[6] ROU at 2.

[7] ROU at 3.

[8] In the *Notice*, we stated that newly constructed or existing vessels that wish to install the GMDSS equipment as of February 1, 1992, would be required to carry dual sets of equipment and Morse code radiotelegraph operators if the Communications Act is not amended. Thus, we expect few owners to fit their ships voluntarily unless the Communications Act is amended since incurring the cost of operating two systems would place U.S. ships at a competitive disadvantage. *Notice* at para. 43.

[9] RTCM at 4-5 and ROU at 3-4.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

TS Infosystems, Inc. FOIA Control No. 90-03
On Request for Inspection
of Records

MEMORANDUM OPINION AND ORDER

Adopted: December 19, 1990; Released: January 2, 1991

By the Commission:

1. The Commission has before it an Application for Review filed on behalf of TS Infosystems, Inc. (Infosystems), appealing an August 3, 1990 Freedom of Information Act (FOIA)[1] decision by the Chief, Operations Support Division, Office of Managing Director (OMD). Infosystems seeks review of the OMD's withholding of certain materials concerning Request for Proposal (RFP) No. 90-03, issued by the Commission on February 1, 1990.

BACKGROUND

2. The RFP sought offers for the award of a contract to install and maintain photocopy and microfilm reader and printer equipment, and provide for the search, retrieval, and duplication of Commission documents. On July 6, 1990, the Commission awarded the contract to Downtown Copy Center (DCC or awardee).[2] Infosystems, an unsuccessful bidder in the procurement action, then filed the subject FOIA request. Among other things, [3] Infosystems sought access to the technical scores, evaluated prices, and relative ranking for all of the bidders in RFP 90-03. Infosystems also requested a copy of the awarded contract and the awardee's price listing and proposal.

3. The OMD denied access to this information under the deliberative process privilege embodied in Exemption 5 of the FOIA.[4] On appeal, Infosystems challenges the applicability of Exemption 5 of the FOIA. It argues that the information requested should be released because it is factual in nature and does not reveal the agency's deliberative process.

DISCUSSION

4. We agree with the OMD's determination that the records containing the technical scores and relative rankings for all of the bidders are protected under Exemption 5 of the FOIA. Those records were developed by the technical and cost evaluation teams established for the underlying procurement action. Like any other procurement activity, the evaluation teams did not have independent decisionmaking authority. Instead, the teams acted in an advisory capacity to the Commission's contracting officer, who was responsible for selecting the successful bidder. Moreover, while the information requested is numerical, it nonetheless reflects opinions and recommendations from the members of the evaluation teams to the contracting officer. Thus, the information developed by the evaluation teams is both predecisional and deliberative, and therefore within the scope of Exemption 5. *See SMS Data Products Group, Inc. v. Department of the Air Force*, Civil No. 88-0461, slip op. at 3 (D.D.C. March 31, 1989) (technical scores and technical rankings of competing contract bidders held predecisional and deliberative); *Professional Review Organization v. HHS*, 607 F. Supp. 423, 427 (D.D.C. 1985) (affording Exemption 5 protection to scores used to rate procurement proposals).[5]

5. We note that Infosystems' initial FOIA request sought access to "the evaluated prices for all bidders." *FOIA Request Letter*, July 19, 1990, at 1. Within the context of Infosystems' request, the OMD apparently interpreted this statement as a request for the evaluated cost points awarded to each bidder.[6] On appeal, Infosystems states that "listings of the prices bid (bid abstracts) are commonly available in federal procurements . . . . such as this one." *FOIA Appeal Letter*, August 10, 1990, at 2. To the extent that Infosystems sought access to the total cost figures proposed by each bidder, this information is protected from mandatory disclosure by Exemption 4 of the FOIA, 5 U.S.C. § 552(b)(4).[7] In this case, the bidding process could be reopened to all of the bidders as a result of a pending protest proceeding before the General Accounting Office (GAO). *See* note 2, *supra*. Disclosure of the total costs proposed by the bidders at this juncture could cause substantial harm to their competitive posture if the contract is resolicited. For the same reasons, we agree with the OMD's determination to withhold the awarded contract and the awardee's price listing and proposal. Pending the outcome of the GAO protest proceeding, this information is protected under Exemption 4 of the FOIA.[8] If the agency's award to DCC is sustained, however, DCC's price listing and the resulting contract will become publicly available pursuant to federal acquisition regulations. *See* 48 C.F.R. §§ 5.303; 15.1001.[9]

6. In view of the foregoing, the Application for Review filed by TS Infosystems, Inc. is denied. Infosystems may seek judicial review of this decision pursuant to 5 U.S.C. § 552(a)(4)(B).

7. The officials responsible for this action are the following Commissioners: Albert C. Sikes, Chairman, James H. Quello, Sherrie P. Marshall, Andrew C. Barrett, Ervin S. Duggan.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] 5 U.S.C. § 552.

[2] On July 19, 1990, International Transcription Services, Inc., incumbent contractor and unsuccessful bidder in this procurement activity, filed a protest against the contract award before the General Accounting Office. This proceeding is still pending.

[3] Infosystems' FOIA request consisted of thirteen questions. The OMD fully responded to eight of those inquiries. The remaining five items are the subject of the instant Application for Review.

[4] Exemption 5 prevents the disclosure of "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." 5 U.S.C. § 552(b)(5). The exemption has been interpreted to incorporate certain common law privileges developed in civil discovery cases, including, among others, the deliberative process privilege. *See Coastal States Gas Corp. v. Department of Energy*, 617 F.2d 854 (D.C. Cir. 1980). Generally, this privilege protects advice, recommendations, and opinions which are part of the deliberative, consultative, and decisionmaking process leading to the adoption of an agency decision. *See NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132 (1975); *Coastal States Gas Corp. v. Department of Energy, supra.*

[5] Infosystems further states that it seeks access to the technical scores and relative ranking of the offerors so it "may be better prepared for future bids," and to "determine how [it compares] to [its] competitors for future bidding purposes." *FOIA Appeal Letter*, August 10, 1990, at 1-2. The Commission has authorized public disclosure of information that is otherwise exempt from disclosure under the FOIA only where there is a sufficient showing that the information is a necessary link in a chain of evidence that will resolve a public interest issue. *See Western Union Telegraph Co.*, 2 FCC Rcd 4485, 4487 (1987); *Classical Radio of Connecticut, Inc.*, 69 FCC 2d 1517, 1520 n.4 (1978). Infosystems has not presented a compelling interest sufficient to justify public disclosure. Rather, Infosystems merely seeks to enhance its own competitive posture in future procurement activities.

[6] The cost evaluation team arrived at those scores by using a cost evaluation formula specified in the RFP to evaluate the prices proposed by each bidder for each service requested by the contract.

[7] Exemption 4 is designed to protect "commercial or financial information obtained from a person [that is] privileged or confidential." 5 U.S.C. § 552(b)(4). Generally, information is confidential if disclosure is likely to cause substantial harm to the competitive position of the person from whom the information was obtained. *See National Parks & Conservation Ass'n v. Morton,* 498 F.2d 765 (D.C. Cir. 1974).

[8] The OMD denied access to DCC's price listing and proposal and to the awarded contract pursuant to Exemption 5. For the reasons discussed in paragraph 6 above, we believe the material properly should have been withheld pursuant to Exemption 4 . *See Shermco Industries v. Secretary of Air Force,* 613 F.2d 1314, 1317 (5th Cir. 1980).

[9] Total costs proposed by unsuccessful bidders may be protected from disclosure under Exemption 4 even subsequent to a final contract award by the agency. *See Raytheon Co. v. Department of the Navy,* Civil No. 89-2481, slip op. at 2-3 (D.D.C. Dec. 22, 1989). We need not reach here whether, subsequent to a final contract award, Exemption 4 would apply to the costs proposed by unsuccessful bidders. We also do not reach whether the successful bidder's proposal, containing both technical and price strategy data, would be exempt from disclosure after the final award. *See SMS Data Products Group, Inc. v. Department of the Air Force, supra.; Landfair v. Department of the Army,* 645 F. Supp. 325, 329 (D.D.C. 1986); *Professional Review Organization v. HHS,* 607 F. Supp. at 426.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-172

In re Applications of

CAROL SUE BOWEN	File No. BPH-880406MH
Joseph B. Prater and Joseph P. Durham, A Partnership, d/b/a PRATER and DURHAM	File No. BPH-880406MJ
HEART OF VIRGINIA BROADCASTING	File No. BPH-880407ND

For Construction Permit for
New FM Station, Channel 268A,
Vinton, Virginia

MEMORANDUM OPINION AND ORDER

Adopted: December 12, 1990; Released: January 3, 1991

By the Review Board: MARINO (Chairman), BLUMENTHAL and ESBENSEN.

1. Prater & Durham's (P & D) application was dismissed by Administrative Law Judge Joseph Chachkin (ALJ) because P & D failed to timely demonstrate its financial qualifications, and did not comply with its document discovery obligations. *See Order*, FCC 90M-2997, released September 21, 1990. P & D's appeal from that *Order* was filed October 10, 1990; a joint opposition was filed October 16, 1990 (and supplemented November 13); and P & D's response was filed November 28, 1990. The Board will affirm the ALJ's dismissal of P & D, which is fully supported by the factual record and controlling precedent.

BACKGROUND

2. P & D's application (FCC Form 301), as filed April 6, 1988, contained a negative response to the financial certification question, with the statement that the "applicant is in the process of obtaining finances." Some two years passed without P & D resolving its financial problems, and the *Hearing Designation Order*, 5 FCC Rcd 2973, 2974 (1990), thus specified a financial issue against P & D.

3. At the prehearing conference convened on July 20, 1990, more than two months after designation for hearing, the ALJ noted on the record P & D's financial defects. Tr. 4-5. Counsel then represented before the ALJ that P & D now had "acquired the necessary resources of financing" and would, within 30 days, file a motion for summary decision on P & D's the financial issue. Tr. 5-6. Opposing counsel urged that P & D would be required to show "good cause" for its belated financial showing, citing *Edwin A. Bernstein*, 4 FCC Rcd 8420 (Rev. Bd. 1989), *aff'd*, 5 FCC Rcd 2843 (1990). Counsel for P & D responded that here, unlike the *Bernstein* case, the other parties would not be "prejudiced by lack of discovery on the issue. They'll have their full chance to discover, the facts will be made known [in its motion for summary decision] before discovery begins." Tr. 7-8.

4. The presiding ALJ then cautioned P & D's counsel (Tr. 8; emphasis added):

> Well, I think it's certainly advisable . . . that you file your motion for summary decision as soon as you can and I think if you can file it sooner than thirty days, it may forestall the necessity for discovery on that issue if it's as clear cut -- for instance, if you have a bank loan.
>
> I don't know what you're relying on, but . . . *it's in your interest to file your motion for summary decision as soon as you can. And also an argument won't be able to be made that you delayed discovery, you know, that you prejudiced the parties. So I think ... the quicker you can file your motion for summary decision and put your cards on the table as to what your financial showing is, it would be better for all concerned.*
>
> *Particularly, there is a number of cases, I know, going through the Commission as to whether or not an amendment is necessary or not . . . .*

5. At that same prehearing conference, the ALJ also indicated that discovery (including the taking of depositions) should be completed in early September: "I have no problem with early September. I don't think it should be much later than that." Tr. 12. Thereafter on August 7, 1990, the ALJ released an *Order*, FCC 90M-2410, granting an unopposed joint motion for production of documents "requiring P & D to produce documents relative to financial issue by August 17, 1990." Nonetheless, some two months after the prehearing conference, and more than four months after designation of the issue, P & D had still failed to file its promised motion for summary decision, and further failed to comply with the specified directive of the ALJ to produce its financial documents by August 17, 1990.

6. After considering several motions and responsive pleadings filed by the parties, the ALJ released his September 21, 1990 *Order* dismissing P & D's application. There, the ALJ found that "as of this date, a motion for summary decision has not been filed" by P & D and that (*Order* at para. 3):

> A broadcast applicant must be "ready, willing and able" to meet the Commission's financial requirements, certainly once the hearing has been designated, unless some unanticipated event requires an application amendment." *Edwin A. Bernstein*, 4 FCC Rcd 8420, 8421 (Rev. Bd. 1990). Here, by its own admission, P & D was not qualified when it filed its application in April 1988. Moreover, as of this date, some 27 months later, it has not cured this critical deficiency. The Review Board has made clear that any effort to demonstrate financial qualifications after the 30 day period allowed after designation for

> filing of amendments as "a matter of right," must meet the rigorous "good cause" test for post-designation amendments set forth in Rule 73.3522(b). *Bernstein, supra* ; *Northampton Media Associates*, 3 FCC Rcd 5164, 5169 (Rev. Bd. 1988), *rev. denied*, 4 FCC Rcd 5517 (1989). It is abundantly clear in light of P & D's utter lack of diligence in establishing its financial qualifications that P & D can not meet the required "good cause" test for post-designation amendments. Under these circumstances, no purpose would be served in delaying action on P & D's dismissal until such time in the future when P & D attempts to put its financial house in order. Consistent with the holding in *Bernstein*, P & D's failure to cure its financial deficiences in a timely and diligent manner requires dismissal of its application. (footnotes omitted)

In the first two footnotes to his *Order*, the ALJ observed (1) that some uncertainty was expressed at the prehearing conference as to the need to amend under the certification procedure, but that "[t]he cases cited leave no doubt that an amendment is required"; and (2) that P & D's failure to attempt to make a financial showing, even at this late date, raised a serious question whether its statement in its application that it was in the process of obtaining financing had any factual foundation, and "if P & D's application was not dismissed, a misrepresentation/lack of candor issue would be added against P & D."

7. The second prong of the dismissal *Order* rested upon P & D's failure to comply with its document production obligations. On this point the ALJ first found that (*Order* at para. 6.):

> P & D was ordered to produce *all* documents by August 17, 1990. It has no authority to unilaterally change the date or terms of such production. Such authority reposes exclusively with the Presiding Judge and P & D's failure to comply with the Presiding Judge's *Order* can not be countenanced. Contrary to P & D's assertion, P & D's failure to produce the documents in a timely fashion has prejudiced the parties. While the hearing is scheduled for November, it was contemplated that the taking of depositions would be completed in the *early part of September* (Tr. 12). Until the production is complete, the parties will not be in a position to know the identity of the deponents with knowledge pertinent to the financial issue. Thus, P & D's conduct has effectively foreclosed meeting the September schedule.

Lastly, the ALJ found that (*id*., at para. 6):

> [A]lthough mandated by the Presiding Judge more than three months ago [FCC 90M-1592, June 11, 1990, at 2], P & D has failed to participate in the preparation of a joint motion for production of documents with respect to the comparative issue. In this connection, the parties recite that prior to the July 20 prehearing conference, a joint motion was drafted and provided to P & D's counsel for his review. To date, P & D had provided no comments on that draft. P & D's failure to act has delayed the taking of depositions on the comparative issues and further prejudiced the parties. P & D's conduct falls far short of the conduct which the Commission can and does expect of broadcast applicants and provides additional support for dismissal of P & D's application. *See Warren Price Communications, Inc.*, 2 FCC Rcd 7409 (Rev. Bd. 1988), *rev. denied*, 4 FCC Rcd 1992 (1989), *recon. denied*, 5 FCC Rcd 2906 (1990).

DISCUSSION

8. P & D's major point in its Appeal, pp. 1-4, is that dismissal of its application for failure to amend violated its "due process rights to notice of the procedures to be employed by the Commission." Relying on *RKO General, Inc.*, 24 RR 2d 16, 19 (1972), and similar cases, it urges that prior to the Commission's adoption of the financial certification requirement an applicant like P & D was "not required to amend prior to submitting evidence under the financial qualifications issue." *Id*., at 2-3. It also urges that at the prehearing conference the ALJ expressed doubts about whether an amendment was necessary, and "did not order P & D to file a financial amendment as he has the authority to do under Rule 73.3514(b)." *Id*., at 3-4.

9. The competing applicants respond that "P & D relies on hoary precedent" and ignores *Bernstein, supra*, "the most recent Review Board and Commission authority on this point [which] directly contradicts P &D's argument" and which was called to P & D's attention during the prehearing conference. Tr. 6-7. Further, both the Board's and the Commission's actions in *Bernstein* were released before the adoption of the *Hearing Designation Order* in this case, giving P & D ample notice of the applicable Commission procedures. Opposition, pp. 1-3.

10. We agree that P & D's argument is based upon "out-dated policies and precedent." Recently, after reviewing many of the relevant authorities in *Albert E. Gary*, 5 FCC Rcd 6236 para. 9 (Rev. Bd. 1990), we found that:

> From the 1960s until the adoption of the (now-abandoned) financial certification requirements, *Revision of Form 301*, 50 RR 2d 381 (1981), the Commission followed a liberal "policy of permitting an applicant to remove a disqualifying factor through amendment during hearing. *See Fisher Broadcasting Co*., 30 FCC 177 (1961), and *Beacon Broadcasting Systems Inc*., FCC 60-118, 19 RR 927 (1960)." *Azalea Corp*., 31 FCC 2d 561, 563 (1971). Applicants were permitted to amend in response to petitions to add financial issues, *William R. Gaston*, 35 FCC 2d 615, 619 (Rev. Bd. 1972); many months after designation of a financial issue for hearing, *Click Broadcasting Co*., 25 FCC 2d 511, 513 (Rev. Bd. 1972); on the eve of the hearing, *Bison City TV 49 L. P.*, 91 FCC 2d 26, 28-29 (Rev. Bd. 1982); and even after the hearing record was closed. *Gilbert Broadcasting Group*, 68 FCC 2d 186, 207-208 n.54 (Rev. Bd. 1978). This practice changed with the adoption of certification.

Significantly, in *Bernstein*, 5 FCC Rcd at 2843 n.1, the Commission squarely rejected a contention identical to that profered by P & D that *RKO General, supra*, established that a prompt financial amendment is not a condition precedent to the prosecution of an application. The Commission responded in *Bernstein* that the "argument is without merit in light of the Commission's ruling in *Chudy Broadcasting Corp.*, 58 RR 2d 133 (1985), affirming the dismissal of an application for lack of a financial proposal. Significantly, the Commission there noted that 'temporizing with flawed proposals has in the past disserved the public interest by inordinately delaying the initiation of new service.' 58 RR 2d at 134 n.7." *See also Hillebrand Broadcasting, Inc.*, 1 FCC Rcd 419, at paras. 2-3 (1986), where the Commission emphasized its responsibility to provide new service to the public in the most efficient and expeditious manner possible, an integral part of the public interest. *See also CSJ Investments, Inc.*, FCC 90-367, released November 18, 1990, at para. 8. Thus, like the ALJ, we have no doubt that the *Chudy-Hillebrand-Bernstein* line of cases, which stretches from 1985 to 1990, gave P & D ample notice that it had to demonstrate good cause for an amendment.[1]

11. Here, P & D's complete failure to amend to establish its financial qualifications (the first prong of the ALJ's *Order)* was aggravated by its failure to comply with *Orders* for the production of documents, and the ALJ's instructions establishing a deadline for the taking of depositions. First, P & D failed to file a motion for summary decision, which might have obviated the need for discovery on the financial issue, after promising the ALJ that it would do so (*see* para. 3, above). Second, it failed to produce its financial documents by August 17, 1990 as ordered by the ALJ, and lastly, it failed to comply with an earlier *Order,* regarding "the production of documents with respect to the comparative issue," (*see* paras. 5 and 7, above).

12. We agree with the ALJ's finding that these defaults delayed the taking of depositions, prejudiced the other parties, and "foreclosed meeting the September schedule." *Order* at para. 6. This second prong of the ALJ's *Order*, standing alone, is sufficient to justify dismissal of the application. *See Lorraine Walker Arms,* 5 FCC Rcd 3426, 3427-28 (Rev. Bd. 1990), *aff'd,* FCC 90-365, released November 21, 1990, and *Warren Price Communications, Inc., supra.* In sum, the factual record and the relevant precedent establish that either prong of the ALJ's ruling, standing alone, justified the dismissal of P & D's application.[2] Its appeal is therefore denied.

13. ACCORDINGLY, IT IS ORDERED THAT Prater & Durham's Appeal from Order Dismissing Application filed October 10, 1990, IS DENIED; and that the Motion to Strike Notice of Appeal filed October 3, 1990, by Carol Sue Bowen and Heart of Virginia Broadcasting IS DISMISSED as Moot.[3]

FEDERAL COMMUNICATIONS COMMISSION

Joseph A. Marino
Chairman, Review Board

FOOTNOTES

[1] To the extent that the ALJ's ruling, quoted above in para. 6, suggests that an applicant fully aware of a basic qualification problem with its application for a long period of time prior to designation may simply amend as a matter of right within 30 days of the *Hearing Designation Order,* we recall the Court's response to an identical assertion in *Cleveland Television Corp. v. FCC,* 732 F2d. 962, 965 n. 2 (D.C. Cir. 1984):

> Under the Commission's rules, an amendment may be made after the cut off date (1) "only upon a showing of good cause for late filing" or (2) as a matter of right if the amendment "relate[s] to issues first raised in the [hearing] designation order." *See* 47 CFR §73.3522 (b) (1), (2) (1982).
>
> The Commission defends the acceptance of the amendment on two grounds. First, it argues that the amendment relates to an issue "first raised in the designation order," i.e., the cross-ownership issue. As the ALJ explained, "While Channel 19 was undoubtedly cognizant of the cross ownership problem . . . the matter was not identified as one requiring an evidentiary hearing until the order of designation was issued." J.A. at 46. This explanation, however, proves too much, for it would apparently permit [free] amendment as to any issue set down for hearing by the designation order. After all, the purpose of the hearing designation order is to identify issues "requiring an evidentiary hearing." By contrast, the regulations permit amendment as to "issues first raised" in the designation order, not issues first set down for hearing in the order.

Cf. CR Broadcasting, Inc. 5 FCC Rcd 5348, 5349 para. 7 (Rev. Bd. 1990); *Mableton Broadcasting Co., Inc.*, 5 FCC Rcd 6314, 6326 n.36 (Rev. Bd. 1990) (original certification must be valid).

[2] We do agree with the presiding ALJ (*Order*, n.2) that if P & D's application is not dismissed a misrepresentation or lack of candor issue would be added against P & D because of its fallacious representation that the applicant since April of 1988 has been "in the process of obtaining finances." *See Bernstein,* 4 FCC Rcd at 8422 n.6.

[3] Because of the time element involved, we have served prepublication copies of this *Order* on the parties and the ALJ.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-311

In re Applications of

MARC A. ALBERT	File No. BPH-870918MC
TAYLOR COMMUNICATIONS OF SYRACUSE, INC.	File No. BPH-870918ML
SALT CITY COMMUNICATIONS INC.	File No. BPH-870918MN
HUSTON TELECOM, INC.	File No. BPH-870918MX
D.J.'S BROADCASTING CO.	File No. BPH-870918MY

For Construction Permit for
New FM Station, Channel 290A,
Syracuse, New York

MEMORANDUM OPINION AND ORDER

Adopted: December 14, 1990; Released: January 3, 1991

By the Review Board: MARINO (Chairman), BLUMENTHAL, and ESBENSEN. Board Member BLUMENTHAL issuing a Separate Statement.

1. Before the Review Board is an Appeal, filed November 26, 1990, by Huston Telecom Inc. (Huston) from *Memorandum Opinion and Order*, FCC 90M-3622, released November 15, 1990, by Chief Administrative Law Judge Joseph Stirmer (ALJ), ultimately dismissing Huston's application from the captioned proceeding. D.J.'s Broadcasting Company (DJ's) and Salt City Communications, Inc. (Salt City) filed a joint opposition to Huston's appeal on December 4, 1990, and the Commission's Mass Media Bureau (Bureau) similarly opposed the appeal on December 7, 1990.

BACKGROUND

2. Huston is (now) a corporate applicant with two classes of stock (voting and non-voting) initially organized by Sonrise Management Services, Inc. (Sonrise), and originally represented by Thomas L. Root, P.C. (Root) (Huston Appeal at p. 2). Huston's principal, Randall Lynn Huston, purportedly relied upon Sonrise and Root assurances that sufficient funds would be available for construction and operation of Huston's proposed facility; thus, upon filing, Huston affirmatively certified in its application (FCC Form 301) that it had reasonable assurance of financing for its station.[1] *Id.* Nevertheless, Huston admits that "[*I*] *t is conceded that* [*at the time of filing its application*], *Huston was not financially qualified* " pursuant to Commission rule and precedent. *Id.*, at p. 3; (emphasis added).

3. By *Memorandum Opinion and Order*, FCC 90M-601, released March 22, 1990, the ALJ added the following issues with respect to Huston:

> 1. To determine whether Huston is financially qualified to construct and operate its proposed Syracuse FM radio station;
>
> 2. To determine whether Huston lacked candor or misrepresented facts in originally certifying that it was financially qualified to construct and operate its proposed station; and,
>
> 3. To determine, in light of the evidence adduced under the foregoing issues, whether Huston possesses the basic qualifications to be a Commission licensee.

4. Following addition of these issues, the ALJ conducted a pre-hearing conference and issued two *Orders* (FCC 90M-1609, released June 11, 1990; FCC 90M-2675, released August 24, 1990) scheduling further hearings and dates for exchanging direct written testimony. Huston was required to submit its written testimony meeting these financial issues on October 8, 1990. However, in reviewing Huston's submission, the ALJ observed (FCC 90M-3622 at n. 2):

> Huston's direct case exhibits consist essentially of prior declarations prepared by Mr. Huston and filed in this proceeding. Those declarations were found insufficient to resolve requests for financial issues in favor of Huston. They are clearly insufficient to favorably resolve the financial issues which have been specified.

Thus, the ALJ concluded (*id.*, at paras. 3, 9-10): [2]

> Because it is absolutely clear from the exhibits exchanged by Huston that Huston failed to fulfill its fundamental obligation of obtaining reasonable assurance of funding before certifying its financial qualifications, the financial qualifications issue must be resolved against Huston.
>
> * * *
>
> An applicant for broadcast facilities must be found financially qualified to build and operate the proposed station. 47 U.S.C. 308(b) . . . . To establish its financial qualifications, an applicant must have "reasonable assurance" of sufficient net liquid assets on hand or sufficient funds available from committed sources to construct and operate the proposed facility for three months without revenue. *Scioto Broadcasters Limited Partnership*, 5 FCC Rcd 5158 (1990); *JAM Communications, Inc.*, 4 FCC Rcd 3754 (1989). And, the applicant must have such financial

> qualifications at the time it files its application and certifies its financial qualifications. *Aspen FM, Inc.*, 5 FCC Rcd 3196 (1990); *Shawn Phalen*, 5 FCC Rcd 4669 (1990). In the event the applicant certifies its financial qualifications, it cannot thereafter amend its financial proposal without first establishing that the applicant was financially qualified at the time of certification. *Albert E. Gary*, [5 FCC Rcd 6235 (Rev. Bd. (1990)]; *Pepper Schultz*, 5 FCC Rcd 3273 (1990). Thus, initial financial qualifications become an essential ingredient to a good cause showing for a later financial amendment. *Marlin Broadcasting of Central Florida, Inc.*, [5 FCC Rcd 5751 (1990)].
>
> When Huston filed its application and certified its financial qualifications, it did not have "reasonable assurance" of sufficient net liquid assets on hand or funds available from committed sources to construct and operate its proposed station . . . . The conversation Mr. Huston had with a representative of Sonrise did not provide the applicant with reasonable assurance of financing. Moreover, the brief discussions with representatives of the Chase Bank also failed to provide the applicant with reasonable assurance of financing. Specifically, it has been held that discussion of the possibility of bank financing with bank officials does not constitute reasonable assurance of financing. *Marlin Broadcasting of Central Florida, supra.* Yet, that is all Mr. Huston did. In neither case did any bank issue a letter providing Huston with reasonable assurance of financing. In fact, to this day, Huston has failed to introduce into this proceeding any bank letter reflecting that it had reasonable assurance of financing at the time the application was filed and the financial certification made. In this respect, the applicant here is in a worse posture than the applicant in *Roxanne Givens*, 5 FCC Rcd 5371 (1990). In *Givens*, the applicant at least had a loan letter, although it was clearly deficient. Here, the applicant had nothing at the time of certification and still has nothing demonstrating it was financially qualified when it filed its application. Huston argues that it acted in good faith in certifying its financial qualifications. But, the good faith of the applicant has nothing to do with the question whether the applicant was financially qualified. *Aspen FM, Inc., supra.* Specifically, when a financial issue is specified, the applicant must adduce probative evidence which "necessarily includes something more than the self-serving, uncorroborated statement[s] of the individual responsible for the certification that he had taken steps to secure the needed funds." *Northampton Media Associates*, 4 FCC Rcd 5517, 5519 (1989). Huston has utterly failed to meet this test in any way which would demonstrate that the applicant was financially qualified when it filed its application.

In light of the foregoing, the ALJ (1) granted the pending Motion for Summary Decision filed by DJ's (2) adversely resolved the financial qualifications issue specified against Huston; and (3) dismissed Huston's application.

5. In its Appeal, Huston asserts (1) that the refusal of the ALJ to allow a later amendment designed to cure an initially defective financial certification is an inappropriate "draconian standard"; (2) that this standard post-dates Huston's financial certification here, the standard "must be more consistent with fairness, due process, and the general practice of the Commission," and that "[a]n initial failure to meet the Commission's standard should not, *ipso facto*, require disqualification regardless of the surrounding circumstances." Appeal, at pp. 4-5. Huston also argues (3) that even if summary decision was appropriate here, the ALJ erred in dismissing its application; and, finally (4) that the "severe page limitation" attendant to appeals precludes "full argument." *Id.*, at pp. 6-7.[3] DJ's and Salt City, as well as the Bureau, urge that the ALJ's reasoning was correct, and that Huston's Appeal must be denied.[4]

DISCUSSION

6. We cannot improve upon the ALJ's cogent reasoning and conclusions set forth in para. 4, *supra*. Huston admits that it was not financially qualified when it filed its application; and when given an opportunity to meet the financial issues designated against it, Huston proffered nothing of substance to demonstrate its financial qualifications. Having "failed miserably" to show that it is financially qualified, Huston must fail in its Appeal. *Christian Childrens Network, Inc.*, 1 FCC Rcd 982 (Rev. Bd. 1986), *rev. denied*, 2 FCC Rcd 7395 (1987); *see Local Morgan Hill Radio Associates*, 4 FCC Rcd 2404 (Rev. Bd. 1989), *rev. denied*, 5 FCC Rcd 498 (1990) (adverse summary decision granted and applicant dismissed for failure to present evidence on specified issues).

7. As to Huston's later request to amend after its admittedly fallacious financial certification, the Board recently reiterated in *Albert E. Gary*, 5 FCC Rcd at 6236:

> From the 1960s until the adoption of the (now-abandoned) financial certification requirements, *Revision of Form 301*, 50 RR 2d 381 (1981), the Commission followed a liberal "policy of permitting an applicant to remove a disqualifying factor through amendment during hearing. *See Fisher Broadcasting Co.*, 30 FCC 177 (1961), and *Beacon Broadcasting Systems Inc.*, FCC 60-118, 19 RR 927 (1960)." *Azalea Corp.*, 31 FCC 2d 561, 563 (1971). Applicants were permitted to amend in response to petitions to add financial issues, *William R. Gaston*, 35 FCC 2d 615, 619 (Rev. Bd. 1972); many months after designation of a financial issue for hearing, *Click Broadcasting Co.*, 25 FCC 2d 511, 513 (Rev. Bd. 1972); on the eve of the hearing, *Bison City TV 49 L.P.*, 91 FCC 2d 26, 28-29 (Rev. Bd. 1982); and even after the hearing record was closed. *Gilbert Broadcasting Group*, 68 FCC 2d 186, 207-208, n. 54 (Rev. Bd. 1978). This practice changed with the adoption of certification [in 1981].

See generally Mableton Broadcasting Co., Inc., 5 FCC Rcd 6314, 6326 n. 26 (Rev. Bd. 1990) (original certification must be valid); *Carol Sue Bowen*, FCC 90R-120, adopted December 12, 1990. And, as the Commission recently declared in *Marlin Broadcasting, supra*, at ¶ 6: "As [the applicant] did not have reasonable assurance of financial qualifications at the time of certification on March 19, 1985, it was not entitled to rely on the [later-obtained] May 1, 1987 bank letter to support the earlier certification." In light of all the foregoing, we find no error in the

ALJ's grant of the adverse summary decision and the ultimate dismissal of Huston's application. *Local Morgan Hill, supra* ; *see also Edwin A. Bernstein*, 4 FCC Rcd 8420 (Rev. Bd. 1989), *aff'd*, 5 FCC Rcd 2843 (1990) (summary dismissal appropriate where financial issue not met).

8. ACCORDINGLY, IT IS ORDERED, That the Appeal filed by Huston Telecom, Inc., on November 26, 1990 (as supplemented on November 28, 1990), IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Eric T. Esbensen
Member, Review Board

FOOTNOTES

[1] Huston states in its Appeal (at p. 3) that:

> As of the date its application was filed, Huston thus resembled numerous other applicants organized by Sonrise and advised by Root. Thereafter, however, Huston distinguished itself from the mass of Sonrise applicants who have voluntarily dismissed their applications or had their applications dismissed for failure to prosecute. Even before the extent of the Sonrise/Root scam had become evident, Mr. Huston repeatedly sought to satisfy the Commission's "reasonable assurance" standards -- as he understood them -- by personally seeking alternative, independent sources of financing. Moreover, when the nature of the fraud perpetrated by Sonrise/Root did become evident, Mr. Huston not only retained new counsel, the applicant itself was reconstituted so that it contained only those members of its non-voting shareholder who had demonstrated a willingness to pursue the project by investing additional funds and personally appearing at depositions scheduled by Huston's opponents. Mr. Huston also expended the time, funds and energy necessary to appear at depositions and the hearing under other issues which had been specified against the applicant.

[2] More specifically, the ALJ detailed the following with respect to Huston (*Order*, at paras. 4-8):

> According to the declarations submitted by Huston in support of its direct case under the financial issues, Mr. Huston's estimated budget was based on a budget given to him by Sonrise, as confirmed by his past experience in radio and as a prior FM applicant for a construction permit for Van Buren, Indiana. Huston estimated construction and initial operating expenses at approximately $500,000. No breakdown of these estimated expenses has been provided.
>
> To meet these estimated expenses, Mr. Huston spoke with Marty Bishop of Sonrise who informed him that Sonrise "had had conversations with various banks such that Huston would have no problem securing the financing of up to the $500,000 which it might need." No documentation of any kind was secured from any bank by Huston nor was any effort made by Huston to secure funding from any of the banks with which Sonrise allegedly had conversations. Huston's financial certification was based on Mr. Huston's belief that Sonrise had secured financing for Huston Telecom Partnership, Huston Telecom, Inc.'s predecessor.
>
> Additionally, Huston's financial certification also was based on discussions regarding financing in the amount of $500,000 from Chase Lincoln First Bank (now Chase Bank) (Chase Bank) in Syracuse, New York, where Mr. Huston had been a customer. In August or September of 1987, Mr. Huston personally visited with George Koularis, who handled his account at Chase Bank and who introduced Mr. Huston to Joe Cutrone, of Chase Bank's investment division. Mr. Huston then discussed with Mr. Cutrone the bank's willingness to provide Huston with reasonable assurance of construction and initial operating expenses. Mr. Huston informed Chase Bank that estimated construction and initial operating expenses would be $500,000 and detailed what the funds would be used for. Mr. Huston provided the bank with oral information concerning his background in the broadcast business, including the news, sales and management responsibilities he had. He also explained that he personally would be in charge of the operation.
>
> According to Mr. Huston, he was advised that there apparently was no problem with his proposal, and that the necessary arrangements would be worked out upon grant of the application. Mr. Huston relied on these statements, as well, when certifying that Huston had reasonable assurance of financing.
>
> It is significant to note that Huston has provided no documentation whatever demonstrating its financial qualifications at the time its application was filed. No bank letters have been exchanged from any of the banks Sonrise and Huston were allegedly relying on, nor has any bank letter been exchanged from the Chase Bank. Moreover, no declarations or testimony have been provided by the two bank officials of the Chase Bank with whom Mr. Huston discussed financing. In short, despite having to meet financial issues in this hearing, Huston has failed to produce documentary evidence of its financial qualifications when its application was filed. [Footnote omitted].

[3] However, this "severe" page limitation did not preclude Huston from filing an 8-page Appeal and a 7-page Supplement thereto. 47 CFR §1.301(c)(5) states that appeals filed pursuant to this section of the Commission's Rules "shall not exceed 5 double-spaced typewritten pages."

[4] Ordinarily, the Bureau would not participate with respect to such a matter as that presented here. However, as the Bureau notes in its Opposition (at n. 1): "Consistent with recent practices, the Bureau has been an active participant in the hearing concerning Huston's qualifications because Huston was organized by Sonrise Management Services, Inc."

SEPARATE STATEMENT OF BOARD MEMBER NORMAL B. BLUMENTHAL

Having expressly conceded that its application was conceived in fraud (*see ante* note 1), Huston's belated effort to purge the taint is unavailing. *See generally Newton Television Limited,* 3 FCC Rcd 553, 558 n. 2 (Rev. Bd. 1988).

As we have had long-previous occasion to note, where an application is suffused with fraud at the outset, we should be deaf to claims of the "equities" of the "innocent," but should adhere rather to the ancient judicial maxim *"crimen omnia ex se nata vitiat." West Jersey Broadcasting Co.*, 90 FCC 2d 363, 375 (Rev. Bd. 1982).

Huston's (admittedly) specious financial certification is but the *initial* proximate cause of its dismissal; its own admissions resonate that its application, *en gross*, was bereft of substance when filed. Huston should be relieved that the worst federal action it might here face is dismissal of its hollow application. *See* 18 U.S.C. § 1001.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-357

In re Applications of

SWAN BROADCASTING LIMITED	File No. BPCT-870717KQ
CRESCENT CITY BROADCASTING CORPORATION	File No. BPCT-880419KE
DELTA BROADCASTING OF LOUISIANA, LTD.	File No. BPCT-880419KF
Robert H. and Janee M. Tucker d/b/a TUCKER BROADCASTING COMPANY, LIMITED PARTNERSHIP	File No. BPCT-880419KG

For Construction Permit for New
Television Station, Channel 20,
New Orleans, Louisiana

Appearances

Leo I. George, *Pamela C. Cooper*, and *Mark Van Bergh*, n behalf of Swan Broadcasting Limited; *DeWitt C. Conklin*, on behalf of Crescent City Broadcasting Corporaion; *Jeffrey D. Southmayd* and *Michael R. Miller*, on behalf of Delta Broadcasting of Louisiana, Ltd.; *Bradford D. Carey*, *Marjorie R. Esman*, and *Craig E. Frosch*, on behalf f Robert H. and Janee M. Tucker, d/b/a Tucker Broadasting Company, Limited Partnership.

DECISION

dopted: December 17, 1990; Released: January 3, 1991

By the Review Board: MARINO (Chairman), BLUMENTHAL, and ESBENSEN.

Board Member ESBENSEN:

1. Now before the Review Board are the *Initial Deision*, 5 FCC Rcd 3045 (1990) (I.D.) of Administrative aw Judge Edward J. Kuhlmann (ALJ), granting the Construction Permit application of Delta Broadcasting of Lousiana, Ltd. (Delta) for a new commercial television tation, proposed to operate on Channel 20, at New Oreans, Louisiana, as well as the exceptions and replies thereto filed by all of the above-captioned parties. Based upon our review of the pleadings and the hearing record below, and having heard oral argument on October 26, 1990, we reverse the ALJ's ultimate grant to Delta, uphold his denial of the applications of Crescent City Broadcasting Corporation (Crescent) and Tucker Broadcasting Company, Limited Partnership (Tucker), and determine that Swan Broadcasting Limited (Swan) is the preferred applicant.

BACKGROUND

2. The *Hearing Designation Order*, 3 FCC Rcd 4751 (1988) (HDO), released in this proceeding, originally designated the four applicants in the caption, and two others now dismissed, for consolidated hearing on the "standard comparative" issue, which is governed primarily by the guidelines enunciated in the Commission's *Policy Statement on Comparative Broadcast Hearings*, 1 FCC 2d 393 (1965) *("Policy Statement")*. In his analysis under this issue, the ALJ found that the only decisional distinction for selecting the best comparative applicant was the ownership and voting control of the various applicants' principals who proposed to be integrated into the day-to-day managerial operations of the new New Orleans station. *Policy Statement*, 1 FCC 2d at 395 (full-time participation in station operation by owners considered a factor of substantial importance since it is "desirable that legal responsibility and day-to-day performance be closely associated"). Both Swan and Delta were awarded an identical 100% quantitative credit for proposing to integrate their entire voting ownership into management positions. Crescent and Tucker, on the other hand, received no credit because (1) Crescent's directors did not propose to work at the station on a day-to-day basis; and (2) Tucker's principals purportedly could not effectuate their proposals due to outside commitments. As between Swan and Delta, the ALJ looked to the qualitative enhancements of the participating owners and selected Delta because its sole voting principal's "much longer residence . . . combined with . . . broadcast experience" outweighed Swan's female preference and shorter-term residence. I.D., at para. 33.

CRESCENT CITY

3. Crescent, a non-profit, non-stock corporation governed by three directors,[1] concedes in its brief (at 12) that it "does not propose the boilerplate full-time on-site managerial-level positions common to the [integration analysis of the] comparative process"; nonetheless, it argues that its proposal (consisting of minority principals purportedly seeking to better conditions for low and moderate income families) is the most consistent with the Commission's objective of identifying the best practicable service. As the Board is not empowered, however, "to make new policy or change old policy," *Horne Industries, Inc.*, 53 RR 2d 1647, 1648 (1983), we affirm the ALJ's conclusion that Crescent is not entitled to any integration credit, since its directors do not propose to work full-time at the station. *See generally Julia S. Zozaya*, FCC 90-355, released November 8, 1990.[2]

4. In light of the foregoing, Crescent is not a viable applicant here. With respect to the remaining applicants, the decisional questions raised by the exceptors are: (1) whether the ALJ erred in wholly discounting Tucker's claimed integration proposal; (2) whether he was correct

in crediting Swan's 100% quantitative integration proposal; (3) whether Swan or Delta prevails comparatively on the qualitative enhancements of their respective integrated owners; and (4) whether Swan's application may be granted without a further evidentiary hearing, in light of a felony conviction and subsequent pardon of Swan's sole voting principal.

TUCKER BROADCASTING COMPANY

5. Tucker is a limited partnership, consisting of two general partners, Robert H. Tucker, Jr. and Janee M. Tucker (husband and wife), each with 50% voting authority. I. D., para. 8. Robert Tucker proposes to work at the station full-time as general manager, while Ms. Tucker represents that she will work full-time as station manager. *Id.* They presently own and are employed at Tucker and Associates, Inc. (TAI), a consulting organization offering management and technical services to the public and private sectors. Mr. Tucker holds a 49% equity ownership in TAI. *Id.* Ms. Tucker serves as TAI's president and chief executive officer, and is a 51% owner. *Id.*, para. 27; Tucker Exh. 4.

6. Although both Mr. and Ms. Tucker pledged to resign from TAI in the event of a grant of their application, the ALJ concluded that they could not, in fact, effectuate their integration commitments. I. D., para. 30. He found that Ms. Tucker was contractually obligated to work full-time at TAI, and prohibited from outside employment, by virtue of that firm's participation in the Section 8(a) program administered by the Small Business Administration (SBA). That program, as we have previously noted in an analogous case, *see Knoxville Broadcasting Corp.*, 103 FCC 2d 669, 680 (Rev. Bd. 1986), is a federal minority contract set-aside program designed to assist individual minority entrepreneurship. The applicable SBA regulations require that the principal owners of an 8(a) concern must maintain exclusive control and management over the daily business operations of the firm. 13 CFR §124.104. At least one of the owners must hold a full-time position as President and/or CEO and is precluded from any outside employment or business interest which hinders the 8(a) firm from achieving its business objectives. *Id.* The ALJ found that Ms. Tucker had renewed her SBA Sec. 8(a) certification on December 17, 1989, following the hearing here. I.D., para. 29. With respect to Mr. Tucker, the ALJ discounted his proposal based on testimony that Mr. Tucker would remain at TAI until the station is operational. *Id.*, paras. 28, 30.

7. Tucker excepts to the denial of its quantitative integration credit, arguing that the ALJ "incorrectly assumed," based on Ms. Tucker's intent to retain SBA Sec. 8(a) status for TAI, that she has an "ongoing obligation" at TAI which would preclude her from fulfilling her integration pledge. It submits that TAI's SBA Sec. 8(a) requirements were scheduled to expire October 1990, and it proffers a letter from the New Orleans SBA District Counsel, Alan J. Wells, dated May 1, 1990, which, it claims, clarifies that the SBA Sec. 8(a) program would in no way interfere with the Tuckers' full- time integration pledges. Tucker further argues that Mr. Tucker's testimony that he would work at TAI until the station became operational provides no legal basis for denying him integration credit, since Commission precedent does not require "applicants to forsake their livelihood while their applications are pending," citing *Cuban American Ltd.*, 2 FCC Rcd 3264, 3269 (Rev. Bd. 1987).

8. *Discussion re : Tucker* : It is long-standing Commission precedent that an applicant is not entitled to integration credit for a purportedly participating principal whose outside activities cast substantial doubt on whether the proposed integration is likely to be effectuated. *Blancett Broadcasting Co.*, 17 FCC 2d 227 (Rev. Bd. 1969); *see also Virgil L. Pearman*, 5 FCC Rcd 5697, 5699 (Rev.Bd. 1990), *recon. granted on other grounds*, FCC 90R- 115, released December 4, 1990; *Leininger - Geddes Partnership*, 2 FCC Rcd 3199 (Rev. Bd. 1987), *review denied*, 3 FCC Rcd 1181 (1988); *Margaret Garza*, 1 FCC Rcd 1294 (Rev. Bd. 1986), *review denied*, 3 FCC Rcd 2525 (1988); *Ft. Collins Telecasters*, 103 FCC 2d 978, 985-986 (Rev. Bd. 1986), *review denied*, 2 FCC Rcd 1780 (1987) (subsequent history omitted). Thus, where the integration proposal conflicts with simultaneous commitments, the applicant has an affirmative burden to establish the reliability of his or her integration pledge by indicating how the other activities will be eliminated or curtailed to effectuate the commitment to the station. *Knoxville Broadcasting Corp.*, 103 FCC 2d at 680-683; *Washoe Shoshone Broadcasting*, 3 FCC Rcd 3948, 3952 (Rev. Bd. 1988), *recon. denied*, 3 FCC Rcd 5631 (Rev. Bd. 1988), *review denied*, 5 FCC Rcd 5561 (1990). *See also Marlin Broadcasting of Central Florida, Inc.*, 5 FCC Rcd 5751, 5754 n. 13 (1990).

9. Here, we agree with the ALJ that no credit can be awarded to Tucker in light of Ms. Tucker's apparent simultaneous SBA Sec. 8(a) contractual obligations. Although she testified she would resign from TAI (Tr. 365), as well as refrain from consulting with that firm, it is doubtful, in light of the following letter from the New Orleans SBA District Counsel, that she could be permitted to do so, and still remain in full compliance with SBA requirements. The SBA letter reads in pertinent part:

> While it is clear that all 8(a) firms must be in strict compliance with our regulations while that firm is active within the program, it is not quite clear as to whether or not that same firm is strictly bound by our regulations once it graduates from the 8(a) program. Tucker & Associates is scheduled to graduate as an 8(a) concern in October of 1990. So the question now presented is whether or not Bob Tucker and/or his wife, Janee Tucker, must continue in the full time employment of TAI as required by our regulations, 13 C.F.R. 124.104.
>
> While there are no past legal and/or administrative precedences of which I am aware which deal directly with the requirement of full time employment on an 8(a) firm which has graduated and which 8(a) firm continues to perform on a contract that was awarded prior to the graduation date, there seems to be a possible answer in Parts 13 C.F.R. 124.317 and 124.318 which states that an 8(a) contract (included its options) awarded on or after October 1, 1989 shall be performed by the 8(a) concern which was originally awarded the contract.
>
> Regulations Part 13 C.F.R. 124.318(b) presents a situation whereby an 8(a) firm which has graduated from the program will be allowed to exercise certain contract options under the previously awarded con-

> tract in spite of the fact that that firm after its graduation because of its growth became large business and, therefore, was technically unable to comply with certain size standard regulations which were applicable to the firm during its original program term.
>
> Therefore, following the graduation of TAI from the program, *in spite of the fact that TAI may technically be in violation of our regulations because of a lack of full time employment status by Bob and/or Janee Tucker, it is my opinion that as long as both Bob and Janee Tucker remain the majority stockholders, principal directors and officers of TAI, and as long as they are able to retain effective and sufficient control over the business operations of TAI to the exclusion of all others*, their failure to continue as "full time" employees of TAI would probably not be a basis upon which the Agency would terminate the present 8(a) contract upon which TAI is performing for the Department of Energy.

May 29, 1990 Letter from Alan J. Wells, New Orleans SBA District Counsel (emphasis added) (Official Notice aken).[3] It is undisputed that TAI's government contracts xtend well beyond TAI's October 1990 graduation date. Thus, it is clear that, despite Ms. Tucker's testimony to he contrary, the Tuckers would still be required to "reain effective control" over TAI "to the exclusion of all ther employment activities."

10. In *Knoxville Broadcasting Corp.*, 103 FCC 2d at 682, vhich, as here, involved a SBA Sec. 8(a) contractor, we nderscored the fact that there was "clear documentary vidence reflecting two mutually exclusive fulltime peronal management pledges to two different federal agenies in order to secure very special and valuable privileges rom both agencies." Based on the conflicting obligations, s well as the Knoxville principal's "unfulfilled commitnent of "fulltime," "day-to-day," "personal supervision of his] SBA federal contract businesses," the Board voiced ts lack of confidence that the principal "would show any reater honor to his FCC pledge of 'fulltime,' personal nanagement of CCT's communications business than he lid to that virtually synonymous pledge made to the SBA vith respect to his stewardship of [his minority firm]"; hus, we denied the applicant any quantitative integration redit. Although Tucker would distinguish *Knoxville* from he instant case merely because there was a shorter duraion from TAI's graduation date than that of the Knoxville pplicant's firm, we discern no legal distinction between he cases because TAI's contracts extend far beyond the October 1990 graduation date. Thus, we find *Knoxville* ontrolling for denying Janee Tucker her 50% integration redit. *See also Washoe Shoshone Broadcasting*, 3 FCC Rcd t 3952 (no credit where integration pledge conflicted vith restaurant franchise agreement). Because Tucker annot prevail comparatively, even if awarded 50% inegration credit for Mr. Tucker's participation, *see Van Buren Community Service*, 87 FCC 2d 1018, 1022 (Rev. Bd. 1981) (qualitative attributes of participating owners annot overcome a clear quantitative difference), we need ot reach the question whether it was error for the ALJ o deny Mr. Tucker integration credit on his testimony hat he would remain at TAI until the station was operational. Similarly, we need not address Tucker's qualitative enhancements, as urged by Tucker, since they are only pertinent if the applicant is awarded 100% quantitative integration credit.[4]

SWAN BROADCASTING LIMITED

11. Swan, awarded 100% quantitative integration credit by the ALJ, is a limited partnership, comprised of one general partner, Marian M. Vaccari, and two limited partners, Harold and Marilyn Erbs. I.D., para. 3. Vaccari owns 70% of the equity, and she proposes to work full-time as the facility's general manager. *Id.* The limited partners are prohibited by the limited partnership agreement from participating in the business of the partnership. *Id.*, para. 18 and n. 4.

12. Under well-settled Commission precedent, quantitative integration credit is generally awarded based on the "voting" ownership that is proposed full-time in station management. *See V. O. B. Incorp.*, 5 FCC Rcd 5872 (Rev. Bd. 1990). "Ownership interests held by passive investors are deemed inconsequential for integration purposes, because 'as passive investors [they] have no authority to control the licensee'". *Id.*, at 5872, *quoting Anax Broadcasting, Inc.*, 87 FCC 2d 483, 488 (1981). Where "limited partners or non-voting stockholders, although nominally without influence over the applicant, may actually participate in or control the applicant's decision- making process . . . the Commission disregards the applicant's formal ownership structure and treats the nominally passive owners (that is, non-voting stockholders or limited partners) as if they were active in the management of the applicant - and thus relevant to the Commission's integration analysis." *Coast TV*, 4 FCC Rcd 1786, 1787 (1989). *See also Royce International Broadcasting*, *supra*, FCC 90-390, released November 27, 1990. However, the role played by passive investors in the formation of an applicant is not necessarily dispositive of whether the applicant will secretly be managed by its passive investors. *Victory Media, Inc.*, 3 FCC Rcd 2073, 2074 (1988). The test for analyzing the *bona fides* of an applicant's integration proposal is the totality of the record. *See Metroplex Communications Inc.*, 4 FCC Rcd 8149, 8159 (Rev. Bd. 1989) (subsequent history omitted).

13. Swan's competitors challenge the *bona fides* of Vaccari's integration proposal and except to the 100% quantitative integration credit awarded Swan. In support, they contend that Vaccari is currently unemployed and has no significant business employment; that she has no broadcast experience; that she possesses a lack of familiarity concerning her management participation; and that she has previously relied upon limited partner Harold Erbs, who, they argue, will in most likelihood be involved in the management of the proposed station (contrary to his nominal status as a passive investor). They also argue that Erbs initially informed Vaccari of the availability of the broadcast channel, introduced her to communications counsel, and himself is presently in the communications business (*i.e.*, a licensee of several common carrier microwave facilities).

14. *Discussion re*: *Swan*: Initially, the contentions concerning Vaccari's lack of employment and broadcast experience, standing alone, provide no conclusive basis for undermining Vaccari's integration proposal. Her current unemployment is not pertinent to whether she could effectuate her proposal. And, as Swan notes in its Reply Exceptions (at 7), there is no record support for the claim

she has no significant business experience. She testified that she was on the Board of Directors of the Leevak Corporation, an offshore supply, shipyard and marine business, and was involved in public relations and represented the company at trade shows. *Id. See also* Tr. 50-51. Similarly, a lack of broadcast experience, by itself, has never been equated with an inability to effectuate an integration proposal, *see Webster-Baker Broadcasting Co.*, 88 FCC 2d 944, 951 (Rev. Bd. 1982), since it could discourage qualified newcomers to broadcasting and confers only an initial advantage. *Policy Statement*, 1 FCC 2d at 396. With respect to her alleged unfamiliarity with management participation, this argument was persuasively answered by the ALJ (I.D., para. 14):

> Delta and Crescent urge that Ms. Vaccari's promise should not be credited because she has little understanding of her role at the station, with no clear idea of how she plans to be involved in any particular aspect of the management. Their arguments are not supported by the record. Ms. Vaccari, as the foregoing conclusions demonstrate, spelled out in some detail her role at the station. Delta and Crescent rely on transcript page 31 where Ms. Vaccari said she did not know exactly how she would be involved with any particular department. The import of the question appears to contain an expectation that Ms. Vaccari should provide details about how she would act on a day-to-day basis. A few pages earlier in the transcript she explained her role when she was asked her duties, Tr. 27-28; she added further specificity as the questions became more pointed, Tr. 29, and she explained that she had even given some thought to what type of programming the station would carry. Tr. 30. The question which Delta and Crescent cite was unanswerable because it was too vague; it certainly would not form a basis for discrediting Ms. Vaccari's promise.

And, with regard to the alleged future intrusion by passive investor Erbs, the totality of the evidence leaves no "fundamental uncertainty" about the true nature of Swan's organizational structure which would justify discounting Swan's integration proposal. *Royce International Broadcasting, supra.* In this regard, we agree with the ALJ's reasoning (I.D., paras. 17-18):

> Ms. Vaccari did learn about her counsel, Leo George, from Mr. Erbs. Tr. 64. And it was Mr. Erbs who initially told her about the availability of the New Orleans' channel. Tr. 53. Ms. Vaccari explained that Mr. Erbs helped her with her financial statement when her spouse died. She asked him if he could find her something she could be active in in New Orleans. *Id.* She has known Mr. Erbs since about 1954. From 1987 to the present, Ms. Vaccari stated, she has met with Mr. Erbs about three times and she talks with him on the telephone twice a month. Those conversations have involved "very little" about Channel 20, she said; they are mainly about her financial investments, for which she pays him a fee for his advice, or about personal and social matters involving their families. Tr. 66-67.
>
> While Mr. Erbs does provide Ms. Vaccari with financial advice in other areas, he provides advice when paid a fee. There is no evidence that he will have a similar arrangement with her if Swan operates Channel 20. Ms. Vaccari holds 70% of Swan's equity and she lives in New Orleans while Mr. Erbs lives in Houston, Texas and shares 30% equity with his spouse. There is no evidence that Mr. Erbs has an interest in operating a business in New Orleans and Ms. Vaccari appears well suited to operate one there. She is, after all, shouldering most of the financial risk. Mr. Erbs and his spouse hold a small interest and could not expect to direct the affairs of the partnership, even if they were not prohibited from such participation by the partnership agreement.

In sum, the record provides an insufficient legal basis for discrediting Swan's integration proposal.[5] *Coast TV*, 5 FCC Rcd at 1787. And, as will be discussed *vis a vis* Delta, Swan will also receive qualitative enhancements sufficient for it to prevail in this proceeding.[6]

DELTA BROADCASTING

15. Both Swan and Delta were awarded 100% quantitative full-time integration credit by the ALJ. Delta, like Swan, is a limited partnership, with one general partner, John G. Curren, Jr., who proposes to work full-time as the general manager of the station. In concluding that Delta was qualitatively superior, the ALJ noted (I.D., para. 33):

> Mr. Curren has lived [in New Orleans] approximately 34 years and Ms. Vaccari has lived in the community for about the last ten years. Mr. Curren's essentially lifetime local residence warrants a greater preference because it indicates a "likelihood of continuing knowledge of changing local interests and needs." *See Colonial Communications, Inc.*, FCC 90R-20, Review Bd. released March 30, 1990, at ¶ 8. Ms. Vaccari receives a preference for her female status because of the impact that will have on the diversity of programming in the community. Mr. Curren is entitled to credit for his 22 years in broadcasting, much of which is local. Ms. Vaccari's female preference is not given as much weight as local residence and when Mr. Curren's much longer residence is combined with his broadcast experience, Delta is to be slightly preferred over Swan.

16. Swan initially objects to the predicate underlying Delta's local residence preference (*i.e.*, Curren's "lifetime" local residence), arguing that the record demonstrates that Curren is actually no more than a "periodic" resident of New Orleans. It claims that any local residence credit that Delta may be entitled to is more than offset by Vaccari's continuous decade-long local residence. Swan argues that the decisional factor then becomes Vaccari's female status, which, Swan asserts, is entitled to greater weight than a preference for past broadcast experience.

17. *Discussion*: The Commission looks to the qualitative attributes of the integrated principals where the applicants have virtually equal quantitative integration proposals. See generally *McClenahan Broadcasting, Inc.*, FCC 90R-113,

released December 4, 1990. These attributes include local residence, civic participation, minority ownership, female ownership, and past broadcast experience. *See generally Miracle Strip Communications, Inc.*, 4 FCC Rcd 5064, 5065 (1989). The enhancing factors are not accorded equal weight. *See McClenahan Broadcasting, Inc., supra.* With respect to the attributes pertinent here, local residence is entitled to the greatest weight. *Id.* And, under this enhancing factor, continuous long-time local residence warrants more weight than does local residence of a much shorter duration. *Ronald Sorenson*, 5 FCC Rcd 3144, 3145 (Rev. Bd. 1990); *Vacationland Broadcasting Co., Inc.*, 97 FCC 2d 485, 496 (Rev. Bd. 1984) (subsequent history omitted); *Radio Greenbrier, Inc.*, 80 FCC 2d 107, 123 (Rev. Bd. 1980). Participation in local civic activities, which is given credit because it similarly indicates a knowledge of, and interest in, the welfare of the community, *see Policy Statement*, 1 FCC 2d at 396, is accorded less significance than local residence, *see Radio Jonesboro, Inc.*, 100 FCC 2d 941, 948 (1985). Credit is also bestowed for female ownership. *See generally William M. Piner*, 4 FCC Rcd 5100 (1989). Female ownership, however, has less significance than local residence. *See Miracle Strip Communications, Inc.*, 4 FCC Rcd at 5066. Past broadcast experience is deemed of minor significance. *Policy Statement*, 1 FCC 2d at 396.

18. Applying the above principles to the instant case, we agree, at the outset, with Swan's contention that Delta's local residence was accorded too much weight, since Curren's residence was not continuous. Although Curren was born in New Orleans, he left at approximately age 18 to serve in the United States Navy. Delta Exh. 2. We have previously observed that childhood residence, by itself, does little to further one's knowledge of, or appreciation for, the needs and problems of the service area. *Jarad Broadcasting Co., Inc.*, 1 FCC Rcd 181, 187 (Rev. Bd. 1986) (subsequent history omitted). *Compare Jarad* with *Ronald Sorenson*, 5 FCC Rcd at 3145 (credit heightened where residence was unbroken). And, after serving in the Navy from 1959 through 1962, Curren attended college at Hattiesburg, Mississippi until 1968. *Id.* Subsequently, from 1976 through 1981 and from 1985 until 1986, he was employed in Texas and South Carolina. *Id.*

19. We reject Delta's contention that Curren is entitled to credit for the years he was absent from New Orleans, since his presence elsewhere did little to further his knowledge of the needs and problems of New Orleans. Further, in contrast to Curren's "periodic" past residence, Vaccari is entitled to credit for continuous local residence in New Orleans (although not from 1979 as claimed by Swan). *See* Swan Exh. 2. From 1979 until January 1981, Vaccari was institutionalized at various New Orleans psychiatric facilities as a result of a felony conviction (from which she was later pardoned).[7] Although she was able to leave the hospital during the day, and for overnight stays on weekends, it was not until January 1981 that she was ultimately released. *Id.* Delta would deny her credit for local residence during the period prior to her pardon (which occurred in March 1985), but it is clear that, in light of her involvement in local activities with the New Orleans Chapter of Alcoholics Anonymous shortly after her release from the hospital, she was a fully participating New Orleans resident after her release. Hence, she is entitled to local residence credit commencing in January 1981. In sum, weighing Curren's longer but intermittent local residence against Swan's shorter continuous residence (since January 1981), we find that Delta is entitled to a plus factor over Swan on local residence.

20. Were the local residence factor the sole difference between the applicants, Delta would be the comparative winner, *see Radio Jonesboro, Inc.*, 100 FCC 2d at 948 (even a slight difference may be decisive when greater differences do not exist); however, we are persuaded that Vaccari's superior past civic activities are sufficient to offset Delta's local residence. Vaccari has been a member of the New Orleans Chapter of Alcoholics Anonymous ("AA") since 1982, serving as the chairperson of the first study group at Loyola University, which organized seminars on the "Big Book," the text book of AA. Swan Exh. 2. The seminars, sponsored in part by the New Orleans Service Board, were designed to familiarize the New Orleans community on the disease, treatment, and recovery of alcoholism. *Id.* Vaccari has in the past served as a member of the AA Service Board in New Orleans. *Id.* Additionally, since 1982, Vaccari has been a volunteer member of the Hospital and Institute Committee, acting as a liaison to re-orient hospitalized and institutionalized patients returning to society. She speaks at meetings held at institutional facilities, and serves as a temporary sponsor for former patients, providing 24-hour assistance on an as-needed basis. *Id.* She was one of the original organizers of New Orleans' first women's alcoholic halfway house in 1984, which treats women suffering from drug and alcohol abuse. *Id.* In contrast to the impressive civic record above, the only past civic activities claimed by Delta is a cryptic reference to involvement with the Jaycees (1972-1975) and WYES-TV (1973-1977). Delta Exh. 2. This is entitled to little or no weight. *Mableton Broadcasting Co., Inc.*, 5 FCC Rcd 6314, 6317 (Rev. Bd.1990) (applicant bears the burden of proof on all facets of its comparative case). Both Vaccari and Curren have been involved in various civic community activities subsequent to the filing of the applications, but those activities are entitled to only minor credit. *MTF Enterprises*, 99 FCC 2d 297, 300-301 (Rev. Bd. 1984), *review denied*, FCC 85-429, released August 2, 1985. Thus, as correctly contended by Swan, the decisional comparison between Swan and Delta is Vaccari's gender preference versus the preference for Curren's past broadcast experience. Although we are not aware of any case in which the ultimate choice rested on the ultimate weight accorded 100% female ownership versus 100% past broadcast experience, it would appear that. based on the minor weight generally accorded past broadcast experience, the Commission's policy of fostering expanded female ownership would prevail.

OTHER MATTERS

21. In its application, Swan reported that Vaccari had pled guilty to a charge of manslaughter in New Orleans, from which she had subsequently received a full pardon from the Governor of Louisiana. Swan Application, filed July 17, 1987, at Exh. 2. More specifically, Vaccari entered her guilty plea on September 21, 1979, received a suspended three year sentence on February 25, 1980 from the Twenty-Fourth Judicial District Court, Division A, Parish of Jefferson, State of Louisiana. and was placed on active probation for a term of five years. Swan's Petition for Leave to Amend, filed November 14, 1990; Swan's Supplement and Request for Official Notice, filed November 14, 1990. Ms. Vaccari served no time in jail. A special

condition of her probation was that she be institutionalized in a psychiatric facility for three years. Following sentencing, Vaccari returned to River Oaks Hospital for a brief time (until approximately March 1980), when she became a patient at CPC Coliseum Medical Center on Coliseum Street, New Orleans, Louisiana. She remained a patient at Coliseum Medical Center until approximately May 1980. *Id.* From approximately June 1980 to January 1981, Vaccari was treated at DePaul's Hospital on Calhoun Street, New Orleans, Louisiana. *Id.* She was released from DePaul's in January of 1981. Following release, Vaccari continued to reside in New Orleans to complete her psychiatric treatment. *Id.* On March 6, 1985, Vaccari received a full pardon. *Id.*

22. Both Tucker and Delta argue that before Swan's application is grantable, further inquiry into the nature of Vaccari's felony conviction is necessary in light of the Commission's recent modifications to its policies regarding character qualifications. *Policy Regarding Character Qualifications in Broadcast Licensing*, 5 FCC Rcd 3252 (1990). In its original *Policy Regarding Character Qualifications in Broadcast Licensing*, 102 FCC 2d 1179 (1986), *recon. granted in part, denied in part*, 1 FCC Rcd 421 (1986), *appeal dismissed sub nom. National Association for Better Broadcasting v. FCC*, No. 86-179 (D.C. Cir. June 11, 1987), the Commission expressed concern with "misconduct which demonstrates the proclivity of an applicant or licensee to deal truthfully with the Commission and to comply with our rules and policies." 102 FCC 2d at 1190-91. The Commission there held that it would consider only adjudications involving fraudulent representations to government bodies, criminal misconduct involving false statements or dishonesty, and broadcast-related antitrust violations. *Id.*, at 1195-1197, 1200-1203. In its most recent pronouncement, the Commission broadened its approach to consider any conviction for misconduct constituting a felony. 5 FCC Rcd at 3252.

23. In the case at bar, however, we are not persuaded that further inquiry into this matter is mandated by the new modifications to the Commission's character policies or is warranted by the facts. Initially, we note that, despite the seriousness of the offense, Vaccari was never incarcerated in a penitentiary (which one might reasonably infer would indicate a lack of "propensity to comply with the law generally"); instead, she was placed on active probation, specifically conditioned on her receipt of psychiatric treatment. She underwent such treatment, apparently until the appropriate authorities were satisfied she could safely be released, and subsequently received a full pardon. And, during this period, Vaccari actively participated and assisted in local community programs to re-orient other hospitalized and institutionalized patients returning to society, *see* paras. 19-20, *supra*. The Commission's concern is not violations of laws or other misconduct in the abstract, but rather the extent to which the misconduct provides a useful predictive judgment that an applicant or licensee will conform to FCC rules and policies. *Character Qualifications*, 5 FCC Rcd at 3252; *see also Focus Television Co.*, 98 FCC 2d 546, 549-550 (Rev. Bd. 1984) (subsequent history omitted).[8] Here, the event in question happened more than a decade ago; the principal received assistance and was granted a pardon, *see Area Wide Paging Systems, Inc.*, 46 FCC 2d 406, 407-408 (1974) (rejecting contention that non-disclosure of felony conviction required hearing, noting that pardon mooted out conviction); she has been a contributing member of society since; and no showing has been made with respect to her subsequent behavior that calls into question her basic fitness to be a Commission licensee.

CONCLUSIONS

24. All exceptions having decisional significance have been considered by the Board. No applicant is found unqualified. The only decisional comparative distinction among the four applicants is the quantitative integration credit to which each is entitled. And, as between the two frontrunners, Swan and Delta, all of their qualitative enhancements, save Swan's female ownership and Delta's past broadcast experience, offset one another. Between these latter comparative enhancement factors, the female gender preference prevails. Thus, we hold that Swan's application will best serve the public interest, convenience, and necessity.

25. ACCORDINGLY, IT IS ORDERED, That the Withdrawal of Amendment, filed May 31, 1990, as supplemented June 4, 1990, by Crescent City Broadcasting Corporation, pursuant to the Initial Decision's directive at paragraph 34, IS GRANTED; that the Joint Motion to Dismiss the Application of Crescent City Broadcasting Corporation, filed July 13, 1990, by Swan Broadcasting Limited, Tucker Broadcasting Company Limited Partnership, and Delta Broadcasting of Louisiana, Ltd., IS DENIED;[9] that the request to file reply pleading, filed August 9, 1990, by Delta Broadcasting of Louisiana, Ltd., IS GRANTED; that the petition for leave to amend, filed August 20, 1990, by Crescent City Broadcasting Corporation, IS GRANTED, and the amendment IS ACCEPTED; that the petition for leave to amend, filed November 14, 1990, by Swan Broadcasting Limited, IS GRANTED, and the amendment IS ACCEPTED; that the Supplement and Request for Official Notice, filed November 14, 1990, by Swan Broadcasting Limited, IS GRANTED; that the Supplement to Reply and Request for Official Notice, filed November 28, 1990 by Delta Broadcasting of Louisiana, Ltd. IS GRANTED; and that the partial motion to stike, filed December 5, 1990. by Swan Broadcasting Limited, IS DENIED.

26. IT IS FURTHER ORDERED, That the application of Swan Broadcasting Limited (File No. BPCT-870717KQ) for a Construction Permit for a new television station at New Orleans, Louisiana, IS GRANTED; and that the applications of Crescent City Broadcasting Corporation (File No. BPCT-880419KE), Delta Broadcasting of Louisiana, Ltd. (File No. BPCT-880419KF), and Tucker Broadcasting Company, Limited Partnership (File No. BPCT-880419KG), ARE DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Eric T. Esbensen
Member, Review Board

FOOTNOTES

[1] Directors of non-stock corporate applicants are treated comparable to integrated owners for integration purposes. *See generally Farragut Television Corp.*, 8 FCC 2d 279, 282 (1967).

[2] Crescent argues that the ALJ erred when he denied its request for a specialized programming issue, and when he failed to award it a "diversification" preference based on the argument that it would provide a "new voice" to the community (*i.e.* the only voice owned and controlled by low and moderate income people). Both of Crescent's exceptions are denied. In rejecting the requested specialized programming issue, the ALJ correctly found that the petitioning applicant had not made the requisite *prima facie* showing for supporting the addition of an issue. Rather, Crescent's submission was little more than self-serving declarations that low and moderate groups have specific needs and interests that are not currently met by existing broadcasters. We perceive no error by the ALJ. Moreover, the typical "diversification" analysis pertains to the diffusion of control of the media of mass communications, *see Policy Statement*, 1 FCC 2d at 394-395, and thus, applicants are assessed demerits for other media interests. The ALJ found here that none of the applicants owned attributable media interests and, therefore, concluded that they were equal on the diversification criterion. An award of a "diversification" preference on any other basis is beyond the purview of our authority. *Horne*, *supra* ; *see also Julia S. Zozaya*, *supra*. In light of our affirmance that Crescent is not entitled to quantitative integration credit, and thus cannot prevail comparatively, we do not reach exceptions by Tucker that the ALJ erred in failing to add real-party-in-interest, misrepresentation and lack of candor, and reporting issues against Crescent.

[3] The content of the letter is essentially the same as an earlier letter from Wells, dated May 1, 1990, in which Tucker requested that official notice be taken. We take official notice of both letters. In this regard, we reject Tucker's exception that the ALJ erred in allowing Delta to reopen the record at the close of hearing to admit documents concerning TAI's status with the SBA. Similarly, we deny Tucker's exception that it was denied an opportunity to respond to facts adduced by Delta pertaining to TAI's participation with the SBA Sec. 8(a) program or that it should have been permitted to cross-examine the authors of the documents from the SBA. First, no one disputes that TAI is an SBA Sec. 8(a) contractor; and second, as contemplated by 5 U.S.C. §556(e), we have granted Tucker's official notice request for the May 1, 1990 letter from the SBA, clarifying SBA policy, and allowing Tucker to present its substantive defense to the adverse SBA findings. One of the signatories of the Delta submission was Wells.

[4] Although no longer decisional, we believe comment is warranted on one additional matter. We are troubled by Tucker's failure to disclose its principals' obligations to the SBA program until they were initially raised by one of its competitors after the close of the record, particularly where we had previously denied integration credit to a similarly situated applicant in an earlier decided case, *i.e., Knoxville Broadcasting Corp.* Although Tucker claims that its competitors had notice earlier of the SBA relationship, by virtue of the disclosure in Tucker's written direct case that TAI provides services to the government, we are not persuaded that this constituted ample notice, nor are we as confident as Tucker that glossing over this fact was of no importance. *See Royce International Broadcasting*, FCC 90-390, released November 27, 1990 at n. 4 ("the duty of applicants to show the credibility of their proposals is fundamental to our comparative analysis"). We do not reach the question here whether the SBA non-disclosure would warrant a lack of candor issue were Tucker the preferred applicant.

[5] The parties also seek to show Erb's influence over the applicant based on a letter from an engineering firm to Harold Erbs concerning a search for an antenna site for Swan (*see* Delta Exh. 3). The letter is dated prior to the filing of Swan's application and long before the execution of the Limited Partnership Agreement, and thus would not be prohibitive *per se*. Vaccari testified that Erbs suggested to her to contact the particular engineering firm, but to the best of her knowledge, he had no other involvement in the selection of the antenna site. Tr. 39-40. We agree with the ALJ that the letter shows that Erbs had some participation in the development of the proposal, but there is no other evidence to show that Erbs was materially involved in contravention to his subsequently nominally passive status. Tucker also contends that an additional basis for discrediting Swan's integration proposal is that its Limited Partnership Agreement was not signed by all of its partners by the "B" cut-off date, *i.e.*, June 3, 1988. It notes that the residences of the general partner and limited partners are New Orleans, Louisiana, and Houston, Texas, respectively, and argues that there is no practical way the limited partners could have signed on the same day as the general partner. Even assuming, *arguendo*, that the Agreement had to be signed by the June 3 "B" cut-off date, *but see Victory Media, Inc.*, 3 FCC Rcd 2073, 2074 (1988) ("current Commission precedent does not require written documentation of an applicant's ownership structure on the B cut-off date"), Swan explains in its Reply Exceptions (at 6) that there is no mystery about the execution of the Agreement in two different cities since the Agreement states that it may be executed in any number of counterparts, and the agreement was indeed so executed. We deny Tucker's exception. *See also* I.D., para. 19.

[6] In light of our disposition, we do not reach those exceptions that challenge the quantitative integration credit awarded Delta. We note, however, that all of Delta's competitors claim that the ALJ erred in failing to add financial certification and financial qualifications issues against Delta. Delta's John Curren testified at hearing that Delta's cost estimate for putting the proposed facility into operation is between $2.25 and $4 million. Tr. 158. Subsequently, in an opposition filed February 6 and supplemented March 16, 1990, to an enlargement motion seeking financial and related issues, Delta attached the declarations of Curren and his step-father, John J. Richards, upon whom Delta was purportedly relying to establish its financial qualifications. Curren's declaration refers only to funds of $2.5 million, while Richards, in his declaration, avers that it had been his "intention to assist by helping to raise the required funds with the understanding that any loan obtained through my assistance would also be personally guaranteed by Mr. Curren and secured by a first security interest in the physical assets of the station." No mention is made by Richards that he would or could provide Delta with the requisite funds from his personal liquid assets. Where an applicant relies upon a potential loan from a lending institution, the Commission requires that the bank have a "present firm intention to make [the] loan future conditions permitting." *Merrimack Valley Broadcasting Inc.*, 82 FCC 2d 166, 167 (1980). *See also Scioto Broadcasting*, 5 FCC Rcd 5158, 5160 (Rev. Bd. 1990) for the type of showing necessary for establishing reasonable assurance. Here, it appears that a bank was never even approached. Accordingly, a substantial and material factual question has arisen regarding Delta's finances, which would necessitate a remand on appropriate issues were Delta to prevail here.

[7] Swan's Supplement and Request for Official Notice, filed November 14, 1990; Delta's Reply and Request for Official Notice, filed November 27, 1990. Official Notice of both submissions granted. 5 U.S.C. § 556(e). The parties were directed at oral argument to submit the records relating to the duration of

Vaccari's hospitalization. Tr. 419-420. Both Delta and Swan submitted the information. Although the parties were unable to stipulate as to the significance that should be accorded the factual data, the data itself is not disputed.

[8] *See also Alessandro Broadcasting Co.*, 99 FCC 2d 1, 11 n. 13 (Rev. Bd. 1984) (refusal to impose demerit on applicant whose 70% principal had been convicted of second degree murder. No predictive nexus between his past crime and his current and future fitness to be a Commission licensee in light of fact that the crime was an isolated event that occurred in the remote past, and the state authorities connected with his conviction, imprisonment, parole, and release determined officially that principal was rehabilitated and had civil rights restored), *review denied*, 85-334, released June 28, 1985, *aff'd sub nom. New Radio Corp v. FCC,* 804 F.2d 756 (D.C. Cir. 1986).

[9] Crescent's competitors contend that Crescent's application should be dismissed for transferring 50% of its ownership to an individual who was not a party to its original application. In his I.D., the ALJ directed Crescent to file an amendment which would reinstate its control as it had been on the date for amendments as of right. Crescent has duly complied with the ALJ's directive.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Applications of

RELIGIOUS
BROADCASTING
NETWORK
San Bernardino,
California
et al.

MM Docket No. 83-911
MM Docket Nos. 83-914 to 83-916
MM Docket No. 83-919
MM Docket Nos. 83-921 to 83-923
MM Docket No. 83-925
MM Docket No. 83-928
MM Docket No. 83-930

For Construction Permit
For New Television Station

ORDER

Adopted: December 21, 1990; Released: January 3, 1991

By the Review Board: MARINO (Chairman), and BLUMENTHAL.

1. By *Memorandum Opinion and Order*, 5 FCC Rcd 6362 (Rev. Bd. 1990), and pursuant to 47 CFR § 73.3525 and 47 U.S.C. § 311(c) (as amended), the Board approved a universal settlement in the above-captioned proceeding, granted the application of Sandino Telecasters, dismissed the withdrawing applicants, and terminated this proceeding.

2. Now before the Board is a mailgram ("letter pleading") of December 14, 1990, from one Cal E. Burton,[1] presumably a principal of A & R Broadcasting Company. Therein it is alleged, in essence, that Burton was unaware of, and did not consent to, the settlement agreement approved by the Board, notwithstanding that the settlement was signed by Dr. Herbert Avery as General Partner of A & R, and submitted formally to the Board by A & R counsel. [2] Burton therefore asserts that the Board's action was *ultra vires* and it demands, *inter alia*, "that the FCC and Menshulam Riklis-Sandino Telecasters ceased and desist [sic] on the approval and transaction until all elements of this settlement have been revealed and reviewed by all parties."

3. We will dismiss the Burton missive. First, it is well-established "that the letter form of pleading employed is not contemplated by the Commission's Rules." *Belo Broadcasting Corp.*, 44 FCC 2d 534, 537 (1973).[3] Second, and more pertinent, the Board terminated this proceeding by *Order* released publicly on October 31, 1990. It no longer has jurisdiction over this proceeding, *see* 47 CFR § 1.102, [4] and a tribunal without jurisdiction, always a threshold inquiry, has no option but to dismiss. *See National Black Media Coalition v. FCC*, 760 F.2d 1297 (D.C. Cir. 1985) (opinion by Scalia, J.). [5]

4. ACCORDINGLY, IT IS ORDERED, That the pleading by Cal E. Burton, dated December 14, 1990, and received by the Review Board on December 18, 1990, IS DISMISSED.

FEDERAL COMMUNICATIONS COMMISSION

Norman B. Blumenthal
Member, Review Board

FOOTNOTES

[1] Although the mailgram purports to be from Cal E. Burton, the telegram form itself appears to indicate that the originator of the missive to Western Union was one Sharon Fletcher, 5440 Garth Avenue, Los Angeles California. Because, from the face of the mailgram itself, it appeared that not all of the captioned parties were served with a copy of the missive (only two or three, at most), the Board by Memorandum of December 19, 1990, referred the original of the mailgram to the Commission's Managing Director pursuant to 47 CFR § 1.1212(c) (*ex parte* rules).

[2] Supplement to Joint Requests For Approval of Settlement Agreements, filed jointly (per counsel of record) by Sandino Telecasters and A & R Broadcasting, October 5, 1990 (Declaration of Dr. Herbert Avery).

[3] *See also Catoctin Broadcasting Corp. of New York v. FCC*, No. 89-1552 (D.C. Cir. Dec. 18, 1990) (judgment and memorandum), disregarding entirely letter of licensee principal (letters of October 18, 1990 from Henry R. Serafin to Circuit Court Judges) and addressing only formal pleadings of counsel.

[4] Even were the Board to regard the Burton mailgram as in the nature of a petition for reconsideration, the period for filing such a petition expired on December 3, 1990. 47 CFR § 1.106(f).

[5] *But see CSJ Investments*, FCC 90-367, released November 16, 1990, where despite agreement that the Board lacked threshold jurisdiction, the Commission set aside the Board's dismissal of a pleading, and suggested that it instead "certify" the matter to the Commission "which has jurisdiction over actions by all subordinate officials." *Id.*, at para. 4; *see also id.*, n.4 (misdirected pleadings should be forwarded to "appropriate official").

Although we believe that the Board's *Order* terminating this proceeding has become final, *see* 47 CFR § 1.102, and certainly that the 30-day period for filing an application for review of the Board's *Order* has expired as well, *id.*, § 1.115(d), we shall, *ex abundanti cautela,* refer this matter to the Adjudication Division, Office of General Counsel, which is the office to which appeals of Board action are directed for initial scrutiny. *See id.*, § 0.41(p).

(As indicated in note 1, above, and because the Burton mailgram appeared on its face to be *ex parte,* the Board has referred the original (docket-associated) missive to the Managing Director. Should the Office of General Counsel be unable to secure a copy of the mailgram from the Managing Director, it may obtain a copy from the Board, or inspect the Board's copy at its offices. *See generally WWOR-TV*, 5 FCC Rcd 6261, 6264 n.4 (1990)).

[6] Pre-publication copies of this dismissal have been made available, on the adoption date, to counsel of record for all parties captioned in our prior orders. A pre-publication copy of this dismissal order had also been mailed by the Board to the mailgram originator, Sharon Fletcher (*see supra* note 1), as no other address appears on the mailgram.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-137

In the Matter of

Amendment of Section 73.202(b),	RM-7095
Table of Allotments,	RM-7106
FM Broadcast Stations.	
(Morris and Pontiac, Illinois)	

REPORT AND ORDER
(Proceeding Terminated)

Adopted: December 12, 1990; Released: January 4, 1991

By the Acting Chief, Allocations Branch:

1. The Commission has before it for consideration the *Notice of Proposed Rule Making*, 5 FCC Rcd 1761 (1990), issued in response to two separate petitions for rule making. Nelson Enterprises, Inc. ("Nelson") proposed the allotment of Channel 276A to Morris, Illinois, as a second local service. In order to accomplish the allotment at Morris, Nelson also requested the substitution of Channel 229A for Channel 276A at Pontiac, Illinois. Livingston County Broadcasters, Inc. ("WJEZ") licensee of Station WJEZ(FM), Channel 276A, Pontiac, Illinois, requests the substitution of Channel 229A for Channel 276A at Pontiac, Illinois, and modification of the license for Station WJEZ to specify operation on Channel 229A. Nelson and WJEZ filed supporting comments restating their intentions to apply for the respective channels, if allotted. Goodrich Broadcasting, Inc. ("Goodrich"), filed a counterproposal requesting the allotment of Channel 277B1 to East Peoria, Illinois, and the substitution of Channel 287A for Channel 277A at Spring Valley, Illinois, contingent on the substitution of Channel 229A for Channel 276A at Pontiac, Illinois.[1] Jerry Rosalius ("Rosalius") filed a counterproposal seeking the allotment of Channel 277A to Gilman, Illinois, contingent on the substitution of Channel 229A at Pontiac, Illinois.[2] Neither proposal will be considered in this proceeding.

2. We believe the public interest would be served by substituting Channel 229A for Channel 276A at Pontiac, Illinois, and the allotment of Channel 276A to Morris, Illinois. As indicated in the *Notice*, Channel 276A can be allotted to Morris, Illinois, in compliance with the Commission's minimum distance separation requirements with a site restriction of 8.2 kilometers (5.1 miles) southeast, in order to avoid a short-spacing to Station WVVX(FM), Channel 276A at Highlands, Illinois. Channel 229A can be substituted for Channel 276A at Pontiac, Illinois, in compliance with the Commission's minimum distance separation requirements with a site restriction 2.2 kilometers (1.4 miles) east at Station WJEZ's currently licensed site. [3] As proposed, we are modifying the license of Station WJEZ(FM) to specify Channel 229A in lieu of Channel 276A.

3. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **February 19, 1991,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, to read as follows:

City	Channel No.
Morris, Illinois	276A, 284B
Pontiac, Illinois	229A

4. The window period for filing applications for Channel 276A at Morris, Illinois, will open on **February 20, 1991,** and close on **March 22, 1991.**

5. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the license of Station WJEZ(FM), Pontiac, Illinois, IS MODIFIED to specify operation on Channel 229A in lieu of Channel 276A, subject to the following conditions:

> (a) Nothing contained herein shall be construed as authorizing any change in Station WJEZ(FM)'s license, BLH-4485, except the channel as specified above. Any other changes, except for those so specified under Section 73.1690 of the Rules, require prior authorization pursuant to an application for construction permit (FCC Form 301).
>
> (b) Program tests may be conducted in accordance with the provisions of Section 73.1620 of the Rules, PROVIDED the transmission facilities comply in all respects with Station WJEZ(FM)'s license, BLH-4485, except for the channel as specified above and a license application (FCC Form 302/341) is filed within 10 days of commencement of program tests.

6. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

7. For further information concerning this proceeding, contact Nancy J. Walls, Mass Media Bureau, (202) 634-6530. Questions related to the window application filing process should be addressed to the Audio Services Division, FM Branch, Mass Media Bureau (202) 632-0394.

FEDERAL COMMUNICATIONS COMMISSION

Andrew J. Rhodes
Acting Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau.

FOOTNOTES

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[1] A Commission engineering analysis indicates that, using the coordinates specified in the construction permit (BPH-880505MQ) for Station WAIV(FM), Channel 277A, Spring Valley, Channel 287A would be short-spaced to the site specified in

the construction permit for Station WCFL(FM), Channel 284B, Morris, Illinois. Station WAIV(FM), therefore, would have to relocate its transmitter site. It is Commission policy not to require a station to involuntarily relocate its transmitter site. *See North Charleston, South Carolina*, 47 Fed. Reg. 10560, published March 11, 1982. Goodrich failed to include a statement from the Station WAIV(FM) permittee indicating its consent to the proposed channel substitution. Therefore, Goodrich's counterproposal is dismissed as unacceptable for consideration.

[2] Rosalius' proposal cannot be considered as a counterproposal, since there is no conflict between his request and those of Nelson and WJEZ. Rosalius' proposal, however, will be accepted as a petition for rule making (RM-7576) and will be the subject of a separate *Notice of Proposed Rule Making*.

[3] The coordinates for Channel 276A at Morris, Illinois, are North Latitude 41-18-39 and West Longitude 88-22-08. The coordinates for Channel 229A at Pontiac, Illinois, are North Latitude 40-52-31 and West Longitude 88-36-11. Since these allotments are made as a result of petitions filed prior to October 2, 1989, the Pontiac licensee and applicants for Channel 276A may avail themselves of the provisions of Section 73.213(c) of the Commission's Rules. *See* 47 CFR § 73.213(c).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-628

In the Matter of

Amendment of Section 73.202(b), RM-7576
Table of Allotments,
FM Broadcast Stations.
(Gilman, Illinois)

NOTICE OF PROPOSED RULE MAKING

Adopted: December 12, 1990; Released: January 8, 1991

By the Acting Chief, Allocations Branch:

1. The Commission has before it the petition for rule making filed by Jerry Rosalius ("petitioner") requesting the allotment of Channel 277A to Gilman, Illinois, as the community's first local FM service. Petitioner states that he will apply for the channel, if allotted.

2. We believe the public interest would be served by this proposal since it could provide Gilman with its first local FM channel. A Commission engineering analysis has determined that Channel 277A can be allotted to Gilman in compliance with the Commission's minimum distance separation requirements with a site restriction of 8.3 kilometers (5.2 miles) south of the community.[1] The site restriction is necessary in order to avoid short-spacings to Station WFXF(FM), Channel 277B, Indianapolis, Indiana, and a construction permit for Station WAIV(FM), Channel 277A, Spring Valley, Illinois. We note that the allotment of Channel 277A at Gilman is contingent on the substitution of Channel 229A for Channel 276A at Pontiac, Illinois, in MM Docket 90-137. We have substituted the Pontiac channel in a *Report and Order* adopted simultaneously with this *Notice*. Therefore, the grant of a license at Gilman will be delayed until the license grant occurs at Pontiac on Channel 229A.

3. Accordingly, the Commission believes it would be in the public interest to seek comments on the proposal to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to the following community:

City	Channel No. Present	Proposed
Gilman, Illinois	--	277A

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **February 25, 1991,** and reply comments on or before **March 12, 1991,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Jerry Miller
Miller & Fields, P.C.
P.O. Box 33003
Washington, D.C. 20033
(Attorney for Petitioner)

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202 (b), 73.504 and 73.606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Nancy J. Walls, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Andrew J. Rhodes
Acting Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the

Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

> (a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)
>
> (b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.
>
> (c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTE

[1] The coordinates for this allotment are North Latitude 40-41-45 and West Longitude 88-00-55.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Amendment of Section 73.606(b),
Table of Allotments,
Television Broadcast Stations.
(Various Locations)

ORDER

Adopted: December 19, 1990; Released: January 4, 1991

By the Chief, Policy and Rules Division:

1. This *Order* amends Commission Rule 73.606(b), the Television Table of Allotments, to conform the Television Table to reflect the communities to which the listed channels are authorized. The Commission ordered this action in *Amendment of the Commission's Rules Regarding Modification of FM and TV Authorizations to Specify a New Community of License (Memorandum Opinion and Order)*, FCC 90-374, adopted November 8, 1990, and released November 30, 1990. The attached Appendix lists the communities and channels affected by this action.

2. This action constitutes an editorial change in the Television Table of Allotments. Therefore, a public notice and comment proceeding is unnecessary. 5 U.S.C. 553(b)(A) and (B).

3. For further information regarding this *Order*, contact Michael Ruger, Mass Media Bureau, (202) 632-7792.

FEDERAL COMMUNICATIONS COMMISSION

Douglas W. Webbink
Chief, Policy and Rules Division
Mass Media Bureau

APPENDIX

The Television Table of Allotments will be amended at the following communities and channels. In each instance, the Table will reflect the community to which the channel is authorized, rather than the community currently listed in the Table.

Community Named in Table	Authorized Community	Channel
Andalusia, AL	Dozier, AL	* 2-
Birmingham, AL	Homewood, AL	21-
Munford, AL	Mount Cheaha, AL	* 7-
Fairbanks, AK	North Pole, AK	4+
Batesville, AR	Newark, AR	*17
Fresno, CA	Clovis, CA	43
Fresno, CA	Sanger, CA	59
Los Angeles, CA	Norwalk, CA	9
Riverside, CA	Ontario, CA	46
San Francisco, CA	Oakland, CA	2+
Santa Ana, CA	Huntington Beach, CA	*50-
Tulare, CA	Visalia, CA	26+
Boulder, CO	Broomfield, CO	*12
Washington, DC	Arlington, VA	14-
West Palm Beach, FL	Palm Beach, FL	61
Savannah, GA	Hardeeville, SC	28-
Monroe, LA	West Monroe, LA	14-
Monroe, LA	West Monroe, LA	39+
Lewiston, ME	Poland Spring, ME	8-
Portland, ME	Biddeford, ME	*26-
Boston, MA	Cambridge, MA	56
North Adams, MA	Adams, MA	19
Middleton, MA	Lawrence, MA	62
Worcester, MA	Marlborough, MA	66
Bay City, MI	University Center, MI	*19+
Parma, MI	Onondaga, MI	10-
Biloxi, MS	Gulfport, MS	25-
Columbus, MS	West Point, MS	27
Boulder City, NV	Henderson, NV	5+
Hanover, NH	Hartford, VT	31
Manchester, NH	Derry, NH	50-
Manchester, NH	Merrimack, NH	60+
Little Falls, NJ	Montclair, NJ	*50+
New Brunswick, NJ	Linden-Newark, NJ	47+
Lake Placid, NY	North Pole, NY	5
Levittown, NY	Garden City, NY	*21-
Massena, NY	Norwood, NY	*18
Patchogue, NY	Smithtown, NY	67
Cincinnati, OH	Newport, KY	19+
Cleveland, OH	Shaker Heights, OH	19
Elk City, OK	Sayre, OK	8+
North Bend, OR	Coos Bay, OR	11
York, PA	Red Lion, PA	49+
Vega Baja, PR	Naranjito, PR	64
Watertown, SD	Florence, SD	3-
Richardson, TX	Garland, TX	23
Temple, TX	Belton, TX	46-
Fredericksburg, VA	Goldvein, VA	*53
Beckley, WV	Oak Hill, WV	4
Colfax, WI	Menomonie, WI	*28-

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matters of

GE AMERICAN COMMUNICATIONS, INC. File Nos. 65-DSS-ML-90
Application for
Orbital Reassignment
of Satcom 1R

GE AMERICAN COMMUNICATIONS, INC. 64-DSS-MISC-90
Application for
Temporary Assignment
of Satcom C-1

ALASCOM, INC. 1-DSS-MISC-91
Application for
Temporary Assignment
of Aurora 2

ORDER

Adopted: December 28, 1990; Released: January 4, 1991

By the Domestic Facilities Division:

I. BACKGROUND

1. GE American Communications, Inc. (GE Americom) and Alascom, Inc. (Alascom) have filed three related applications pertaining to their Satcom and Aurora domestic fixed-satellite systems. In the first, GE Americom requests authority to relocate its in-orbit Satcom 1R satellite from 139^0 W.L. to 131^0 W.L. In the second, GE Americom requests authority to operate its recently launched Satcom C-1 satellite at the vacated 139^0 W.L. location on a temporary basis. In the third, Alascom requests authority to test its Aurora 2 satellite at 136^0 W.L. for an eight-week period when the satellite is launched in mid-1991. Hughes Communications Galaxy, Inc. (HCG) filed comments with respect to GE Americom's applications. For the reasons discussed below, the three applications are granted.

2. All three requests stem from the impending retirement of GE Americom's Satcom 3R satellite, which is operating at 131^0 W.L. Satcom 3R was launched in 1981 and is currently operating beyond its eight-year nominal design life. The satellite is used exclusively to distribute video programming primarily to cable television systems and, according to GE Americom, serves approximately 50 million homes. GE Americom states that the least disruptive means of maintaining programming for its customers is to move its in-orbit spare satellite, Satcom 1R, from 139^0 W.L., where it is currently operating, to 131^0 W.L. Satcom 1R would then operate at 131^0 W.L. until Satcom 3R's authorized replacement, Satcom C-3, is launched in early 1993.[1]

3. Moving Satcom 1R, however, would leave the 139^0 W.L. location unoccupied. GE Americom notes that the Aurora 2 satellite -- which is assigned to 139^0 W.L. and which will eventually serve the Satcom 1R customers -- will not be launched until mid-1991. GE Americom therefore proposes to locate its Satcom C-1 satellite, which was launched in November 1990 and is assigned to 137^0 W.L., at 139^0 W.L. on a temporary basis.[2] It states that it will move Satcom C-1 to its assigned location when Aurora 2 becomes operational. GE Americom submits that this plan is less disruptive than requiring customers to repoint their antennas twice -- once to Satcom C-1 at 137^0 W.L. and then back to Aurora 2 at 139^0 W.L. -- at a cost of approximately $1.25 million.

4. Finally, Alascom requests authority to test Aurora 2 at 136^0 W.L. before it is moved to 139^0 W.L. Alascom states that if Satcom C-1 is operating at 139^0 W.L. when Aurora 2 is launched, as proposed, testing Aurora 2 at its assigned location will prematurely and unnecessarily disrupt customers receiving service from 139^0 W.L. Alascom states that 136^0 W.L. is the most feasible location for testing Aurora 2 since it will be separated by three degrees from Satcom C-1, which will be operating on the same polarization, and two degrees from Hughes's Galaxy 1 satellite, which is cross-polarized with Aurora 2. Alascom states that Aurora 2 should be fully tested and on station at 139^0 W.L. no later than July 1991.

5. No oppositions to the proposed orbital rearrangements were filed. HCG, however, filed comments in which it alleges that the operation of Satcom C-1 from its assigned 137^0 W.L. location presents a serious potential for disrupting millions of cable television viewers on HCG's Galaxy 1 satellite. Galaxy 1 is currently operating at 134^0 W.L. although it is assigned to the 133^0 W.L. location. HCG suggests that we require GE Americom to monitor the earth station antennas transmitting to Satcom C-1 and require power reductions in their uplink transmissions, as necessary, during the transition period to HCG's next generation satellite in 1994.

II. DISCUSSION

6. Granting the GE Americom and Alascom requests will serve the public interest, convenience and necessity. No new orbital locations are involved. The proposed orbital plan and temporary assignments will allow GE Americom and Alascom to provide continued service and will eliminate the need for customers to repoint their antennas. Moreover, no party has objected to any of the relocations requested in the applications at issue. We therefore grant the requests.

7. With respect to HCG's comments, the allegations of potential interference from Satcom C-1's operations at 137^0 W.L. are not properly raised in this proceeding. Satcom C-1 was assigned to 137^0 W.L. in January 1990, after its application was placed on public notice and after opportunity for public comment.[3] HCG did not object to Satcom C-1's operations at that time. Its comments here may be considered as an untimely petition for reconsideration of that decision and dismissed on those grounds.[4]

8. In any event, HCG has not presented any potential interference concerns that warrant placing any extraordinary conditions regarding the monitoring of uplinking earth stations or other coordination requirements on Satcom C-1's license. HCG's concerns stem not from the operations of Satcom C-1 *per se*, but from problems

caused by earth station uplink transmissions into the satellite. As HCG acknowledges, "[w]ith proper power limits on the operation of small and transportable earth stations, HCG does not expect that Satcom C-1 will cause unacceptable interference into Galaxy 1."[5] HCG, however, does not provide any documentation to support its claims that earth station licensees are regularly exceeding their authorized powers or that licensed earth stations operating at higher powers are causing harmful interference.[6] As with all licensees of new satellites, it is incumbent on GE Americom to coordinate its operations with the operations of adjacent in-orbit satellites before it brings its satellite into service at 137^0 W.L. Satcom C-1's power levels fall within those levels that are routinely authorized. Other satellites are operating with comparable specifications and these satellites have been and are continuing to be coordinated among affected licensees without a special license requirement. There is no reason to believe that Satcom C-1 will not similarly be successfully coordinated with adjacent satellites without the need for Commission involvement.

III. CONCLUSION

9. Accordingly, IT IS ORDERED that Application File Nos. 64-DSS-MISC-90, 65-DSS-ML-90, and 1-DSS-MISC-91 ARE GRANTED.

10. IT IS FURTHER ORDERED that the Orbital Assignment Plan set forth in the Appendix to *Assignment of Space Stations in the Domestic Fixed-Satellite Service*, 3 FCC Rcd 6972 (1988), *modified*, 5 FCC Rcd 179 (1990), *further modified* in *American Satellite Company*, 5 FCC Rcd 1186 (1990), in *GTE Spacenet Corporation*, 5 FCC Rcd 1182 (1990), and in *Hughes Communications Galaxy, Inc.*, 5 FCC Rcd 3423 (1990) IS FURTHER MODIFIED to assign Satcom 1R to 131^0 W.L.

11. IT IS FURTHER ORDERED that GE Americom Communications, Inc. IS AUTHORIZED to operate Satcom C-1 at the 139^0 W.L. orbital location on the condition that the satellite be moved to its regularly assigned location of 137^0 W.L. not later than the date on which 139^0 W.L. is ready to be occupied by Alascom, Inc.'s Aurora 2 satellite.

12. IT IS FURTHER ORDERED that Alascom, Inc. IS AUTHORIZED to test Aurora 2 at the 136^0 W.L. orbital location for an eight week period after it is launched. At the expiration of this period, it must begin to move the satellite to its regularly assigned location of 139^0 W.L.

13. GE American Communications, Inc. and Alascom, Inc. are afforded thirty days from the date of release of this order to decline the authorizations as conditioned. Failure to respond within this time period will constitute formal acceptance of the authorizations as conditioned.

FEDERAL COMMUNICATIONS COMMISSION

James R. Keegan
Chief, Domestic Facilities Division
Common Carrier Bureau

FOOTNOTES

[1] GE Americom states that it plans to maintain Satcom 3R as a non-operational in-orbit spare.

[2] GE Americom states that it will operate Satcom C-1, which is equipped with polarization switching capability, in the vertical polarization sense while it is operating at 139^0 W.L. to conform to the C-band polarization plan at that location.

[3] Assignment of Orbital Locations to Space Stations in the Domestic Fixed-Satellite Service, 5 FCC Rcd 179 (1990) (Reconsideration Order).

[4] HCG states that its objections are timely because it recently learned that Satcom C-1's performance specifications are different from what HCG had understood them to be. This does not alter the procedural deficiencies of HCG's pleading. If HCG believes that GE Americom is implementing the Satcom C-1 satellite with technical specifications different from those authorized, this proceeding -- which involves only Satcom C-1's temporary assignment to 139^0 W.L. -- is not the appropriate place in which to raise these issues.

[5] HCG Response at 3.

[6] If HCG believes this to be the case in general, it is more appropriately addressed in the context of a Rule Making proceeding. The Commission will take any necessary action in the context of that proceeding.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

CABLE & WIRELESS
COMMUNICATIONS, INC.,
Complainant,

v.

CONTEL OF
VIRGINIA, INC.,
Defendant.

File No. E-91-028

ORDER

Adopted: December 14, 1990; Released: January 4, 1991

By the Chief, Enforcement Division, Common Carrier Bureau:

1. On October 29, 1990, Cable & Wireless Communications, Inc. (hereinafter "CWC") filed the above-captioned formal complaint against Contel of Virginia, Inc. (hereinafter the "Defendant") seeking recovery of damages for Defendant's alleged overearnings on interstate access charges for the period January 1, 1987 through December 31, 1988. On December 6, 1990, however, CWC filed a motion for leave to withdraw the complaint with prejudice stating that the parties had entered into a formal resolution of this matter and that there was no longer any need for these proceedings.

2. We are satisfied that dismissal of the complaint will serve the public interest by eliminating the need for further litigation and the expenditure of further time and resources of the parties and of this Commission.

3. Accordingly, IT IS ORDERED, pursuant to the authority delegated by Section 0.291 of the Commission's Rules, 47 C.F.R. § 0.291, that CWC's Motion for Leave to Withdraw Complaint IS GRANTED and that the above-captioned proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Mary Beth Richards
Chief, Enforcement Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Application for Review of
Liability of MTD, Inc., Permittee
of Station KWMW(FM), Maljamar,
New Mexico

For a Forfeiture

MEMORANDUM OPINION AND ORDER

Adopted: December 21, 1990; Released: January 7, 1991

By the Commission:

1. The Commission has under consideration an Application for Review of a Forfeiture Order issued by the Commission's Field Operation Bureau (FOB), pursuant to delegated authority, finding MTD, Inc., (MTD) permittee of KWMW(FM), Maljamar, NM, in violation of the Commission's tower lighting rule and imposing a $10,000 forfeiture.

2. On or about January 18, 1990, MTD completed construction of its new 923-foot tower, which is located on an aeronautical VFR (Visual Flight Rules) flyway. Pursuant to a Determination of No Hazard to Air Navigation made by the Federal Aviation Administration (FAA), MTD's construction permit (No. BPH-850712RN) granted on August 14, 1987, called for both red beacons (for night) and high intensity strobe lights (for day, with reduced power for twilight and night). Upon completion of the construction, the FAA contacted the permittee and expressed concern about the lack of high intensity strobe lighting.

3. On March 9, 1990, the FAA inspected the station and advised the Commission's Denver FOB office of the failure of Station KWMW to install the required high intensity strobe lighting on its tower. On March 12, 1990, the Denver FOB office spoke with the permittee by telephone and determined that the strobe lighting had not been installed, nor had any concrete steps been taken to provide for such lighting installation. On April 26, 1990, the Denver office issued a $10,000 Notice of Apparent Liability (NAL), citing the permittee for apparent repeated violations of Section 17.41 of the Commission's Rules from January 18, 1990, to March 12, 1990.[1] In a May 14, 1990, response to the NAL, MTD admitted the violation, but claimed it had entrusted Transmission Structures Limited (TSL), the company hired to construct the tower, to build in compliance with Commission requirements. MTD enclosed a copy of its contract with TSL with its response. The contract called for TSL to provide an FAA A-3 kit for lighting. That kit does not include the high intensity strobe lighting specified in the permittee's construction permit. On June 6, 1990, the Denver office issued a $10,000 Forfeiture Order for the tower lighting violation.

4. In its Application for Review, filed July 16, 1990,[2] MTD presents several arguments that it asserts should cause rescission of the forfeiture or mitigate the forfeiture amount. MTD states that it relied upon TSL to produce and erect a tower that complied with FAA and FCC requirements. MTD asserts that, although the FAA had "initially 'expressed concern' with the lack of strobe lighting it took no serious measures to demand immediate installation, issue warnings to aircraft, etc." MTD notes that the Forfeiture Order did not use the word "willful" to describe the instant violation and states that the FAA has subsequently determined that, with the installation of strobe lights, the red lighting on the tower may be discontinued. A request for such a modification in the construction permit has since been requested and granted. The permittee argues that the FAA "is now obviously satisfied with the tower lighting at KWMW," that it has no history of prior offenses, and that payment of a $10,000 forfeiture is unreasonable and would financially threaten the station's existence.

5. We find permittee's arguments unavailing. As to the permittee's contention that it relied on TSL, MTD has acknowledged that the station failed to have its tower lit in accordance with the construction permit. MTD's contract with a company to build its tower does not relieve MTD of its nondelegable obligation to provide the lighting specified in its construction permit. The Commission has long held licensees responsible for the negligent acts or omissions of their employees and that responsibility is not lessened when independent contractors are used. *Wagenvoord Broadcasting Company*, 35 FCC 2d 361 (1972). Additionally, as previously pointed out to the permittee in the Forfeiture Order, the contract did not call for the lighting that the construction permit required. Regarding the contention that the FAA did not demand immediate correction when it initially contacted the permittee, apparently in January 1990, such a demand is not a prerequisite to the permittee's compliance with its construction permit or to the Commission's enforcement of its rules. We note that the permittee still had taken no corrective action by the time the NAL was issued in April 1990.

6. As to the absence of citation for willfulness, Section 503(b) does not require that the NAL specifically include a finding of willfulness, so long as the behavior involved is, in fact, willful or repeated. There can be no dispute that MTD failed to light its tower as required by Section 17.41 and that its failure was willful, *i.e.*, the result of its own failure to act by constructing and lighting its tower as required by the construction permit. *Vernon Broadcasting, Inc*, 60 RR 2d 1275 (1986).[3] Accordingly, MTD was properly assessed a forfeiture for a willful violation of Section 17.41.

7. Subsequent modification of lighting requirements is irrelevant. Among other things, the construction permit required high intensity strobe lighting during the day, with reduced intensity at night. The tower as constructed contained no strobe lighting. The permittee was, therefore, not in compliance with the construction permit. It moved into compliance by installing medium intensity strobe lighting only after the FAA and the FCC agreed to modify the requirements. Furthermore, corrective action in no way dilutes MTD's liability for having failed to comply with its earlier obligation. The Commission has stated repeatedly that corrective action subsequent to notification of liability will not relieve licensees, or

permittees, of liability. *See Executive Broadcasting Corporation*, 3 FCC 2d 699 (1966). Furthermore, in the instant case, corrective action of a hazardous situation was not commenced until long after construction of the tower and notification by the FAA.

8. MTD has failed to document its claimed precarious financial situation. Given the seriousness of the offense,[4] and the fact that MTD faced a potential $250,000 forfeiture,[5] it is clear that all mitigating circumstances have already been taken into account in assessing the $10,000 forfeiture.

9. ACCORDINGLY, IT IS ORDERED, That the Application for Review, filed July 12, 1990, by MTD, Inc., permittee of Station KWMW(FM), Maljamar, New Mexico, IS DENIED.

10. IT IS FURTHER ORDERED That MTD, Inc., permittee of Station KWMW(FM), Maljamar, New Mexico, SHALL FORFEIT to the UNITED STATES OF AMERICA the sum of ten thousand dollars ($10,000) for repeated violations of Section 17.41 of the Commission's Rules.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] Section 17.41 reads, in part:

> Antenna structures having a skeletal tower or other main support structures over 182.88 meters (600 feet) up to and including 304.80 meters (1,000 feet) in height shall be obstruction lighted as follows:
>
> (a) There shall be installed at the top of the skeletal or other main support structure three or more high intensity light units which conform to FAA/DOD Specification L-856, High Intensity Obstruction Lighting Systems. . . .
>
> . . . .
>
> (d) All lights shall be synchronized to flash simultaneously at 40 pulses per minute. . . .

[2] Although the Application for Review was filed 10 days late, limitations on filing applications for review are established solely by Commission Rule (*see* 47 C.F.R. Section 1.115(d)) and thus can be waived. Since no other parties would be prejudiced by consideration of this Application for Review on the merits, we will waive the time limit contained in Section 1.115(d).

[3] The permittee had notice that the tower lacked the required strobe lighting as of the initial FAA inspection, which occurred upon completion of construction in January 1990.

[4] Violations of antenna lighting rules are always serious because of their potential dangers to aviation. *Radio Beaumont, Inc.*, 13 FCC 2d 965 (1968).

[5] The permittee's potential liability for the instant continuing violation is $25,000 for each day with an aggregate limit of $250,000. These limits became effective with the enactment of the Omnibus Budget Reconciliation Act of 1989, on December 19, 1989. The permittee's violation continued for more than 10 days after these liability limits became effective.

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 85-166
Phase II, Part 1

In the Matter of

Investigation of
Special Access
Tariffs of Local
Exchange Carriers

MEMORANDUM OPINION AND ORDER

Adopted: December 28, 1990; Released: December 31, 1990

By the Chief, Common Carrier Bureau:

I. INTRODUCTION AND BACKGROUND

1. By its *Refund Order* [1] in this docket the Commission required that specified local exchange carriers (LECs) refund excessive special access charges occasioned by strategic pricing,[2] to the extent such refunds could be funded from excess earnings, and that the affected LECs submit reports describing their plans for implementing those refunds. The reports initially submitted have since been supplemented by further reports, by information on settlement agreements reached between LECs and some customers, and by associated comments.

2. The original refund reports submitted by LECs on March 5, 1990[3] in some respects failed to satisfy the instructions of the *Refund Order*. After a Bureau Order iterating the LECs' escrow obligations,[4] these deficiencies were addressed by supplemental LEC reports on April 10, 1990.[5] A principal issue raised by those reports was the contention by LECs that settlement agreements reached with some customers had discharged any refund obligations otherwise owed those customers, so that amounts to be escrowed could be correspondingly reduced. By letter of May 22, 1990 the Deputy Chief (Policy) of the Common Carrier Bureau requested additional information from the LECs regarding settlement agreements; by letter of May 24, 1990 the Chief, Accounting and Audits Division, requested further details of accounting treatment accorded settlements. The requirements of the May 22 letter were clarified in a Public Notice issued June 15, 1990, 5 FCC Rcd 3796, and the information supplied by the LECs on June 21, 1990 has since been included in the record with the exception of customer rosters for which some carriers requested confidential treatment. Subsequent comments on the settlement-related information were filed August 8, 1990, and reply comments were filed by the LECs August 29, 1990. *See* Public Notice, 5 FCC Rcd 5235 (1990).[6]

II. ANALYSIS AND DISCUSSION

A. Effect of Settlements

3. None of the customers LECs describe as settling parties dispute LEC claims that those customers entered into settlements that encompass any "strategic pricing" refunds those customers might receive.[7] CompTel asserts, however, that the Commission should scrutinize settlement agreements to assure that the settlements do not prejudice the rights of non-settling parties to refunds. CompTel Comments at 2-3. CompTel adds that the LEC submissions responsive to the May 22 letter from the Deputy Chief (Policy) do not eliminate the possibility that net earnings were written down on the basis of liabilities removed by settlements, and asserts with Williams that the non-settling parties placed at risk by such practices lack sufficient data on the public record to adequately review LEC practices. CompTel Comments at 4-6; Williams Comments at 4-5.

4. Southwestern Bell replies that its settlements have not and will not prejudice amounts owed to non-settling customers, and states it should not be required to issue refunds to settling customers nor to keep funds for such accounts escrowed. Southwestern Bell Reply at 2-5. BellSouth, Pacific, and US West also assert in their replies that a settlement with one customer will not reduce the refund entitlement of another customer under the factual circumstances presented here. Pacific and US West state they made no settlement-related adjustments to their Forms 492; BellSouth reiterates its earlier statement that no adjustments have been made to Forms 492 "to reflect individual carrier settlements." BellSouth Reply at 2; Pacific Reply at 2-3; US West Reply at 8-10.

5. The record in this proceeding does not suggest grounds for concern that the settlements involved here have impinged, intentionally or otherwise, on this refund process. The affected carriers assert that the earnings reported on Forms 492, on which the *Refund Order* relied, were not reduced by settlement amounts, and the staff review of supporting materials submitted by LECs on this issue in response to the May 24, 1990 letter from the Chief, Accounting and Audits Division, disclosed no deficiencies warranting further inquiry. We therefore perceive no useful purpose would be served by requiring disclosure of customer rosters or accounting entries, nor have CompTel or other commenters sought access to that information through the mechanism established by Section 0.461 of the Commission's Rules. The refund plans submitted by the LECs will provide nonsettling parties with the same refunds those customers would have received in the absence of any settlements.

B. Methodological Disputes

6. Contentions directed to the LEC refund calculations include (1) requests for further documentation of underlying data; (2) claims that the carriers' refund methodologies improperly altered excess earnings calculations. We consider these several claims below.

7. (1) *Further Documentation*. CompTel seeks disclosure of customer lists submitted by some LECs with requests for confidential treatment, and asks that LECs be required to disclose the terms of settlement agreements. *Id*. at 6-8. Williams avers that various LECs have ignored Commission reporting requirements or filed data under seal that should be disclosed, and argues that penalties should be added to refunds owed by carriers who have delayed

refund payments by withholding relevant and material data. Williams Comments at 1-5. MCI, while finding the LECs' informational submissions "basically sound in methodology and data sources," asserts that back-up material ranges from adequate (Pacific Bell) to wholly inadequate (BellSouth). MCI states that the rate adjustment factors (RAFs) or ratios used by LECs to develop refunds are themselves established by initially comparing DS1 rates that are eight times the voice grade rate with the DS1 rates actually charged, and then either multiplying the resulting ratio (i) directly against individual customer billings; or (ii) against total billings for an aggregate refund, which is then allocated between customers based on individual billing records. MCI notes that the LECs generally fail to mention the process by which their special access billing records were reviewed, and urges the Commission to require specification of RAFs used and of total DS1 billings to enable verification by comparison with data submitted by LECs in access filings. MCI Comments at 4-7.

8. Southwestern Bell characterizes MCI's reservations as extraneous, stating that it provided RAFs and associated methodology and that disbursement issues need not await Form 492 revisions. Southwestern Reply at 7 n.25. BellSouth contends MCI's criticism of its supporting data should be disregarded for generality, but asserts that RAFs and DS1 billed revenues are already included in its refund plan, and suggests that billing records in MCI's possession are a separate data source for confirming the calculations described therein. BellSouth Reply at 3-4.

9. We are not persuaded by MCI's and Williams' contentions that the BOCs have failed to supply adequate information regarding their refund methodologies. As to Williams' contentions that the carriers have ignored Commission reporting requirements, we note that (i) Ohio Bell and Wisconsin Bell submitted complete refund reports on March 5, 1990; (ii) US West submitted a supplemental escrow report April 10, 1990; and (iii) Pacific, Southwestern and US West each submitted responses to the May 22, 1990 letter request for information sent by the Deputy Bureau Chief (Policy). While Williams asserts that some LECs have filed such reports under seal "in their entirety," the only information filed with requests for proprietary treatment under 47 C.F.R. § 0.459 of the Commission's Rules are the LECs' customer lists, and this procedure was explicitly contemplated by the June 15, 1990 Public Notice, *supra* para. 2. That Notice explicitly stated that the submissions would be included in the docket record and opportunity for comment specified by a later action; the August 7, 1990 Public Notice fulfilled that undertaking. *See* para. 2, *supra*.

10. Southwestern has provided rate adjustment factors and explains their development as part of its refund plan methodology submitted March 5, 1990, and as explained at para. 5, *supra*, the data on Form 492 reports are not distorted by adjustments to reflect settlements, so that no revisions are necessary on that account prior to resolution of disbursement issues. Southwestern will, as described *infra* at para. 16, be required to revise its refund proposal in other respects. Similarly, with respect to BellSouth, the billed revenues and RAFs were supplied with BellSouth's refund plan, and in any case BellSouth will now be submitting a revised plan to comport fully with requirements of the *Refund Order*. *See* para. 15, *infra*.

11. (2) *Calculation Methodologies*. Williams contends that "fanciful interpretations" of the Commission's strategic pricing guidelines account for a "good portion" of alleged discrepancies between the Commission's *Refund Order* and refunds proposed by LEC plans. Williams specifically cites BellSouth's use of one-year periods to calculate excess earnings, and Southwestern Bell's use of projected demand and projected average length of haul rather than historical data from actual billings, as practices that operate to understate those carriers' liability compared to calculations in the *Refund Order*. Williams Comments at 6-8. More generally, Williams argues, the LECs' crossover calculations arbitrarily exclude and include significant costs: multiplexers are a vital part of HiCap configurations and multiplexer costs should be included in crossover analysis; conversely, if subelement-based crossover ratios are appropriate, consistency requires that LECs present separate crossover ratios for the Channel Termination and Channel Mileage components of their cost projections. Williams asserts that the great bulk of strategic overcharges arises in the Channel Termination rate element, and that combining that element with Channel Mileage for purposes of crossover analysis excludes the bulk of strategic overcharges from refund liability. *Id.* at 8-9.[8]

12. BellSouth replies that Williams's contentions respecting the use of one-year earnings data are meritless because the application of two-year monitoring periods in the calculation of refund liabilities in the *Refund Order* was in error, and notes that BellSouth's petition for reconsideration of the subsequent *Escrow Order* remains pending. BellSouth Reply at 4-5. Southwestern Bell replies that it calculated rate levels that would have been filed to produce the crossover ratio mandated by strategic pricing guidelines based upon prospective demand quantities, because rates the Commission believed should have been filed would have been developed on that basis. Southwestern Bell asserts that the use of prospective demand is consistent with data used to determine compliance with the *Strategic Pricing Order*,[9] and states it would be unreasonable to determine on a retrospective basis if rate levels met crossover requirements based on prospective demand but then determine rate adjustments on the basis of actual demand. Southwestern Bell Reply at 9-10.

13. As to the inclusion of multiplexer costs. Ohio Bell and Wisconsin Bell, as well as BellSouth, state that the Commission rejected this argument in its *Pricing Order Reconsideration*, so that Williams's contentions are an untimely effort to seek reconsideration. *See Pricing Order Reconsideration*, 5 FCC Rcd at 406 nn.43, 46. US West adds that the same contention was rejected when raised by AT&T in the *Annual 1989 Access Tariff Filing* proceeding. *See* 4 FCC Rcd 3638, 3693 (1989).

14. As to Williams' critique of its pricing of rate elements for crossover analysis, Southwestern replies that its use of prospective demand for crossover analysis tracks the Commission's method in the December, 1988 *Strategic Pricing Order*, and states that length-of-haul factors are irrelevant to the 1987-88 earnings period (because its refund obligation for that period is capped by overearnings) and could only minimally affect the 1985-86 period. Southwestern Reply at 10-11.

15. BellSouth's use of a one year period to compute overearnings is inconsistent with the procedures the Commission adopted for the computation of these particular refunds in the *Refund Order*. The *Refund Order Reconsideration* [10] states:

> We did not purport to identify the category overearnings "caused" by strategically priced subcategory rates and to refund that amount. We instructed the LECs to refund the *lesser* of (1) the amount by which their rates exceeded the reasonable range for HiCap services (i.e., the Voice Grade HiCap rate crossover range), or (2) their category overearnings. We could have required the LECs to refund the former amount regardless of whether that amount exceeded category overearnings and thereby forced the LECs to earn less than their authorized return for special access as a category. We chose instead to exercise our equitable discretion and limit a LEC's refund liability to category overearnings.

Refund Order Reconsideration, 5 FCC Rcd at 4862. The prior *Refund Order* used the Part 65 rate of return monitoring periods, and the Form 492 reports for those periods in order to compute the category overearnings limitation on the strategic pricing refunds. BellSouth's decision to use a different time period to compute the overearnings limitation does not comply with the *Refund Order*. We will accordingly defer all distributions from the BellSouth escrow and require BellSouth to submit a revised refund plan on or before January 14, 1991.

16. We reject Southwestern Bell's contention that it may rely on demand projections to perform its crossover analysis. The Commission's Order required carriers to calculate the amount by which customers were overcharged. That amount was defined in the Commission's Order as the difference between the DS1 rate actually charged and a DS1 rate no higher than eight times the charge for voice grade service. To determine the relevant charge for voice grade service, Southwestern Bell should have calculated a representative voice grade charge based on the average length of haul for voice grade circuits. Southwestern has offered no persuasive rationale for using projected demand to calculate average length of haul rather than the actual demand it experienced during the years at issue herein. We therefore require Southwestern Bell to file an amended refund report displaying its calculation of a DS1 crossover rate based on actual demand for voice grade service during the 1985-86 earnings period. We agree with Southwestern Bell that length of haul factors are irrelevant to calculation of its refund liability for the 1987-88 earnings period since it is already refunding all of its category overearnings, which is the maximum amount required by the Commission's Order.

17. With respect to multiplexing costs, the Common Carrier Bureau first noted in the *Annual 1989 Access Tariff* proceeding that the Commission had not directed the inclusion of LEC-provided multiplexing costs in the cost crossover calculations specified by the *Strategic Pricing Order*, and stated that AT&T's urgings for inclusion of such costs were better raised by a petition for reconsideration of that Order. *Annual 1989 Access Tariff Filing*, 4 FCC Rcd at 3693. In the subsequent *Pricing Order Reconsideration* the Commission noted that a major reason for the difference between the 6:1 crossover ratio initially adopted in the *Strategic Pricing Order* and various ratios suggested by other parties was those parties' inclusion of costs not part of the Commission's crossover analysis. *Pricing Order Reconsideration*, 5 FCC Rcd at 406 n.43. The LECs' exclusion of multiplexing costs for purposes of the crossover analysis is consistent with the Commission expectations expressed in the *Refund Order*. Williams' suggestion that multiplexing costs be included must, therefore, be rejected.

18. Williams' suggestion that the LECs should be required to perform separate crossover analyses for the Channel Termination and Channel Mileage components is also inconsistent with our understanding of the *Refund Order*. We infer from that Order that the Commission expected the LECs to perform the crossover analysis on an aggregate basis. The LECs have in fact performed such an aggregate analysis. Williams' objections to the use of an average length of haul for purposes of a crossover analysis are also inconsistent with the Commission's decision in the *Refund Order*.

19. The late-filed comments of the Telephone Communications Corporation (TCC) are also based upon the premise that LECs should not have based refund computations upon crossover ratios at the average length of haul. We believe that the Refund Order mandated the use of an average length of haul for purposes of computing these refunds. Accordingly, the TCC objection is not well founded.[11]

20. Finally, Allnet states that while some LECs attempted to justify their variance from initially calculated Commission amounts by reference to settlements with customers, Ameritech has failed to explain why its claimed liability for Wisconsin Bell is only $868,271 while the Commission determined special access overearnings for that carrier of $3,001,000. Allnet Reply Comments at 1-2. While Wisconsin Bell does not address Allnet's contention in its Reply, its original explanation in its March 5, 1990 refund plan report establishes that the reduction in DS1 billing needed to reduce Wisconsin rates to levels compliant with the 8:1 crossover standard was substantially less than the overearnings identified in the *Refund Order*. Joint Ohio Bell and Wisconsin Bell refund plan report, March 5, 1990, at 4-5. That reduction ($576,029), augmented by interest and the then-anticipated refund obligation to DDS customers (since retracted by the Commission's *Refund Order Reconsideration*), generated the figure questioned by Allnet. The record thus provides no basis for questioning this aspect of Wisconsin Bell's proposal.

C. Termination of Escrow

21. Ohio Bell and Wisconsin Bell argue against any immediate refund disbursement, asserting that payment of refunds should be deferred pending judicial review of the *Refund Order* and *Refund Order Reconsideration*.[12] The escrow arrangements, these carriers assert, entitle LECs to a stay *pendente lite* under *Virginia Petroleum Jobbers* [13] and related precedent. Joint Ohio Bell and Wisconsin Bell Reply at 2-3. Allnet, in contrast, urges that Commission-determined refund amounts should be disbursed without delay. Allnet Reply at 1-2. Southwestern Bell, reiterating that its settlements have not and will not prejudice amounts owed to non-settling customers under refund requirements, contends it should not be required to make refunds to customers who have settled nor to escrow funds for such accounts. Southwestern Bell Reply at

2-5. BellSouth similarly avers that no purpose is served by maintaining escrow requirements for customers who have settled their claims, and US West contends there is no logical reason why a LEC should not reduce the escrow amount by settlements. BellSouth Reply at 3; US West Reply at 8-10.

22. Inasmuch as we are approving the refund plans of all carriers other than BellSouth and Southwestern Bell, we will authorize all carriers other than BellSouth and Southwestern Bell to withdraw amounts from escrow that are not allocable to refunds for nonsettling parties. Those carriers whose refund plans are approved may withdraw those amounts immediately.

23. BellSouth's refund plan deficiencies have the potential to substantially affect refund amounts, and so no reduction of its escrow can be permitted in the absence of a satisfactory refund plan. As to Southwestern Bell, a somewhat different approach is necessary. The deficiencies in this carriers' refund methodologies, noted *supra* at paras. 15-16, preclude a final determination of their actual refund pool obligation to non-settling parties. At the same time, the Bureau does not wish to penalize this carrier for its errors by the retention of an escrow obligation disproportionate to the distortions possibly introduced by the oversights. Accordingly, the portion of Southwestern's currently escrowed funds which represent its liability for the 1985-86 monitoring period and which are allocated to parties with whom Southwestern Bell has entered into settlement agreements may be reduced by 90 percent. The portion of escrowed funds which represent its liability for the 1987-88 monitoring period and which are allocated to settling parties may be removed in its entirety. Subsequent escrow reductions must await evaluation of these carriers' revised refund proposals.

24. Carriers other than BellSouth and Southwestern Bell that are not participating in pending appeals must disburse refunds to nonsettling parties within 30 days of the release of this Order. Carriers other than BellSouth and Southwestern Bell that are participating in pending appeals may keep amounts allocable to nonsettling party refunds in escrow, pending Commission action on requests for a stay pending appeal.

III. ORDERING CLAUSES

25. IT IS ORDERED that carriers submitting refund plans under the terms of the *Refund Order*, other than BellSouth and Southwestern Bell, MAY IMMEDIATELY DIMINISH ESCROWED AMOUNTS by the amounts allocable to settling parties.

26. IT IS FURTHER ORDERED that carriers submitting refund plans under the terms of the *Refund Order*, other than BellSouth and Southwestern Bell, SHALL DISBURSE REFUNDS TO NON-SETTLING PARTIES within 30 days of the release of this Order. Such carriers, if participating in pending appeals, may keep amounts attributable to nonsettling party refunds in escrow, pending Commission action on requests for stay pending appeal.

27. IT IS FURTHER ORDERED that BellSouth SHALL SUBMIT by January 14, 1991 a revised refund plan with analysis of overearnings based upon the earnings review periods specified in Attachment B to the Commission's *Refund Order*, n.1 *supra*.

28. IT IS FURTHER ORDERED that Southwestern Bell SHALL SUBMIT by January 14, 1991 a revised refund plan with overcharge analysis based upon actual demand for affected services during the periods specified in Attachment B to the Commission's *Refund Order*, n.1 *supra*.

29. IT IS FURTHER ORDERED that Southwestern Bell MAY IMMEDIATELY DIMINISH ESCROWED AMOUNTS for the 1985-86 monitoring period by 90 percent of the amount allocated to settling parties, and, for the 1987-88 monitoring period, by the full amount allocated to settling parties.

30. IT IS FURTHER ORDERED that carriers subject to refund disbursement obligations respecting non-settling parties shall not disburse refunds until five business days after the release of this Order, to provide affected parties opportunity for the filing of stay requests.[14]

FEDERAL COMMUNICATIONS COMMISSION

Carl D. Lawson
Deputy Chief, Common Carrier Bureau

FOOTNOTES

[1] Investigation of Special Access Tariffs of Local Exchange Carriers, CC Docket No. 85-166, 5 FCC Rcd 412 (1989) (*Refund Order)*.

[2] The history of the strategic pricing investigation is described in the Commission's first reconsideration Order in that phase of the proceeding. Investigation of Special Access Tariffs of Local Exchange Carriers, CC Docket No. 85-166, Phase II, Part 1, 5 FCC Rcd 400 (1989) (*Pricing Order Reconsideration)*.

[3] BellSouth submitted its report February 28, 1990.

[4] Investigation of Special Access Tariffs of Local Exchange Carriers, CC Docket No. 85-166, Phase II, Part 1, 5 FCC Rcd 2506 (1990) (Com.Car.Bur.)(*Escrow Order)*. The Bureau iterated that while refunds specified by the *Refund Order* might be subsequently adjusted in the refund process, the escrow requirements arising from that Order were not contingent upon adjustments or refinements by the LECs, and were subject to alteration only in two respects explicitly provided by the *Refund Order*: escrowed amounts were to be limited to the lesser of overearnings or overcharges, and were then to be augmented by interest accrued at the current IRS rate.

[5] BellSouth submitted its supplemental report April 5, 1990.

[6] Comments were submitted by Allnet Communication Services, Inc. (Allnet); Competitive Telecommunications Association (CompTel); MCI Telecommunications Corporation (MCI); and Williams Telecommunications Group, Inc. (Williams). Replies were submitted by Allnet; jointly by BellSouth Telephone Companies, Southern Bell Telephone and Telegraph Company and South Central Bell Telephone Company (BellSouth); Cincinnati Bell Telephone Company (CBT); jointly by Ohio Bell Telephone Company (Ohio Bell) and Wisconsin Bell, Inc. (Wisconsin Bell); Pacific Bell (Pacific); Southwestern Bell Telephone Company (SWBT); and jointly by Mountain States Telephone and Telegraph Company, Northwestern Bell Telephone Company and Pacific Northwest Bell Telephone Company, doing business as US West Communications (US West).

In addition, Telephone Communications Corp. (TCC), moved on August 30, 1990 to file late comments in this proceeding consisting principally of an informal complaint submitted Aug. 28, 1990. US West moved to strike TCC's motion (Sept. 4, 1990) and TCC opposed US West's motion (Sept. 12, 1990).

[7] Allnet says the LEC settlements create a "dilemma" because non-settling customers such as Allnet must wait for the Commission's action to receive refunds although other customers have already settled with the carriers. Allnet Comments at 1-3. CompTel argues that the settlements should be recorded below-the-line by LECs in the first instance, consonant with Commission practice respecting prejudgment settlement of civil and criminal suits. CompTel Comments at 3. We did not invite further comments in order to review settlement procedures generally. We invited comment in order to determine the effect of settlements that in fact occurred upon refund obligations established in a particular Commission order. These comments do not appear to address the relevant question.

[8] For purposes of Part 65 earnings categories, "subelement" refers to sub-categories of the special access element, *i.e.,* to individual special access services.

[9] Investigation of Special Access Tariffs of Local Exchange Carriers, CC Docket No. 85-166, Phase II, Part 1, Memorandum Opinion and Order, 4 FCC Rcd 4797 (1988) (*Strategic Pricing Order).*

[10] Investigation of Special Access Tariffs of Local Exchange Carriers, CC Docket No. 85-166, Phase II, Part 1, Memorandum Opinion and Order (On Reconsideration), 5 FCC Rcd 4861 (1990) (*Refund Order Reconsideration).*

[11] In view of that conclusion we need not determine whether TCC has in fact demonstrated good cause for accepting late-filed comments. This disposition of TCC's refund claim is not a determination of the merits of its separately filed informal complaint.

[12] The consolidated appeals are pending in the Sixth Circuit *sub nom.* Ohio Bell v. FCC, Case Nos. 3146, 90-3688 *et al.*

[13] Virginia Petroleum Jobbers Ass'n v. FPC, 259 F.2d 921 (1958)(*Virginia Petroleum Jobbers).*

[14] *See* Investigation of Special Access Tariffs of Local Exchange Carriers, CC Docket No. 85-166, Phase II, Part 1, Order, 5 FCC Rcd 1306 (1990).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

AT&T Communications — Transmittal No. 2626

Revisions to Tariff
F.C.C. No. 16

ORDER

Adopted: December 28, 1990; Released: December 31, 1990

By the Deputy Chief, Common Carrier Bureau:

1. By the captioned transmittal AT&T Communications (AT&T) proposes revisions to its tariff for Defense Commercial Telecommunications Network (DCTN), a service that AT&T provides to the United States Department of Defense (DOD). AT&T proposes to replace the existing, satellite-based video teleconferencing service with a terrestrial, fiber-optic based system and revises the rates and charges for this service. AT&T Transmittal 2626, Description and Justification (D&J) at 1-3. Williams Telecommunications Group (WTG) has filed a petition to reject or suspend and investigate the captioned filing and AT&T has filed a reply. In addition, AT&T has filed an application for special permission to allow it to advance the effective date of the captioned tariff revisions.

2. WTG argues that the revised rates for DCTN video teleconferencing are unreasonably discriminatory. WTG contends that the provision of Section 201(b) of the Communications Act, 47 U.S.C. § 201(b), which allows carriers to create classifications of services, does not give the carrier *carte blanche* to discriminate among classes of customers. WTG Petition at 3-9. WTG also asserts that AT&T has provided insufficient cost data to allow it to analyze AT&T's rates and questions how AT&T will recover the costs of satellite facilities. *Id.* at 9-14. Finally, WTG contends that the captioned transmittal violates the Commission's private line guidelines contained in Section 61.40 of the Commission's Rules, 47 C.F.R. § 61.40, and speculates that AT&T may be bundling customer premises equipment with regulated transmission services. *Id.* at 14-15.

3. In response, AT&T asserts that "a preferential rate to the government cannot be discriminatory." AT&T Reply at 3. AT&T also contends that compliance with the Commission's private line guidelines is not mandatory and that Section 61.40 of the Commission's Rules permits carriers to demonstrate that non-conforming rate structures are nevertheless reasonable. AT&T argues that it has done this by providing cost support information which it asserts is fully sufficient under Section 61.38 of the Commission's Rules, 47 C.F.R. § 61.38. *Id.* at 5-7.

4. The Common Carrier Bureau has reviewed AT&T's Transmittal No. 2626, WTG's petition, and AT&T's reply. We conclude that no compelling argument has been presented that the proposed tariff revisions are patently unlawful so as to require rejection, and that no question has been presented that warrants investigation at this time.

5. Accordingly, IT IS ORDERED that the petition to reject or to suspend and investigate AT&T Communications Tariff F.C.C. No. 16, Transmittal No. 2626, filed by Williams Telecommunications Group IS DENIED.

6. IT IS FURTHER ORDERED that AT&T MAY FILE to advance the effective date of Transmittal No. 2626. For this purpose, Sections 61.56, 61.58, and 61.59 of the Commission's Rules, 47 C.F.R. §§ 61.56, 61.58, 61.59, are waived and Special Permission No. 90-1373 is assigned.

FEDERAL COMMUNICATIONS COMMISSION

Carl D. Lawson
Deputy Chief (Policy)
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Southwestern Bell Telephone Company — Transmittal No. 2057

Tariff F.C.C. No. 68

ORDER

Adopted: December 28, 1990; Released: December 31, 1990

By the Deputy Chief, Common Carrier Bureau:

1. On December 18, 1990, Southwestern Bell Telephone Company (Southwestern) filed the above-captioned revisions to its Tariff F.C.C. No. 68 to implement its plan for equal access for 1+ interLATA coin calls made from public telephones. On December 20, 1990, US Sprint Communications Company Limited Partnership (US Sprint) requested that the due date for petitions regarding Southwestern's tariff revisions be extended by one week to allow interested parties more time to prepare their comments. US Sprint contends that, in view of the importance of the instant tariff filing and because of the absence of key personnel due to the holiday season, US Sprint and other interested parties should be granted additional time to prepare their pleadings.

2. The Common Carrier Bureau has reviewed US Sprint's request and we conclude it has demonstrated good cause for the one-week extension it requests. Therefore, petitions regarding Southwestern's Transmittal No. 2057 may be filed by interested parties no later than January 9, 1991. Replies to petitions may be filed no later than January 16, 1991.

3. Accordingly, IT IS ORDERED that the request for extension of time filed by US Sprint Communications Company Limited Partnership with regard to the above-captioned tariff transmittal IS GRANTED.

FEDERAL COMMUNICATIONS COMMISSION

Carl D. Lawson
Deputy Chief (Policy)
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

BellSouth
Telephone Companies
Tariff F.C.C. No. 4

Transmittal No. 341

ORDER

Adopted: December 20, 1990; Released: December 27, 1990

By the Chief, Common Carrier Bureau:

1. On October 1, 1990, the BellSouth Telephone Companies (BellSouth) filed Transmittal No. 341 to revise their "dark," or "dry," fiber individual case basis (ICB) service offerings to terminate August 5, 1991, in compliance with a Commission Order.[1] MCI Telecommunications Corporation (MCI) filed a petition to reject Transmittal 341, to which BellSouth replied. Transmittal 341 is scheduled to become effective December 30, 1990.

2. MCI contends that BellSouth's filing does not fully comply with the *Reconsideration Order* because Transmittal 341 fails to establish general rates for dark fiber service. MCI Petition at 1. MCI notes that it opposed a petition for limited waiver of the *Reconsideration Order* filed by BellSouth which states that the carrier intends to exit the dark fiber market when its existing dark fiber ICBs terminate, and therefore BellSouth should not be required to file general rates. *Id.* at 1-2. MCI reiterates its opposition to BellSouth's petition for limited waiver, and states that "BellSouth's intention to exit the Dark Fiber market would place it in violation of Sections 201(a) and 214 of the Communications Act." *Id.* at 2. MCI incorporates by reference its opposition to BellSouth's petition for waiver. *Id.* at 3.

3. BellSouth asserts that it filed Transmittal 341 to comply with Commission instructions that existing dry fiber ICBs be terminated. BellSouth Reply at 1 (citing the *Reconsideration Order* and Local Exchange Carriers' Individual Case Basis DS3 Service Offerings, CC Docket No. 88-136, Order, 5 FCC Rcd 5919 (Com.Car.Bur. 1990)). According to BellSouth, the question of whether BellSouth must file a general dry fiber tariff offering is the subject of other proceedings. *Id.* at 1-2 (citing Local Exchange Carriers' Individual Case Basis DS3 Service Offerings, CC Docket No. 88-136, BellSouth Petition for Waiver, filed Aug. 22, 1990 and EDS Petition for Declaratory Ruling, filed Oct. 3, 1990). On November 1, 1990, BellSouth filed Transmittal No. 354 which proposes the establishment of averaged, general tariff rates for dark fiber.

4. The Common Carrier Bureau has reviewed Transmittal 341, the description and justification supporting it, and the pleadings. We conclude that no compelling argument has been presented that the tariff revisions filed by BellSouth are patently unlawful so as to require rejection.

5. Accordingly, IT IS ORDERED that the petition to reject BellSouth Telephone Companies Tariff F.C.C. No. 4, Transmittal No. 341, filed by MCI Telecommunications Corporation, IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Firestone
Chief, Common Carrier Bureau

FOOTNOTE

[1] Local Exchange Carriers' Individual Case Basis DS3 Service Offerings, CC Docket No. 88-136, Memorandum Opinion and Order on Reconsideration, 5 FCC Rcd 4842 (1990) (*Reconsideration Order), further recon. pending.*

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

American Telephone and Telegraph Company	Transmittal Nos. 2601 and 2609

Revisions to Tariff F.C.C. No. 12

ORDER

Adopted: December 20, 1990; Released: December 21, 1990

By the Chief, Common Carrier Bureau:

1. American Telephone and Telegraph Company (AT&T) has filed Transmittal Nos. 2601 and 2609 to introduce Virtual Telecommunications Network Service (VTNS) Options 72 and 73, by which AT&T will provide voice and data communications service among locations in the United States, Puerto Rico, the U.S. Virgin Islands, and specific international locations. Following substantially complete installation, the rates for Options 72 and 73 are each stabilized for a three-year term. Option 72 may be extended for two additional one-year terms at the same stabilized rates if the customer opts for such extension and AT&T agrees. *See* AT&T Transmittal No. 2601, Description and Justification (D&J) at 1-4; AT&T Transmittal No. 2609, D&J at 1-4. The basic charge for VTNS Option 72 is $997,000 per month, while the basic charge for Option 73 is $64,700 per month. *See* AT&T Transmittal No. 2601, D&J at 5; AT&T Transmittal No. 2609, D&J at 5. Transmittal Nos. 2601 and 2609 are scheduled to become effective December 29, 1990.

2. US Sprint Communications Company Limited Partnership (Sprint) filed a petition to reject, or alternatively, to suspend and investigate, *inter alia*, Transmittal No. 2601 on October 10, 1990, and a similar petition against Transmittal No. 2609 on October 22, 1990. AT&T filed replies on October 19, 1990, and November 1, 1990, respectively.

3. Sprint argues that AT&T has failed to demonstrate that Options 72 and 73 are integrated service packages that are "unlike" AT&T's other component services. Further, Sprint contends that even if they could qualify as integrated service packages, their rates vary without justification from other options under Tariff 12 and are thus discriminatory. Sprint Option 72 Petition at 1-2; Sprint Option 73 Petition at 1-2. Moreover, Sprint contends that AT&T's provision of 74 individual VTNS offerings makes clear that each such offering is designed for one customer. Sprint Option 73 Petition at 2. Additionally, Sprint maintains that various specifications in the transmittals also effectively restrict each offering to one customer. Sprint further argues that the individualized pricing of VTNS options is comparable to the local exchange carriers' individual case basis (ICB) rates for DS3 service, that AT&T now has sufficient experience to cease its individualized pricing and develop general rates, and that the Commission thus should order AT&T to offer these rates under a generally available tariff, as it did in the ICB DS3 case. Sprint Option 72 Petition at 2-4; Sprint Option 73 Petition at 2-4. Additionally, Sprint alleges that AT&T's projected 1990 revenue from all Tariff 12 VTNS options now exceeds $1.2 billion and likely accounts for more than 2 percent of the entire interexchange market. Sprint Option 72 Petition at 4; Sprint Option 73 Petition at 4. Sprint also alleges that AT&T's cost support for Options 72 and 73 is "seriously deficient" and incorporates by reference the arguments against VTNS Options 17, 18, and 19 (AT&T Transmittals 1810, 1826, and 1832, respectively). Sprint Option 72 Petition at 5 & n.5; Sprint Option 73 Petition at 5 & n.5.

4. AT&T contends that the rates in Options 72 and 73 are not unjustly discriminatory because the Communications Act prohibits discrimination only between "like" services, and the Commission has held that Tariff 12 integrated service packages are not "like" the component services offered by AT&T in separate tariffs. AT&T Option 72 Reply at 4-5; AT&T Option 73 Reply at 3-4. AT&T argues that the Commission has consistently found AT&T's standard, Commission-sanctioned cost systems sufficient to support AT&T's Tariff 12 filings. AT&T contends that these costing methods satisfy the requirements of Section 61.38 of the Commission's Rules. AT&T Option 72 Reply at 7-9 & 8 n. *****; AT&T Option 73 Reply at 5-7 & 6 n.*****.

5. The Common Carrier Bureau has reviewed AT&T Transmittal Nos. 2601 and 2609, Sprint's petition, and related pleadings. We conclude that no compelling argument has been presented that these tariffs are so patently unlawful as to warrant rejection.

6. On October 23, 1990, the U.S. Court of Appeals for the District of Columbia Circuit reversed and remanded the Commission's Order in CC Docket 87-568, AT&T Communications, Revisions to Tariff F.C.C. No. 12, Memorandum Opinion and Order, 4 FCC Rcd 4932, *recon. denied*, 4 FCC Rcd 7928 (1989). *See MCI Telecommunications Corp. v. FCC*, No. 89-1382, slip op. (D.C. Cir. Oct. 23, 1990). Although these transmittals do not present new questions that warrant investigation at this time, they could be affected by the Commission decision in the CC Docket No. 87-568 remand proceedings. Accordingly, Transmittal Nos. 2601 and 2609 are accepted subject to the outcome of the remand proceedings in CC Docket No. 87-568.

7. Accordingly, IT IS ORDERED that the petitions to reject, or to suspend and investigate, American Telephone and Telegraph Company Tariff F.C.C. No. 12, Transmittal Nos. 2601 and 2609, filed by US Sprint Communications Company Limited Partnership ARE DENIED.

8. IT IS FURTHER ORDERED that Transmittal Nos. 2601 and 2609 take effect subject to the outcome of remand proceedings in AT&T Communications, Revisions to Tariff F.C.C. No. 12, CC Docket No. 87-568.

9. IT IS FURTHER ORDERED that American Telephone and Telegraph Company is granted permission to advance the effective date of the revisions proposed in Transmittal Nos. 2601 and 2609 to December 22, 1990.

10. IT IS FURTHER ORDERED that for the above purpose, Special Permission No. 90-1314 is assigned, and Sections 61.56, 61.58, and 61.59 of the Commission's Rules, 47 C.F.R. §§ 61.56, 61.58. and 61.59, are waived.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Firestone
Chief, Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Bell Atlantic
Telephone Companies

Transmittal No. 389

Revisions to Tariff F.C.C. No. 1

ORDER

Adopted: December 20, 1990; Released: December 21, 1990

By the Chief, Common Carrier Bureau:

1. On September 28, 1990, Bell Atlantic Telephone Companies (Bell Atlantic) filed Transmittal No. 389 to reduce their rates for DS3 service in response to marketplace demands and increased competition. Bell Atlantic Transmittal 389, Description and Justification (D&J) at 1-1. On October 15, 1990, Metropolitan Fiber Systems, Inc. (MFS) filed a petition to reject, or alternatively, suspend and investigate the tariff revisions. On October 16, 1990, Institutional Communications Company and Eastern Telelogic Corporation (ICC/ETC) filed a petition to reject or suspend and investigate Transmittal 389.[1] Bell Atlantic filed reply comments on October 25, 1990. The tariff is scheduled to take effect on December 27, 1990.

2. Bell Atlantic states that these reductions are being proposed in direct response to customer dissatisfaction with its existing rates. D&J at 1-3. Bell Atlantic claims that its current rates are not competitive and that its analysis of the market shows that if they are maintained, Bell Atlantic's market share will decline from its current 56 percent to 7 percent by 1995. *Id. at*5-2 to 5-5. Bell Atlantic argues that the proposed rates will cover costs, and due to increased demand it will have an increase in net revenue of $5.8 million if the reductions are allowed. *Id.* at 4-3.

3. The petitioners present three major arguments against Transmittal 389. First, they claim that Bell Atlantic has not provided adequate cost support for the rate reductions. MFS Petition at 9; ICC/ETC Petition at 5. Second, the petitioners argue that there is no stated support for the projections that Bell Atlantic will lose significant market share since Bell Atlantic relies on proprietary analyses which have not been made available for review. MFS Petition at 5-6; ICC/ETC Petition at 10-11. Third, the petitioners argue that the proposed rate reductions represent an attempt by Bell Atlantic to "preposition" itself by lowering rates before price caps are implemented. MFS Petition at 4; ICC/ETC Petition at 12. ICC/ETC also notes that under the *LEC Price Cap Order* [2] proposed price decreases greater than 5 percent, such as this, are to receive close scrutiny and must provide an average variable cost showing. ICC/ETC Petition at 6. ICC/ETC contends that Bell Atlantic has not provided such a showing. *Id.* at 8.

4. Bell Atlantic responds that the proposed rate reductions are pro-competitive since it will not be able to compete effectively in the DS3 market without reducing its rates. Bell Atlantic Reply at 3-4. Bell Atlantic claims that it has provided sufficient cost support for the reductions by including a cost of service study for 1990 in the Description and Justification. Bell Atlantic attached a cost study for the preceding 12-month period to its reply comments. *Id.* at 4.

5. Bell Atlantic also presents a series of arguments in defense of its market projections. *Id.* at 7-11. Finally, Bell Atlantic argues that the *LEC Price Cap Order* does not limit price decreases to 5 percent per year. Rather, according to Bell Atlantic, rate reductions beyond 5 percent require more detailed cost support. *Id.* at 13. Bell Atlantic argues that its cost support covers the average variable costs, and is sufficient for a below band filing under price caps. *Id.* at 14.

6. The Common Carrier Bureau has reviewed Bell Atlantic Transmittal No. 389, the MFS and ICC/ETC petitions, and Bell Atlantic's reply. We conclude that no compelling argument has been presented that the tariff revisions are patently unlawful so as to require rejection, and that no question has been presented that warrants investigation at this time.

7. Accordingly, IT IS ORDERED that the petitions to reject or suspend and investigate Bell Atlantic Telephone Companies Tariff F.C.C. No. 1, Transmittal No. 389, filed by Metropolitan Fiber Systems, and Institutional Communications Company/Eastern Telelogic Corporation, ARE DENIED.

8. IT IS FURTHER ORDERED that the motion to accept a late-filed petition filed by Institutional Communications Company and Eastern Telelogic Corporation IS GRANTED.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Firestone
Chief, Common Carrier Bureau

FOOTNOTES

[1] ICC/ETC filed a motion requesting that its late-filed petition be accepted. Bell Atlantic does not object to this motion. Bell Atlantic Reply Comments at 1 n.2. We believe that ICC/ETC sufficiently demonstrated cause for its untimely petition. Accordingly, we grant its motion.

[2] Policy and Rules Concerning Rates for Dominant Carriers, CC Docket No. 87-313, FCC 90-314, Second Report and Order (released Oct. 4, 1990) (*LEC Price Cap Order), recon. pending.*

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: December 27, 1990

BELLSOUTH FILES PETITION FOR WAIVER OF PARTS 64 AND 69 OF THE COMMISSION'S RULES REGARDING BILLING VALIDATION SERVICES

Pleading Cycle Established

On November 27, 1990, South Central Bell Telephone Company and Southern Bell Telephone and Telegraph Company (collectively, BellSouth) filed a petition for waiver of Parts 64 and 69 of the Commission's Rules to permit BellSouth to continue offering validation of its calling cards as part of the billing and collection services offered to third parties.

BellSouth has developed a database which is to be used to validate calling cards issued by the Bell Operating Companies (BOCs) and provide other billing validation services. The database, known as the Line Information Database (LIDB), contains information regarding calling cards issued by BellSouth as well as billed number screening information.

BellSouth proposes to use its LIDB to validate calling cards issued by the BOCs, to verify third-party billing data, and to screen collect called numbers for intraLATA calls. BellSouth proposes to offer LIDB validation service to other parties who may wish to validate calling cards issued by BellSouth, to verify third-number billing data, and to screen collect called numbers. BellSouth seeks a waiver of the Commission's Part 64 rules in order to account for the costs associated with providing validation services to third parties as a nonregulated activity. BellSouth also requests a waiver of Part 69, to the extent necessary, to establish a separate local transport charge associated with transporting a query to the LIDB.

Interested parties should file comments regarding the BellSouth waiver petition no later than **January 25, 1991.** Reply comments concerning the waiver petition may be filed no later than **February 18, 1991.**

Parties are requested to furnish one copy of each pleading to International Transcription Service, Inc. (ITS), the Commission's duplicating contractor, at its office in Room 246, 1919 M Street, N.W., Washington, D.C. 20554, and to the Chief, Tariff Division, Room 518, 1919 M Street, N.W., Washington, D.C. 20554.

Copies of the BellSouth waiver petition, along with other related documents, may be obtained from ITS. The documents are also available for public inspection and copying in Room 518, 1919 M Street, N.W. An original and four copies of all pleadings and replies must be filed, in accordance with Section 1.51(c) of the Commission's Rules.

For further information, contact Terry S. Conway, Tariff Division, Common Carrier Bureau at (202) 632-6917.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 90-629

In the Matter of

Nevada Bell
Tariff F.C.C. No. 1

Transmittal No. 113

ORDER TO SHOW CAUSE

Adopted: December 20, 1990; Released: December 21, 1990

By the Chief, Common Carrier Bureau:

I. BACKGROUND

1. On September 19, 1990, the Commission adopted the *LEC Price Cap Order* [1] requiring the regional Bell Operating Companies, and the GTE Telephone Operating Companies to implement a "price cap" system of incentive regulation for local exchange carriers (LECs) beginning January 1, 1991. The Common Carrier Bureau issued the *TRP Order*,[2] on October 24, 1990, establishing certain requirements for summary cost support material, and a schedule and procedures, that LECs must follow in filing modifications to their access tariffs to implement the *LEC Price Cap Order* and the Commission's *Represcription Order*. [3]

II. PLEADINGS

2. On November 1, 1990, Nevada Bell filed its tariff revisions in response to the *TRP Order*.[4] Nevada Bell's filing includes an Actual Price Index (API) for the Special Access basket that is above its Price Cap Index (PCI) for that basket.[5] Nevada Bell explains that this anomaly is caused by decreased demand and revenue requirement in the Special Access category. It contends that if it had used 1990-1991 demand to calculate Special Access API, instead of 1989-1990 demand, the API would have been below PCI.[6]

3. On November 16, 1990, MCI Telecommunications Corporation (MCI) filed a petition to suspend and investigate the Nevada Bell filing.[7] MCI complains that the Nevada Bell Special Access API exceeds the PCI, in contravention of the price cap rules. MCI requests that Nevada Bell adjust its rates for Special Access services to ensure that actual rates in the Special Access basket are below or equal to the PCI.[8]

4. In its reply, filed November 29, 1990, Nevada Bell presents two arguments to explain why its Special Access API exceeds its PCI. First, Nevada Bell's forecasted 1990-1991 demand for most Special Access services is significantly lower than the demand for those services experienced in 1989. Second, Nevada Bell recently completed the final phase of its gradual implementation of cost-based non-recurring charges for Special Access services.[9] Thus, Nevada Bell argues it should not be forced to lower its special access rates further to comply with the cap requirements since the rates are already cost based.

III. DISCUSSION

5. The *LEC Price Cap Order* stated that above-cap filings "will be found lawful only in the unlikely event that these rules have the effect of denying a LEC the opportunity to attract capital to continue to operate ...."[10] A LEC that files an above-cap rate must provide extensive cost support information in detail that exceeds the cost support normally required in an annual access tariff filing for LECs subject to rate of return regulation.[11]

6. Nevada Bell does not provide the detailed cost support required by Section 61.49(e) of the Commission's Rules for an above-cap filing.[12] Although it has attempted to provide the showing required in an annual access tariff filing, it has not shown that it will be unable to attract capital and continue to operate.

7. Accordingly, we direct Nevada Bell to file, no later than December 26, 1990, an answer showing cause why the Bureau should not prescribe rates that would not exceed the PCI, or a tariff transmittal reducing the rates to that level. Any such transmittal shall be filed to be effective no later than January 1, 1991.

IV. PROCEDURAL MATTERS

A. Ex Parte Requirements

8. For purposes of this non-restricted notice and comment investigation, the parties are advised that *ex parte* presentations are permitted except during the "Sunshine Agenda" period.[13] The Sunshine Agenda period is the period of time which commences with the release of a public notice that a matter has been placed on the Sunshine Agenda and terminates when the Commission (1) releases a final Order; (2) issues a public notice stating that the matter has been deleted from the Sunshine Agenda; or (3) issues a public notice stating that the matter has been returned to the staff for further consideration, whichever occurs first.[14] During the Sunshine Agenda period, no presentations, *ex parte* or otherwise, are permitted unless specifically requested by the Commission or Commission staff for the clarification or adduction of evidence or the resolution of issues in the proceeding.[15]

9. In general, an *ex parte* presentation is any presentation directed to the merits or outcome of the proceeding made to decision-making personnel which (1) if written, is not served on the parties to the proceeding; or (2) if oral, is made without advance notice to the parties to the proceeding and without opportunity for them to be present.[16] Any person who submits a written *ex parte* presentation must provide on the same day it is submitted, a copy of the presentation to the Secretary of the Commission for inclusion in the public record. Any person who makes an oral *ex parte* presentation that presents data or arguments not already reflected in that person's previously-filed written submissions must provide on the day of the oral presentation, a written memorandum to the Secretary (with a copy to the Commissioner or staff member involved) which summarizes the data and arguments and must also state by docket number the proceeding to which it relates.[17]

B. Filing Requirements

10. An original and seven copies of all pleadings shall be filed with the Secretary of the Commission. In addition, copies of all pleadings shall be delivered to the Chief, Tariff Division, Common Carrier Bureau, and to the Commission's contractor for public records duplication, International Transcription Service, 2100 M Street, N.W., Washington, D.C. 20037, (202) 857-3800. Members of the general public who wish to express their views in an informal manner regarding the issues in this investigation may do so by submitting one copy of their comments to the Secretary of the Commission, 1919 M Street, N.W., Washington, D.C. 20554. Such comments should specify the docket number of the proceeding.

V. ORDERING CLAUSES

11. Accordingly, IT IS ORDERED, pursuant to Sections 4(i), 205(a), 213, 218, and 220 of the Communications Act, 47 U.S.C. §§ 154(i), 205(a), 213, 218, 220, and Sections 0.291 and 1.701 of the Commission's Rules, 47 C.F.R. §§ 0.291 and 1.701, that if Nevada Bell elects not to file a revised tariff to reduce its Special Access rates, it is directed TO SHOW CAUSE why it should not be required to reduce Special Access rates in its interstate access tariff in accordance with Section 61.49 of the Commission's Rules.

12. IT IS FURTHER ORDERED that Nevada Bell SHALL MAKE such showing no later than December 26, 1990.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Firestone
Chief, Common Carrier Bureau

FOOTNOTES

[1] Policy and Rules Concerning Rates for Dominant Carriers, CC Docket No. 87-313, Second Report and Order, FCC 90-314, released Oct. 4, 1990 (*LEC Price Cap Order*).

[2] Commission Requirements for Cost Support Material To Be Filed with January 1, 1991 Access Tariff Revisions, DA 90-1499, released Oct. 24, 1990 (Com.Car.Bur.) (*TRP Order*).

[3] Represcribing the Authorized Rate of Return for Interstate Services of Local Exchange Carriers, CC Docket No. 89-624, FCC 90-315, released Dec. 7, 1990 (*Represcription Order*).

[4] Nevada Bell, Tariff F.C.C. No. 1, Transmittal No. 113, filed Nov. 1, 1990.

[5] Nevada Bell has a PCI of 98.38 and an API of 98.92 for the Special Access basket.

[6] Nevada Bell, Transmittal No. 113, Description and Justification at 4.

[7] MCI Petition, In the Matter of January 1, 1991 Access Tariff Revisions, at 8-9. Petitions against Nevada Bell Transmittal 113 were also filed by American Telephone and Telegraph Company and Ad Hoc Telecommunications Users Committee. Those two petitions deal with aspects of the Nevada Bell filing which are not at issue in this Order, and consequently will be addressed in a separate Order.

[8] *Id.*

[9] Nevada Bell Reply Comments, Transmittal No. 113, at 7-9.

[10] *LEC Price Cap Order* at 134 (para. 304).

[11] *Id.* at 135 (para. 304). Specifically, a LEC must provide an explanation of the manner in which costs have been allocated among baskets and, within the affected basket, a cost assignment showing down to the lowest possible level of disaggregation, including a detailed explanation of the basis for the prices of all rate elements to which costs are not assigned. *See* Section 61.49(e) of the Commission's Rules, 47 C.F.R. § 61.49(e).

[12] Section 61.49(e) of the Commision's Rules, 47 C.F.R. § 61.49(e).

[13] *See generally* Section 1.120(a) of the Commission's Rules, 47 C.F.R. § 1.120(a).

[14] *See* Section 1.202(f) of the Commission's Rules, 47 C.F.R. § 1.202(f).

[15] *See* Section 1.1203 of the Commission's Rules, 47 C.F.R. § 1.1203.

[16] *See* Section 1.1202(b) of the Commission's Rules, 47 C.F.R. § 1.1202(b).

[17] *See* Section 1.1206 of the Commission's Rules, 47 C.F.R. § 1.1206.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Waiver of Certain Reporting
Requirements of Annual Reports
Form O and Form R.

ORDER

Adopted: December 26, 1990; Released: December 28, 1990

By the Deputy Chief, Common Carrier Bureau:

1. Sections 1.785 and 43.21 of the Commission's Rules, 47 C.F.R. §§ 1.785 and 43.21, require wire-telegraph, ocean-cable and radiotelegraph carriers having annual operating revenues in excess of $50,000 to file annual reports with the Commission not later than March 31 of each year, covering the preceding calendar year. The Annual Report Form O is required from wire-telegraph and ocean-cable carriers,[1] and the Annual Report Form R is required from radiotelegraph carriers.[2]

2. As a result of a petition filed by Western Union Corporation, the Bureau completed an analysis of Form O and Form R and issued an Order[3] that only the schedules listed below were needed for the reports covering the 1989 calendar year.

Schedule	Name
1	Identity of Respondent
2	Board of Directors
4	Control over Respondent
5	Security Holders and Voting Rights
6	Elections
7	Organizations Controlled by Respondents
9	Contingent Liabilities of Respondents
100	Comparative Balance Sheet - Asset Side
200	Comparative Balance Sheet - Liability Side
300	Income and Earned Surplus Statement
301	Operating Revenues (301T-C for Wire-Telegraph and Ocean-Cable or 301R for Radiotelegraph)
	330 Operating Expenses (330T-C for Wire-Telegraph and Ocean-Cable or 330R for Radiotelegraph)
414	Changes During the Year
	Signature Page

3. We concluded that, under the circumstances presented by the parties with respect to 1989, waiver of the reporting requirements contained in the other schedules would significantly reduce reporting burdens without depriving the Commission of essential information. The relief granted to Western Union (requiring only the above schedules) was also granted to the other record carriers.

4. There have been no significant circumstances that warrant a modification of the information required. Therefore, to reduce reporting burdens and eliminate regulations that are unnecessary or inimical to the public interest, we again waive the requirements to file any schedules not listed above for the 1990 and 1991 Form O and Form R. Our granting this limited waiver does not preclude the Commission from directing the affected carriers to file detailed information should the need arise.

5. Accordingly, in view of the foregoing, IT IS ORDERED, pursuant to Sections 0.91(a), 0.291 and 1.3 of the Commission's Rules, That the reporting requirements of Annual Reports Form O and Form R as described above, are hereby waived for the 1990 and 1991 reports only.

FEDERAL COMMUNICATIONS COMMISSION

Carl D. Lawson
Deputy Chief, Common Carrier Bureau

FOOTNOTES

[1] Carriers that reported on Form O for 1989 were FTC Communications, Inc.; Western Union International, Inc.; and Western Union Corporation.

[2] Carriers that reported on Form R for 1989 were RCA Global Communications, Inc.; TRT Telecommunications Corporation; and U.S. Liberia Radio Corporation.

[3] Waiver of Certain Reporting Requirements of Annual Reports Form O and Form R, 5 FCC Rcd 2563 (1990).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Pacific Bell Transmittal No. 1506

Tariff F.C.C. No. 128

ORDER

Adopted: December 20, 1990; Released: December 21, 1990

By the Chief, Common Carrier Bureau:

1. Pacific Bell (Pacific) filed Transmittal No. 1506 on October 30, 1990, to reduce and restructure its rates for DS3 and DS3x3 high capacity special access service, and to provide a new high capacity service, DS3x12. Metropolitan Fiber Systems, Inc. (MFS) filed a petition to suspend and investigate Transmittal 1506 on November 15, 1990, to which Pacific replied on November 26, 1990. Williams Telecommunications Group (WTG) filed separate comments on November 27, 1990.[1]

2. MFS contends that Transmittal 1506 proposes extraordinary rate reductions for DS3 service that are not supported by cost data that meet the standards of Section 61.38 of the Commission's Rules, 47 C.F.R. § 61.38. MFS Petition at 2. MFS acknowledges that Pacific provides disaggregated cost data to justify its DS3 and DS3x3 rate reductions but notes that Pacific does not explain why those cost savings result in widely disproportionate reductions in different service rates. *Id.* at 3. MFS further argues that Pacific fails to meet the "average variable cost" standard described in the *LEC Price Cap Order* [2] because it does not show which cost categories have experienced significant cost reductions and fails to describe the distribution of the cost savings among all categories of service provided over new facilities. *Id.*

3. In its reply, Pacific charges that MFS does not identify any particular price, rate, or costs contained in the transmittal which fail to meet Commission standards, and explains that all services in its transmittal are priced above cost. Pacific Reply at 1-2. Pacific argues that it performed detailed cost studies, examined the cross-elasticities in demand, and then quantified the revenue impact of the introduction of the new options. Pacific states that its filing is revenue neutral since the rates for the DS3 family of products were matched to the previously approved revenue requirement. *Id.* at 2. Pacific states that MFS's allegation that reduced costs should have a more "proportional effect on the rates for all services provided for such facilities" is incorrect because a reduction in fiber optic facilities affects DS3 services but not other unrelated services. *Id.* at 2-3.

4. Pacific further argues that its transmittal should be examined under existing rate of return requirements for cost support. But even under the price cap rules, Pacific notes, the data submitted with its filing show that "the average fully allocated costs provided are greater than average variable costs." *Id.* at 3-4.

5. The Common Carrier Bureau has reviewed Pacific's Transmittal 1506 and the associated pleadings. We conclude that Pacific's tariff revision presents no question that warrants suspension or investigation at this time.

6. Accordingly, IT IS ORDERED that the petition to suspend and investigate Pacific Bell Tariff F.C.C. No. 128, Transmittal No. 1506, filed by Metropolitan Fiber Systems, Inc., IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Firestone
Chief, Common Carrier Bureau

FOOTNOTES

[1] The WTG pleading, which opposes the MFS petition, is not contemplated by the Commission's rules and is therefore dismissed. *See* Section 1.773 of the Commission's Rules, 47 C.F.R. § 1.773.

[2] Policy and Rules Concerning Rates for Dominant Carriers, CC Docket No. 87-313, Second Report and Order, FCC 90-314, released Oct. 4, 1990 (*LEC Price Cap Order), recon. pending.*

Before the
Federal Communications Commission
Washington, D.C. 20554

In re:

NATIONWIDE COMMUNICATIONS, INC. (KITN) CSR-3383

Petition for Special Relief

MEMORANDUM OPINION AND ORDER

Adopted: December 31, 1990; Released: January 8, 1991

By the Commission:

1. On April 16, 1990, Nationwide Communications, Inc. (hereinafter "KITN"), licensee of Television Broadcast Station KITN (Ind., Channel 29), Minneapolis - St. Paul, Minnesota, filed a petition for special relief seeking a ruling that KITN is significantly viewed in Nicollet, Rice, and Watonwan Counties, Minnesota on the basis of county-wide, in lieu of the ordinarily required community-specific, audience survey data. A partial opposition to this petition was filed on May 12, 1990, by United Communications Corporation (hereinafter "KEYC-TV"), licensee of Station KEYC-TV (CBS, Channel 12), Mankato, Minnesota, and KITN has replied.

2. In 1972, the Commission adopted a comprehensive regulatory scheme for cable television. *Cable Television Report and Order*, 36 FCC 2d 143, *recon.*, 36 FCC 2d 326 (1972). As part of this regulatory scheme, the Commission limited the number of distant signals a cable system could import from outside of its market. Exemptions to these limits, however, were made for both significantly viewed signals and for specialty stations. A signal is considered to be significantly viewed if it meets certain designated minimum viewership levels off-the-air. A station was considered to be a specialty station if it programmed a designated minimum amount of foreign language, religious, or automated programming.[1] When the Commission deleted its distant signal carriage limitations in 1982, the Commission also deleted its rule defining a specialty station. This category of stations was no longer needed because there were no longer any rules limiting signal carriage from which exemptions on this basis were needed. *Report and Order in Docket Nos. 20988 and 21284*, 79 FCC 2d 663 (1980), *aff'd sub nom. Malrite TV of New York, Inc. v. FCC*, 652 F.2d 1140 (2d Cir. 1981), *cert. denied*, 454 U.S. 1143 (1982). The Commission continues to utilize the significantly viewed status of signals for various purposes, such as exemption from the Commission's program exclusivity rules. 47 C.F.R. §§76.92(f), 76.156(a). On the other hand, the Copyright Office has continued to recognize specialty status for purposes of determining royalty payment rates, the carriage of specialty stations by cable systems incurring lesser fees than the carriage of other distant stations. Similar treatment is afforded significantly viewed signals by the Copyright Office.

3. In establishing the category of significantly viewed stations, the Commission published a nationwide list, county-by-county, of those stations initially deemed to be significantly viewed. *Reconsideration of the Cable Television Report and Order*, 36 FCC 2d at 378-463 app. B. Stations not included in this list may be added in one of two ways. A station may demonstrate that it meets the requisite viewership levels utilizing current community-specific data. 47 C.F.R. §76.54(b). Alternatively, a "new" station -- one not included in the surveys, which established the 1972 list -- may utilize county-wide data, provided that such data is from the station's first three years of operations. 47 C.F.R. §76.54(d). For purposes of this rule, the Commission has extended "new" station status to stations shifting from subscription or noncommercial status to commercial status after the initial survey period.

4. KITN began operation on October 6, 1982 (as Station WFBT-TV) broadcasting a religious programming format. Some time thereafter, however, by May 1984, religious programming ceased to take up the majority of the station's broadcast time.[2] Pursuant to former §76.5(kk) of the Commission's Rules, KITN contends that it could have been classified as a specialty station at its inception. In view of this, states KITN, the station's change from a specialty to a non-specialty format in 1984 entitles KITN to be considered a "new" station for purposes of determining its status as significantly viewed pursuant to §76.54 of the Rules. Consideration as a "new" station, KITN notes, would allow it to demonstrate its status as significantly viewed utilizing county-wide data from the period 1984-1987, rather than current community-specific data. KITN contends that switching its format from specialized to non-specialized programming is equivalent to a station changing from subscription (STV) or non-commercial to a commercial format, or significantly upgrading its technical facilities. In each situation, KITN maintains, a station of limited audience appeal has made changes in its operation enabling it to attract a more widespread audience. Indeed, argues KITN, the Commission recognized the limited audience appeal of specialty stations in establishing this category, citing the *First Report and Order in Docket No. 20553*, 58 FCC 2d 442, 452 (1976), *recon. denied*, 60 FCC 2d 661 (1976).

5. In support of its request to be declared significantly viewed in Nicollet, Rice, and Watonwan Counties, Minnesota, KITN submits 1986 Arbitron viewing data for those counties, and contrasts this data with 1984 Arbitron data. According to the Arbitron data, taken from Arbitron's *1986 County Coverage Survey, Cable-Controlled*, conducted during four separate, consecutive four-week periods in May, July, and November 1985, and February 1986, KITN achieved a 4% share of total viewing hours and a net weekly circulation of 15% in Nicollet County; a 2% share of total viewing hours and a net weekly circulation of 21% in Rice County; and a 6% share of total viewing hours and a net weekly circulation of 32% in Watonwan County. Accordingly, states KITN, in each case it has met the necessary viewership levels to be declared to be significantly viewed as an independent station: a 2% share of total viewing hours and a net weekly circulation of 5%. 47 C.F.R. §76.5(i). In contrast, notes KITN, as a specialty station, it posted no ratings in non-cable homes in Nicollet County in Arbitron's *1984 County Coverage Survey, Cable-Controlled.* [3] The measured improvement cannot be attributed to a facilities upgrade, notes KITN, for none has occurred. It is in the public interest, KITN

claims, to enable it to utilize county-wide data as a "new" station to achieve significantly viewed status, for just as STV and non-commercial stations which have become commercial stations have increased significantly their viewership potential (as have stations which have significantly upgraded their technical facilities), a station which has switched from a specialty to a non-specialty format will by its very nature attract many more viewers.

6. KEYC-TV, in partial opposition to KITN, argues that with respect to Nicollet and Watonwan Counties (KEYC-TV does not object to KITN's petition insofar as it seeks significantly viewed status in Rice County), KITN's viewership apparently results not from off-air viewing of KITN's own signal, but rather from viewing of rebroadcasts of the station's signal by a translator north of St. James, Minnesota.[4] KITN cannot base a claim for significantly viewed status on translator data, contends KEYC-TV, citing *KOIN-TV, Inc.*, 93 FCC 2d 186 (1983), and *Scranton Broadcasters, Inc.*, 88 FCC 2d 1482 (1982). Nor, argues KEYC-TV, should KITN be treated as a "new" station. A change in program format is simply not as significant a change as is a change from STV or non-commercial to commercial status, KEYC-TV contends. The notion of viewer ratings in the ordinary sense is inapplicable to STV and non-commercial stations, whereas commercial stations regardless of format depend upon viewership and ratings. A change from one format to the other, therefore, should not be treated as creating a "new" station.[5]

7. In reply to KEYC-TV, KITN notes that KEYC-TV has provided no evidence to prove its allegation that KITN relies upon a translator to rebroadcast its signal to Nicollet and Watonwan Counties. In addition, claims KITN, the determinative factor in deciding whether to treat a station as "new" for purposes of §76.54 of the Rules "is whether the station in question has changed its operations so dramatically so as to increase significantly its viewership potential." This, claims KITN, it has done, in changes from a specialty to a general interest format.

8. KITN misapprehends the underlying rationale of what constitutes a "new" station for purposes of §76.54 of the Rules. In those cases in which we have permitted stations already on the air to be treated as "new" for such purposes, the station in question has done more than merely seek to offer programming thought to be more attractive to its existing potential audience base. Rather, the station has undergone very extensive technical improvements so as to increase significantly its coverage potential, *e.g.*, *Independent Broadcasting Company (KOLR-TV)*, 54 RR 2d 712 (1983); *Calvert Telecommunications Corporation d/b/a CALTEC*, 63 FCC 2d 1022 (1977), or alternatively, the station has switched from an STV or non-commercial mode of operations to a commercial mode of operations, *e.g.*, *HR Broadcasting Corp. of Milwaukee, Inc. (WCGV-TV)*, Cable Television Actions Report No. 3212 (released April 10, 1989) (STV); *Golden West Broadcasters of Oklahoma, Inc. (KAUT)*, Cable Television Actions Report No. 3110 (released September 8, 1987) (STV); *Blair Broadcasting of Oklahoma, Inc. (KOKH-TV)*, Cable Television Action Report No. 2800 (released October 14, 1983) (non-commercial), changes which altered the basic terms of providing its broadcast service. Noncommercial stations were simply not included in the original 1972 significant viewing list regardless of their share of circulation. Thus, they are inherently "new," insofar as the list and significant viewing process are concerned, when they change to commercial status. In the present case, KITN has merely decided to offer different programming to its existing potential audience base. Determining when changes in entertainment format are substantial enough to warrant categorization as a "new" station would reinvolve the Commission in subjective judgements, from which it has previously sought to extricate itself. *FCC v. WNCN Listeners Guild*, 450 U.S. 582 (1981). Moreover, we have previously established that a change in network affiliation and in non-network program offerings was insufficient to warrant an existing station's loss of significantly viewed status. *Boston Broadcasters, Inc.*, 42 FCC 2d 669 (1973). We see no reason today why a similar change in program content should warrant treatment as a "new" station for purposes of establishing significantly viewed status.

9. Although we have determined that KITN's change of program content does not entitle it to be treated as a "new" station for purposes of demonstrating significantly viewed status, KITN may still demonstrate this status in accordance with §76.54 of the Rules. To do so, KITN must either submit current community-specific data (pursuant to §76.54(b) of the Rules) or county-wide data from prior to October 6, 1985 (pursuant to §76.54(d) of the Rules). This KITN has not done. Accordingly, we cannot find KITN to be significantly viewed in Nicollet, Rice, or Watonwan Counties, Minnesota.

10. In view of the foregoing, we find that grant of KITN's petition is not in the public interest.

11. Accordingly, IT IS ORDERED, That the petition for special relief (CSR-3383) filed April 16, 1990, by Nationwide Communications, Inc. IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

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[1] Former §76.5(kk) of the Rules defined a specialty station as: "A commercial television broadcast station that generally carries foreign language, religious, and/or automated programming in one-third of the hours of an average broadcast week and one-third of weekly prime-time hours."

[2] KITN states that for the period March 25-31, 1984, "66.5 of the station's 124.25 total program hours (53.5%) were devoted to religious programs. During that same period, 21.5 of the station's 35 total prime time program hours (61.4%) were devoted to religious programs." In contrast, during the period May 6-12, 1984, "only 30.5 of the station's 137 total program hours (22.2%). . . [and] 3 of the station's 35 total prime time program hours (8.5%) were devoted to religious programs." KITN submits its program logs for these periods.

[3] Arbitron published no cable-controlled data for Rice and Watonwan Counties in 1984.

[4] KEYC-TV states that KITN's transmitter is at least 56 miles northeast of Nicollet County (70 miles from the county's center) and at least 88 miles northeast of Watonwam County (103 miles from the county's center), while KITN's Grade B contour falls

far short of the nearest portions of Nicollet and Watonwam Counties by, respectively, some 8 and 40 miles. KEYC-TV, however, identifies no specific translator rebroadcasting KITN.

[5] KEYC-TV also asserts that KITN's request with respect to Nicollet County is repetitive, citing *Nationwide Communications*, Inc. (KITN), Cable Television Actions Report No. 3212 (released April 10, 1989). KITN notes that in that case, it had requested a waiver of the three-year period from the station's inception for data collection, which was denied, a point not at issue in the present controversy.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-582

In re Applications of

AJP Communications Investment Co., Inc. (hereafter "AJP")	File No. BPH-890411MB
SPH Associates (hereafter "SPH")	File No. BPH-890412MA
Country Investments Limited Partnership (hereafter "Country")	File No. BPH-890412MG

For Construction Permit
for a New FM Station
on Channel 288C1 (105.5 MHz)
in Idaho Falls, Idaho

HEARING DESIGNATION ORDER

Adopted: November 1, 1990; Released: January 9, 1991

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.

2. The applicant below has petitioned for leave to amend its application on the date show. The accompanying amendment was filed after the last date for filing amendments as of right. Under Section 1.65 of the Commission's Rules, the amendment is accepted for filing. However, an applicant may not improve its comparative position after the time for amendments as of right has passed. Therefore, any comparative advantage resulting from the amendment will be disallowed.

APPLICANT	AMENDMENT FILED
AJP	October 30, 1989 (Engineering)

3. Since no determination has been received from the Federal Aviation Administration as to whether the antennae proposed by SPH, AJP and Country would constitute hazards to air navigation, and since the FAA has determined that SPH's proposal *would* constitute a hazard to air navigation, an issue with respect thereto will be included and the F.A.A. made a party to the proceeding.

4. *AJP*. An engineering study based upon OST Bulletin No. 65, October 1985, entitled "Evaluating *Compliance with FCC-Specified Guidelines for Human Exposure to Radiofrequency Radiation*," reveals that further information is required to substantiate AJP's showing of compliance with OST Bulletin No. 65. The radiofrequency radiation statement submitted with the application indicated that the applicant will use an antenna that will result in "best case" performance with respect to downward radiation. However, in order for the Commission staff to verify that statement, AJP must submit additional information. The showing must include the total contribution of radiation from all radiofrequency sources on and in the immediate vicinty of the proposed tower and must also include a description of all steps taken to comply with the above mentioned OST Bulletin. Further, AJP must specify height and distance from the tower base of any fence that must be erected. Accordingly, AJP will be required to file, within 30 days of the release of this Order the information detailed in this paragraph with the Presiding Administrative Law Judge. In addition, a copy shall be filed with Chief, Audio Services Division, who will then proceed regarding this matter in accordance with the provisions of 47 C.F.R. § 1.1308. The comparative phase of the case will be allowed to begin before the environmental phase is completed. *See Golden State Broadcasting Corp.*, 71 FCC 2d 229 (1979), *recon. denied sub nom. Old Pueblo Broadcasting Corp.*, 83 FCC 2d 337 (1980).

5. Data submitted by the applicants indicate there would be significant difference in the size of the areas and populations which would receive service from the proposals. Consequently, the areas and populations which would receive FM service of 1 mV/m or greater intensity, together with the availability of other primary aural services in such areas, will be considered under the standard comparative issue for the purpose of determining whether a comparative preference should accrue to any of the applicants.

6. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

7. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

> 1. To determine whether there is a reasonable possibility that the tower heights and locations proposed by AJP, by SPH, and by Country would constitute hazards to air navigation.
>
> 2. If a final environmental impact statement is issued with respect to AJP in which it is concluded that the proposed facility is likely to have an adverse effect on the quality of the environment, to determine whether the proposal is consistent with the National Environmental Policy Act, as implemented by 47 C.F.R. § § 1.1301-1319.
>
> 3. To determine which of the proposals would, on a comparative basis, best serve the public interest.
>
> 4. To determine, in light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

8. IT IS FURTHER ORDERED, That the petition for leave to amend filed by AJP IS GRANTED, and the corresponding amendment IS ACCEPTED to the extent indicated herein.

9. IT IS FURTHER ORDERED, That in accordance with paragraph 4 above, AJP shall submit the requested environmental information to the presiding Administrative Law Judge within 30 days of the release of this Order, with a copy to the Chief, Audio Services Division.

10. IT IS FURTHER ORDERED, That the Federal Aviation Administration IS MADE A PARTY to this proceeding with respect to the air hazard issue only.

11. IT IS FURTHER ORDERED, That in addition to the copy served on the Chief, Hearing Branch, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Room 350, 1919 M St., N.W., Washington, D.C. 20554.

12. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

13. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-590

In re Applications of

NORTH SHORE COMMUNICATIONS, INC. (hereafter: NSC)	File No. BPH-890123MF
NORTH SHORE BROADCASTING LIMITED PARTNERSHIP (hereafter: NSB)	File No. BPH-890123MG
NORTH LAKE RADIO, INC. (hereafter: Lake)	File No. BPH-890123MH
LACOMBE BROADCASTING SERVICE (hereafter: Service)	File No. BPH-890123MN
WILLIAM SEILER (hereafter: Seiler)	File No. BPH-890123MW
LACOMBE COMMUNITY BROADCASTERS, INC. (hereafter: LCB)	File No. BPH-890123MX

For Construction Permit
for a New FM Station on Channel 234A
in Lacombe, LA

HEARING DESIGNATION ORDER

Adopted: November 1, 1990; Released: January 9, 1991

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.

2. *NSC*. Section II, Item 4 (old form) of FCC Form 301 (October 1986) requires that an applicant specify its address (number, street, city, state) as well as the home address of each of its principals. NSC has not completed Item 4 correctly. NSC's application gives a post office box number as the residence address for Sheila Wheat Green. Accordingly, NSC must submit an amendment which gives all the information required by Section II, Item 4 to the presiding Administrative Law Judge after this Order is released.

3. *Lake*. Hugh E. Dillard, Jr. is an account executive at stations WYLD(AM) and WYLD-FM, New Orleans, Louisiana. It is not immediately apparent if this position is managerial. Therefore, in an abundance of caution, we note that Mr. Dillard's continued employment at WYLD-FM could represent a potential violation of the Commission's cross-interest policy. *See, e.g., Martin Lake Broadcasting Company*, 21 FCC 2d 180, 181-182 (1970). Dillard has indicated his intent to terminate his relationship with WYLD in the event of grant of the referenced application. Accordingly, in the event of grant of Lake's application, Dillard will be required to sever all connections with WYLD prior to the commencement of program test authority.

4. *Other Matters*. The applicants below have petitioned for leave to amend their application on the dates shown. The accompanying amendments were filed after July 17, 1989, the last date for filing amendments as of right. Under Section 1.65 of the Commission's Rules, the amendments are accepted for filing. However, an applicant may not improve its comparative position after the time for amendments as of right has passed. Therefore, any comparative advantage resulting from the amendments will be disallowed.

APPLICANTS	AMENDMENTS FILED
NSC	February 27, 1990
NSB	March 5, 1990

5. Attempts to obtain FAA clearance through the Commission's Antenna Survey Branch and the following applicant have been unsuccessful. Accordingly, since no determination has been received as to whether the antenna proposed by Seiler would constitute a hazard to air navigation, an issue with respect thereto will be included and the FAA made a party to the proceeding.

6. Data submitted by the applicants indicate there would be significant difference in the size of the areas and populations which would receive service from the proposals. Consequently, the areas and populations which would receive FM service of 1 mV/m or greater intensity, together with the availability of other primary aural services in such areas, will be considered under the standard comparative issue for the purpose of determining whether a comparative preference should accrue to any of the applicants.

7. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

8. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

> 1. To determine whether there is a reasonable possibility that the tower height and location proposed by the Seiler would constitute a hazard to air navigation.
>
> 2. To determine which of the proposals would, on a comparative basis, best serve the public interest.

3. To determine, in light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

9. IT IS FURTHER ORDERED, That NSC shall submit an amendment which contains the information required by Section II, Item 4 (old form) of FCC Form 301, to the presiding Administrative Law Judge within 30 days after the release of this Order.

10. IT IS FURTHER ORDERED, That, in the event of grant of Lake's application, Hugh E. Dillard, Jr. will be ordered to divest himself of all interests in and sever all connections with Stations WYLD AM/FM, New Orleans, Louisiana, prior to the commencement of program test authority.

11. IT IS FURTHER ORDERED, That the petitions for leave to amend filed by NSC and NSB ARE GRANTED, and the corresponding amendments ARE ACCEPTED to the extent indicated herein.

12. IT IS FURTHER ORDERED, That the Federal Aviation Administration IS MADE A PARTY to this proceeding with respect to the air hazard issue only.

13. IT IS FURTHER ORDERED, That a copy of each document filed in this proceeding subsequent to the date of adoption of this Order shall be served on the counsel of record in the Hearing Branch appearing on behalf of the Chief, Mass Media Bureau. Parties may inquire as to the identity of the counsel of record by calling the Hearing Branch at (202) 632-6402. Such service shall be addressed to the named counsel of record, Hearing Branch, Enforcement Division, Mass Media Bureau, Federal Communications Commission, 2025 M Street, N.W., Suite 7212, Washington, D.C. 20554. Additionally, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall also be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Federal Communications Commission, Room 350, 1919 M Street, N.W., Washington, D.C. 20554.

14. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

15. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-583

In re Applications of

KELLY VAUGHAN BUSCH (hereafter "Busch")	File No. BPH-880822MA
VIRGINIA JO & JACK MCFADDEN, SR. (hereafter "McFadden")	File No. BPH-880824MB
WMRI, INC. (hereafter "WMRI")	File No. BPH-880825MT
WEST LAFAYETTE COMMUNICATIONS, INC. (hereafter "West Lafayette")	File No. BPH-880825NH
HICKS BROADCASTING CORPORATION (hereafter "Hicks")	File No. BPH-880825NU
GOODRICH THEATERS, INC. (hereafter "Goodrich")	File No. BPH-880824NB (DISMISSED HEREIN)

For Construction Permit
for a New FM Station on Channel 294A
(106.7 MHz) in West Lafayette, Indiana

HEARING DESIGNATION ORDER

Adopted: November 1, 1990; Released: January 9, 1991

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.

2. *Perliminary matters*. Goodrich's application was originally returned on November 28, 1988, because it was apparently filed after the close of the pertinent filing window. *See* letter from the Chief, FM Branch, Reference 8920-DT. Goodrich filed a petition for reconsideration on December 20, 1988; the Commission granted the reconsideration on March 8, 1990, because Goodrich had shown that the application actually was received at the agency on August 24, 1988, one day *before* the filing window closed. However, in reviewing Goodrich's application, the staff discovered that each copy of the application is missing page 6 of FCC Form 301, which contains the financial certification and program service statement. While Goodrich's application contains an exhibit regarding proposed programming, it contains nothing at all with respect to the applicant's financial qualifications. Under Appendix D to the *Report and Order* in MM Docket 84-750, 590 Fed Reg. 19,936, 19,945 (May 13, 1985), a financial certification is one element of tenderability or substantial completeness. Therefore, failure to contain such certification necessitates that Goodrich's application be returned as inadvertently accepted for tender.

3. The applicant below has petitioned for leave to amend its application on the date shown. The accompanying amendment was filed after April 13, 1990[1] the last date for filing minor amendments as of right. Under Section 1.65 of the Commission's Rules, the amendment is accepted for filing. However, an applicant may not improve its comparative position after the time for filing amendments as of right has passed. Therefore, any comparative advantage resulting from the amendment will be disallowed.

APPLICANT	AMENDMENT FILED
WMRI	June 27, 1990

4. *Hicks*. Hicks has answered "no" to Section V-B, Item 11, regarding city coverage. However, in the application itself, the contour map clearly shows that 3.16 mV/m contour signal cover the city of license. As a result, no issue will be specified here but the applicant will be ordered to amend its application to correct its response to that question.

5. Since no determination has been received from the Federal Aviation Administration as to whether the antenna proposed by Bush, WMRI, West Lafayette, and Hicks would constitute a hazard to air navigation, an issue with respect thereto will be included and the F.A.A. made a party to the proceeding.

6. In the engineering section of the its application, West Lafayette indicates that the height of the radiation center of the transmitting antenna above mean sea level to be 305 meters. However, antenna data on file with the Federal Communications Commission's Antenna Survey Bureau or the Federal Aviation Administration indicates the antenna height to be 301.8 meters above mean sea level. Therefore, West Lafayette will be required to file an amendment with the administrative law judge addressing this discrepancy.

7. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

8. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a a subsequent Order upon the following issues:

> 1. To determine whether there is a reasonable possibility that the the tower height and location proposed by Bush, WMRI, West Lafayette and Hicks would constitute a hazard to air navigation.

2. To determine which of the proposals would, on a comparative basis, best serve the public interest.

3. To determine, in the light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

9. IT IS FURTHER ORDERED, That the application for Goodrich IS HEREBY DISMISSED, as inadvertently accepted for tender.

10. IT IS FURTHER ORDERED, That the petition for leave to amend filed by WMRI IS GRANTED, and the corresponding amendment IS ACCEPTED to the extent indicated herein.

11. IT IS FURTHER ORDERED, That the Federal Aviation Administration IS MADE A PARTY to this proceeding with respect to the air hazard issue only.

12. IT IS FURTHER ORDERED, That Hicks submit an amendment as described in paragraph 4 above with the presiding Administrative Law Judge within 30 days of the date of the release of this Order.

13. IT IS FURTHER ORDERED, That West Lafayette file an amendment as described in paragraph 6 above with the presiding Administrative Law Judge within 30 days of the release of this Order.

14. IT IS FURTHER ORDERED, That the Federal Aviation Administration IS MADE A PARTY to this proceeding with respect to the air hazard issue only.

15. IT IS FURTHER ORDERED, That in addition to the copy served on the Chief, Hearing Branch, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Room 350, 1919 M Street, N.W., Washington, D.C. 20554.

16. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with the Commission in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

17. IT IS FURTHER ORDERED, That the applicants herein shall pursuant to Section 311 (a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

FOOTNOTE

[1] Goodrich's application was reinstated when the Commission granted its petition for reconsideration on March 8, 1990. As a result, all applicants were provided an opportunity to amend their respective applications as of right until April 13, 1990. *See Memorandum Opinion and Order* in MM Docket No. 84-750, FCC 85-555, 50 Fed Reg. 43,157 (1985). While we are dismissing the Goodrich application, as having been inadvertently accepted for tenderability, the April 13, 1990 date will stand.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-589

In re Applications of

TERESA B. LOWRY (hereafter "Lowry")	File No. BPH-891214MJ
G. DEAN PEARCE (hereafter "Pearce")	File No. BPH-891215MO
MEDIA ENTERPRISES OF WARRIOR, INC. (hereafter "Media")	
(Rick L. Jones, James Michael Anderson and Annie Grace Morgan d/b/a) WARRIOR COMMUNICATIONS (hereafter "Warrior")	File No. BPH-891218MG File No. BPH-891218MH
ROSS BROADCASTING COMPANY, INC. (hereafter "Ross")	File No. BPH-891218MI
HENRY S. GRANGER, JR. (hereafter "Granger")	File No. BPH-891218MJ (RETURNED HEREIN)

For Construction Permit
for a New FM Station on Channel 254A
in Warrior, Alabama

HEARING DESIGNATION ORDER

Adopted: November 1, 1990; Released: January 9, 1991

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.

2. *Preliminary Matter*. A preliminary examination of these applications revealed that the entire allocation for Channel 254A at Warrior, Alabama is short-spaced to the Commission's pending MM Docket No. 90-476 proceeding. Nonetheless, the applicants for the Warrior allotment will be allowed to proceed to comparative hearing. However, it shall be ordered that any construction permit awarded as a result of this proceeding shall be made contingent on the outcome of MM Docket 90-476.

3. *Cross-Interest*. Timothy McReynolds, President and 100% equity owner of Media, is employed as an account executive with WENN(FM) in Birmingham, Alabama. Rick L. Jones and James M. Anderson, general partners in Warrior, are account executives with WZBQ(FM) in Jasper, Alabama. Since it is not immediately apparent whether these positions are managerial, each represents a potential violation of the Commission's cross-interest policy. *See, e.g., Martin Lake Broadcasting Company*, 21 FCC 2d 180, 181-182 (1970). Each party has indicated his intent to sever connections with the concerned stations. Accordingly, in the event of grant of Media's or Warrior's application, Mr. McReynolds (Media) or Messrs. Jones and Anderson (Warrior) will be required to sever their connections with the stations noted herein.

4. *EEO*. The Commission requires that if there will be five or more fulltime station employees, the applicant must complete and file Section VI of Form 301 and supply a statement detailing hiring and promotion policies for women and each minority group whose representation in the available labor force is five percent or greater in the proposed service area. Although Ross has filed such statement, it is deficient. Ross has not listed any recruitment sources for women. Accordingly, Ross will be required to file an amended EEO program with the presiding Administrative Law Judge, or an appropriate issue will be specified by the Judge.

5. *Granger*. Broadcast applications filed on Form 301 on or after June 26, 1989 will now be returned if the requisite financial certification is not made. Specifically, if an applicant fails to certify in the application that it is financially qualified (i.e. if it does not respond to the question or checks "No"), its application will be returned as unacceptable or non-tenderable pursuant to 47 C.F.R. § 73.3564. *See, Report and Order*, 4 FCC Rcd 3853, 3859 (1989). In response to Section III, FCC Form 301 ("Financial Qualifications"), Granger certified "No." Accordingly, Granger's application will be returned as inadvertently accepted for tender.

6. *Air Hazard*. Attempts to obtain FAA clearance through the Commission's Antenna Survey Branch and the applicant have been unsuccessful. Accordingly, since no determination has been received as to whether the antenna proposed by Media would constitute a hazard to air navigation, an issue with respect thereto will be included and the FAA made a party to the proceeding.

7. *Late-filed Amendment*. Pearce has petitioned for leave to amend its application on July 18, 1990. The accompanying amendment was filed after the last date for filing amendments as of right. Under Section 1.65 of the Commission's Rules, the amendment is accepted for filing. However, an applicant may not improve its comparative position after the time for amendments as of right has passed. Therefore, any comparative advantage resulting from the amendments will be disallowed.

8. *Areas and Populations*. Data submitted by the applicants indicate there would be significant difference in the size of the populations which would receive service from the proposals. Consequently, the areas and populations which would receive FM service of 1 mV/m or greater intensity, together with the availability of other primary aural services in such areas, will be considered under the standard comparative issue for the purpose of determining whether a comparative preference should accrue to any of the applicants.

9. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

10. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

> 1. To determine whether there is a reasonable possibility that the tower height and location proposed by the Media would constitute a hazard to air navigation.
>
> 2. To determine which of the proposals would, on a comparative basis, best serve the public interest.
>
> 3. To determine, in light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

11. IT IS FURTHER ORDERED, That any construction permit awarded as a result of this proceeding shall be made contingent on the outcome of MM Docket No.90-476.

12. IT IS FURTHER ORDERED, That in the event of the grant of Media's or Warrior's application, Mr. McReynolds (Media) or Messrs. Jones and Anderson (Warrior) will be ordered to divest themselves of all interests in and sever all connections with Stations WENN(FM) and WZBQ(FM), respectively, prior to the commencement of program test authority.

13. IT IS FURTHER ORDERED, That within 30 days of the release of this Order, Ross shall submit Section VI information in accordance with the requirement of Section 73.2080(c) of the Commission's Rules to the presiding Administrative Law Judge.

14. IT IS FURTHER ORDERED, That, the Granger application IS RETURNED as INADVERTENTLY ACCEPTED FOR TENDER.

15. IT IS FURTHER ORDERED, That the Federal Aviation Administration IS MADE A PARTY to this proceeding with respect to the air hazard issue only.

16. IT IS FURTHER ORDERED, That the petition for leave to amend filed by Pearce IS GRANTED, and the corresponding amendment IS ACCEPTED to the extent indicated herein.

17. IT IS FURTHER ORDERED, That a copy of each document filed in this proceeding subsequent to the date of adoption of this Order shall be served on the counsel of record in the Hearing Branch appearing on behalf of the Chief, Mass Media Bureau. Parties may inquire as to the identity of the counsel of record by calling the Hearing Branch at (202) 632-6402. Such service shall be addressed to the named counsel of record, Hearing Branch, Enforcement Division, Mass Media Bureau, Federal Communications Commission, 2025 M Street, N.W., Suite 7212, Washington, D.C. 20554. Additionally, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall also be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Federal Communications Commission, Room 350, 1919 M Street, N.W., Washington, D.C. 20554.

18. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

19. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-557

In re Applications of

HARBOR ISLANDS BROADCASTING, INC. (hereafter "Harbor")	File No. BPH-880519MA
PRAISE BROADCASTING NETWORK, INC. (hereafter "Praise")	File No. BPH-880519ME
WRIGHTSVILLE BEACH RADIO LIMITED PARTNERSHIP (hereafter "WB")	File No. BPH-880519MI
GEORGE S. FLINN, JR. (hereafter "Flinn")	File No. BPH-880519NT
DAVID MCGOWAN AND E. L. FINCH d/b/a OLEANDER RADIO PARTNERS (hereafter "Oleander")	File No. BPH-880519OJ

For Construction Permit
for a New FM Station on
Channel 229A (93.7 MHz)
in Wrightsville Beach, North Carolina

HEARING DESIGNATION ORDER

Adopted: October 26, 1990; Released: January 9, 1991

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.

2. *Harbor*. Information before the Commission indicates that Harbor was organized and is affiliated with Sonrise Management Services ("Sonrise"). Sonrise has been the subject of numerous "real party-in-interest" issues added by presiding Administrative Law Judges in a number of mutually exclusive proceedings. For example, issues concerning Sonrise have been designated in each of the following proceedings:

City/State	Docket No.
Solona, Florida	87-464
Rockledge, Florida	87-556
Silver Springs, Florida	88-119
East Ridge, Tennessee	88-122
Des Moines, Iowa	88-238
Nags Head, North Carolina	88-277
Tyler, Texas	88-280
Raleigh, North Carolina	88-306
Sedona, Arizona	88-335
Mableton, Georgia	88-400
Evansville, Indiana	88-403
Swanton, Ohio	88-432
Atlantic City, New Jersey	88-433

Identical issues were specified in each of these proceedings: whether or not Sonrise was a real party-in-interest in the subject applicant, whether or not the applicant's organizational structure was a sham, and the effect thereof on the applicant's qualifications to be a Commission licensee. In each of the proceedings listed above, the Sonrise-affiliated applicant has dismissed its application rather than resolving these issues. These unresolved issues call into question Harbor's qualification to be a Commission licensee. Therefore, such issues will be specified and tried against Harbor in this proceeding.

3. *WB*. WB's proposal is short-spaced to the allocation for Leland, North Carolina. When WB filed it's application, it met all of the spacing criteria of 47 C.F.R. Section 73.207(a) and was accepted for filing. However, in a *Report and Order*, in MM Docket No. 88-78, released December 28, 1988, 3 FCC Rcd 7317 (1988), the Commission adopted a *Notice of Proposed Rule Making*, 3 FCC Rcd 1079 (1988) proposing the allocation of Channel 231A to Leland, North Carolina. Accordingly, WB will be required to amend its proposal to show a site which complies with Section 73.207(a) within 30 days of the release of this Order.

4. Attempts to obtain FAA clearance through the Commission's Antenna Survey Branch and WB have been unsuccessful. Accordingly, since no determination has been received as to whether the antenna proposed by WB would constitute a hazard to air navigation, an issue with respect thereto will be included and the FAA made a party to the proceeding.

5. The sites proposed by the applicants listed below have been issued determinations of hazard by the FCC. Accordingly, an appropriate issue will be specified.

APPLICANTS
Harbor
Oleander

6. The applicants below have petitioned for leave to amend their application on the dates shown. The accompanying amendments were filed after the last date for filing amendments as of right. Under Section 1.65 of the Commission's Rules, the amendments are accepted for filing. However, an applicant may not improve its comparative position after the time for amendments as of right has passed. Therefore, any comparative advantage resulting from the amendments will be disallowed.

APPLICANTS	AMENDMENTS FILED
Harbor	August 9, 1989; August 22, 1989 July 16, 1990
WB	April 4, 1990
Flinn	October 5, 1988; February 3, 1989; March 1, 1989; August 28, 1989; February 12, 1990; March 30, 1990; June 13, 1990; August 8, 1990

7. Praise petitioned for leave to amend its application after the last day for filing amendments as of right. The September 4, 1990 amendment was accompanied by the good cause showing required by 47 C.F.R. § 73.3522(a)(2); consequently, the amendment is accepted for filing. However, an applicant may not improve its comparative advantage after the time for filing amendments as of right has passed. Therefore, any comparative advantage resulting from the amendments will be disallowed.

8. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

9. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine whether Sonrise Management Services, Inc. is an undisclosed party to the application of Harbor.

2. To determine whether Harbor's organizational structure is a sham.

3. To determine, from the evidence adduced pursuant to Issues 1 and 2 above, whether Harbor possesses the basic qualifications to be a licensee of the facilities sought herein.

4. To determine whether there is a reasonable possibility that the tower height and location proposed by the following applicants would constitute a hazard to air navigation:

APPLICANTS
Harbor
WB
Oleander

5. To determine which of the proposals would, on a comparative basis, best serve the public interest.

6. To determine, in light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

10. IT IS FURTHER ORDERED, That WB shall submit an amendment as required by paragraph 3, above, to the presiding Administrative Law Judge within 30 days of the release of this Order.

11. IT IS FURTHER ORDERED, That the Federal Aviation Administration IS MADE A PARTY to this proceeding with respect to the air hazard issue only.

12. IT IS FURTHER ORDERED, That the petitions for leave to amend filed by Harbor, WB, and Flinn ARE GRANTED, and the corresponding amendments ARE ACCEPTED to the extent indicated herein.

13. IT IS FURTHER ORDERED, That a copy of each document filed in this proceeding subsequent to the date of adoption of this Order shall be served on the counsel of record in the Hearing Branch appearing on behalf of the Chief, Mass Media Bureau. Parties may inquire as to the identity of the counsel of record by calling the Hearing Branch at (202) 632-6402. Such service shall be addressed to the named counsel of record, Hearing Branch, Enforcement Division, Mass Media Bureau, Federal Communications Commission, 2025 M Street, N.W., Suite 7212, Washington, D.C. 20554. Additionally, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall also be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Federal Communications Commission, Room 350, 1919 M Street, N.W., Washington, D.C. 20554.

14. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

15. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Application of:

AMERICAN
CELLULAR
SERVICES U.S.

File No. 10763-CL-P-645-A-89

For construction authority
to establish a new cellular
system to operate on Frequency
Block A in the Domestic Public
Cellular Radio Telecommunications
Service to serve Market No. 645,
Tennessee 3 - Macon Rural Service
Area

MEMORANDUM OPINION AND ORDER

Adopted: January 2, 1991; Released: January 9, 1991

By the Chief, Common Carrier Bureau:

1. Vivian E. Warner (Warner) requests that the Commission reconsider its decision to grant the nonwireline application filed by American Cellular Services U.S. (American), arguing that American failed to correctly identify all of the parties of interest in its application. Upon review, the Common Carrier Bureau finds that Warner's request for reconsideration should be denied because American complied with the Commission's application requirements.

I. BACKRGOUND

2. American was announced as the tentative selectee for the Tennessee 3 (Macon) RSA on December 12, 1989.[1] Interested parties were given until January 29, 1990 to submit petitions to deny. On February 1, 1990, Warner filed a Petition to Deny or Designate for Hearing (Petition). In that Petition, Warner alleged that Wladimir Naleszkiewicz is the real party in interest in American's application, though he was not named as a partner of American in its application. Warner asserted that Naleszkiewicz, controlling shareholder of Genesis Enterprises, Ltd., which prepared American's application for filing, allocated ownership interests to American's partners which were not always consistent with each partner's financial contribution. Additionally, Warner offered in support of her allegation a letter from Naleszkiewicz to American stating that Naleszkiewicz's company would handle the necessary FAA clearance.

3. On February 20, 1990, Warner filed a Supplement to Petition to Deny or Designate for Hearing (Supplement). In her supplement, Warner argued, *inter alia*, that American failed to disclose the partners of Applied Business Research (ABR), itself a 3% partner of American. Warner also advanced in her Supplement that Naleszkiewicz pleaded guilty to two felony charges of committing fraud against clients other than American.

4. On April 11, 1990, Warner filed a collection of documents with the Commission. Among these were pages which appear to have originated with Federal Express and indicate that Warner delivered something at the Federal Express office in Crossville, Tennessee on January 25, 1990 which arrived at the Commission on January 26, 1990. Warner offered no explanation regarding the identity or purpose of these documents.

5. The Mobile Services Division, in its *Memorandum Opinion and Order*, 5 FCC Rcd 3236 (1990), (*Order)* found Warner's Petition and Supplement procedurally defective and substantively without merit. Procedurally, the Petition and Supplement were late-filed and contained no discussion explaining the lateness. Additionally, Warner did not comply with the affidavit requirements of Section 309(d)(1) of the Communications Act or Section 22.30(a)(3) of the Commission's rules. Substantively, the Division found that Warner had offered no support for her allegation that Naleszkiewicz is the real party in interest of American's application. The Division further found that American's failure to disclose the ownership of a general partnership--which is itself a 3% partner in American--was an inconsequential omission. American amended its application in its February 28, 1990, Reply to Warner's original Petition, to correct the clerical error of having omitted ABR's partners and to clarify that neither of the identified individuals is an alien or holds an interest in another cellular application for this market. Accordingly, the Division denied Warner's Petition and granted American's application.

II. CONTENTIONS

6. On June 25, 1990, Warner filed a Petition for Reconsideration of the *Order* which denied its earlier Petition and granted American's application for the non-wireline cellular authorization for the Tennessee 3 RSA. In her Petition for Reconsideration, Warner, while not disputing that her original Petition and Supplement were procedurally defective, argues that the Division was incorrect in determining that American's failure to list the partners of ABR was inconsequential. Warner urges that Sections 22.923(a)(9) and 22.13(a)(1) of the Commission's rules require an applicant to disclose all of the real parties in interest in a Part 22 application. Warner asserts that the Division has trivialized the significance of these sections by characterizing American's failure to disclose all parties as a clerical error. Warner alleges that the Division has previously found certain clerical errors similar to American's omission to render the application fatally defective. In this regard, Warner cites a number of examples where the Commission dismissed cellular applicants for submitting defective site maps.[2] Furthermore, Warner claims the Commission erred by allowing American to amend a defective application after the filing date. Warner argues that such a precedent could lead to an applicant not listing any of its partners in its original application and not naming them until a petition to deny is filed against it. Warner additionally advances the new argument in her Petition for Reconsideration that American has lacked candor in this proceeding. Warner alleges that American was aware of its reporting omission and chose not to file a corrective amendment, hoping that the

error would go unnoticed. Finally, in a footnote, Warner requests the Division to reconsider its conclusion that Naleszkiewicz is not the real party in interest in American's application. Warner, as in her earlier Petition, argues that Naleszkiewicz's role in the assignment of partnership interests proves his control of American. In support of her argument, Warner asserts that because Genesis Enterprises, Ltd., a company owned by Naleskiewicz, and American share the same legal counsel, Naleskiewicz is the real party in interest.

7. American, in its Opposition to Petition for Reconsideration, argues that the Division was correct in finding Warner's original Petition and Supplement procedurally defective and substantively deficient. American asserts that even if Warner had delivered her Petition to Deny to the Federal Express in a timely manner, the Secretary's date stamp is conclusive with respect to determining the timeliness of a filing.

8. American further argues that the Division did not err in finding the omission of the names of the partners of ABR to be a clerical oversight and decisionally insignificant. There are only two partners of ABR, American states, one of whom signed American's partnership agreement and thereby informed the Commission of his identity. Accordingly, the omission only deprived the Commission of the name of one individual, who indirectly owns only 1.5% of American. American asserts that the Commission has concluded in other cases that omission of partnership information from a cellular application does not necessarily constitute a qualification defect and may be corrected by subsequent submission.

9. Warner argues in her Reply to Opposition to Petition for Reconsideration that the Federal Express documents prove her application was timely filed. Additionally, she restates that an applicant must name all the partners of interest to an application. Warner asserts that the Commission only allows an applicant to amend a deficient list of partners in one part of an application if the complete list can be located elsewhere in the application, although she offers no support for this assertion.

III. DISCUSSION

10. With regard to Warner's argument concerning the timeliness of her Petition to Deny, we find that the Division was correct in ruling that Warner's Petition was untimely filed. In *Richardson Independent School District*, 5 FCC Rcd 3135, 3136 (1990), the Commission explained to a petitioner who claimed that the Motion for Extension of Time he submitted was actually filed a day earlier than the stamped date indicated that "[t]he Secretary's date stamp is authoritative and conclusive." Warner's Petition to Deny was date stamped February 1, 1990 and was thus three days late.

11. The argument that American failed to disclose all the parties in interest was initially raised by Warner in her Supplement which was filed on February 20, 1990, three weeks after the final date for filing petitions. Warner did not then, nor does she now, offer any explanation as to why that argument could not have been raised in a timely manner. Accordingly, we cannot find that the Division erred in its disposition that the Supplement was late filed and therefore procedurally defective under Section 1.106 of the Commission's rules.

12. We also uphold the Division's finding that American's omission of indirect ownership interests was inconsequential. American complied with the language of Section 22.13 which requires disclosure of all parties holding an interest in the application. American named its direct partners, *viz*; ABR and twenty-two individuals. Both of ABR's partners, in turn, are U.S. citizens and neither has an interest in another cellular application in the Tennessee 3 market. Warner's argument that allowing American to amend its application could lead to the conclusion that applicants generally may conceal partners is unsupported. Indeed, Section 22.13 of the Commission's rules requires disclosure of "the real party or parties in interest." While American should have included small, indirect ownership interests, its initial omission of this information does not warrant dismissing the application as defective.

13. The cases cited by Warner in support of her argument that American cannot amend the ownership information of its application involve applications with defective site maps.[3] Correct site maps are necessary for the Commission to conduct an engineering review of the application. Although the Commission does need correct ownership information in order to find the applicant legally qualified, the Commission's policy with regard to engineering sufficiency to prevent harmful interference, among other things, is less amenable to flexibility. Omission of an indirect ownership interest does not warrant the same concern during initial application processing. Warner's argument is therefore rejected.

14. Next, we find no basis to reconsider the Division's decision regarding Naleszkiewicz as the real party in interest in American's application. Warner proffers no support for her claim other than vague circumstantial allegations regarding Naleszkiewicz's assignment of partnership interests and the fact that Genesis and American have the same counsel. Likewise, Warner filed no affidavits to support this allegation, thus failing to comply with the requirements of Section 309(d)(1) of the Communications Act and Section 22.30(a)(3) of the Commission's rules. We cannot find that the Division was incorrect in determining that Warner had not supported her allegations that Naleszkiewicz was a real party in interest in American's application.

15. Finally, Warner's assertion that American has lacked candor in this proceeding is rejected. Warner has not raised this allegation prior to her Petition for Reconsideration. Section 1.106(c) only allows new arguments to be raised in a petition for reconsideration when facts or circumstances have changed since the last opportunity to present such matters; or when facts have arisen which were unknown to the petitioner until after his or her last opportunity to raise such matters. Warner makes no assertion that her newly raised allegation falls within the guidelines of Section 1.106(c). Moreover, Warner has not offered any support for her assertion that American was aware of its reporting omission and chose not to file a corrective amendment. Therefore, Warner's candor allegation is rejected.

IV. CONCLUSION AND OREDERING CLAUSE

16. Warner has failed to demonstrate any legal or factual basis on which the Bureau should reverse the Division's action in denying her Petition and granting an authorization to American. Warner's Petition and Supple-

ment were procedurally defective and substantively without merit. For these reasons, we conclude that American Cellular Services U.S. is legally, financially, technically and otherwise qualified to hold the cellular license for the Tennessee 3 (Macon) RSA.

17. Accordingly, IT IS ORDERED that the Petition for Reconsideration filed by Vivian E. Warner IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Richard Firestone
Chief, Common Carrier Bureau

FOOTNOTES

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[1] *See* Public Notice, Report No. CL-90-61 (released December 12, 1989), *corrected*, Report No. CL-90-61-A (released December 13, 1989).

[2] *See* note 3, *infra*.

[3] In *Rem Communication*, 3 FCC Rcd 3705 (1988), the Commission dismissed an application because the applicant submitted an illegible map and the critical engineering data could not be derived elsewhere in the application. In *Winnebago Cooperative Telephone Association*, 5 FCC Rcd 1247 (Com. Car. Bur. 1990), the Commission dismissed the application of a tentative selectee because the map submitted was not the correct size or scale and the necessary information could not be identified. In *Return of Round IV Cellular Applications*, 103 F.C.C.2d 366 (1986), the Commission dismissed an application because the map was too small for engineering calculations to be performed. In *Western California Cellular Partners*, 5 FCC Rcd 2932 (Com. Car. Bur. 1990), the Commission dismissed an application because the map did not indicate the location of the CGSA and 39 dBu contours, preventing processing of the application.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re

KXTX, INC. CSR-3408

Petition for Special Relief

MEMORANDUM OPINION AND ORDER

Adopted: December 31, 1990; Released: January 9, 1991

By the Commission:

1. On May 10, 1990, KXTX, Inc. (hereinafter "KXTX-TV"), licensee of Station KXTX-TV (Ind., Channel 39), Dallas, Texas, filed a petition for special relief seeking a ruling that KXTX-TV is significantly viewed in Fannin, Grayson, Hunt, Henderson, McLennan, Navarro, and Parker Counties, Texas, based on county-wide audience survey data, as opposed to the normally required community-specific data.[1] KXTX-TV's petition is opposed by Fox Broadcasting Stations Inc. (hereinafter "KDAF"), licensee of Television Broadcast Station KDAF (Fox, Channel 33), Dallas, Texas, and KXTX-TV has replied.

2. In 1972, the Commission adopted a comprehensive regulatory scheme for cable television. *Cable Television Report and Order*, 36 FCC 2d 143, *recon.*, 36 FCC 2d 326 (1972). As part of this regulatory scheme, the Commission limited the number of distant signals a cable system could import from outside of its market. Exemptions to these limits, however, were made for both significantly viewed signals and for specialty stations. A signal is considered to be significantly viewed if it meets certain designated minimum viewership levels off-the-air. A station was considered to be a specialty station if it programmed a designated minimum amount of foreign language, religious, or automated programming.[2] When the Commission deleted its distant signal carriage limitations in 1982, the Commission also deleted its rule defining a specialty station. This category of stations was no longer needed because there were no longer any rules limiting signal carriage from which exemptions were needed. *Report and Order in Docket Nos. 20988 and 21284*, 79 FCC 2d 663 (1980), *aff'd sub nom. Malrite TV of New York, Inc. v. FCC*, 652 F.2d 1140 (2d Cir. 1981), *cert. denied*, 454 U.S. 1143 (1982). The Commission continues to utilize the significantly viewed status of signals for various purposes, such as exemption from the Commission's program exclusivity rules. 47 C.F.R. §§76.92(f), 76.156(a). On the other hand, the Copyright Office has continued to recognize specialty status for purposes of determining royalty payment rates, the carriage of specialty stations by cable systems incurring lesser fees than the carriage of other distant stations. Similar treatment is afforded significantly viewed signals by the Copyright Office.

3. In establishing the category of significantly viewed stations, the Commission published a nationwide list, county-by-county, of those stations initially deemed to be significantly viewed. *Reconsideration of the Cable Television Report and Order*, 36 FCC 2d at 378-463 app. B. Stations not included in this list may be added in one of two ways. Any station may demonstrate that it meets the requisite viewership levels utilizing current community-specific data. 47 C.F.R. §76.54(b). Alternatively, a new station, that is a station not operating at the time of the original surveys which established the 1972 list, may utilize county-wide data to establish significantly viewed status, provided that such data is from the station's first three years of operations. 47 C.F.R. §76.54(d). For purposes of this rule, the Commission has extended "new" station status to stations shifting from subscription or noncommercial status to commercial status after the initial survey period.

4. KXTX-TV began operation on February 5, 1968, as Station KDTV. Following donation of the station by Doubleday Broadcasting Company, Inc. to The Christian Broadcasting Company, Inc. in 1973, KXTX-TV began to transmit primarily religious programming, and was thus classified as a specialty station pursuant to former §76.5(kk) of the Commission's Rules.[3] Since 1980, however, KXTX-TV has carried an increasing amount of non-religious programming. KXTX-TV states that a 1989 ruling of the Copyright Office[4] is likely to cause KXTX-TV to lose its specialty station status on January 1, 1991. This change in status, asserts KXTX-TV, entitles the station to be considered a "new" station for purposes of demonstrating that it is significantly viewed pursuant to §76.54 of the Rules. Consideration as a "new" station, KXTX-TV notes, would allow it to utilize county-wide data from its first three years of operation as a "new" station, rather than community-specific data, in making the required significantly viewed showing.

5. In support of its petition, KXTX-TV states that, despite its loss of specialty status, it continues "to present only family-oriented entertainment programming and a considerable amount of religious programming," and does not accept alcoholic beverage advertising.[5] In the face of "increased competition and a financially depressed local market," the station's revenues have continuously declined, decreasing 21% from 1985 to 1989.[6] KXTX-TV's cash flow, states the station, has also been negative. According to KXTX-TV, cable carriage in the outlying areas of the Dallas-Fort Worth, Texas market -- those counties in which KXTX-TV seeks to be declared to be significantly viewed -- is critical to improving the station's financial lot. KXTX-TV asserts that once it loses its specialty status in 1991, cable systems in counties in whole or in part beyond the the station's Grade B contour will drop KXTX-TV rather than pay a 3.75% copyright fee to carry it. Therefore, claims KXTX-TV, it needs to obtain a declaration of significantly viewed status, and to that end submits data from Arbitron's *1989 County Coverage Surveys, Cable-Controlled*, as follows:

County	Share of Total Viewing Hours	Net Weekly Circulation
Fannin	6	22
Grayson	4	44
Hunt	3	34
Henderson	6	43
McLennan	2	14
Navarro	3	30
Parker	3	32

As KXTX-TV notes, these figures meet or exceed the definition of significantly viewed for an independent station: a 2% share of total viewing hours and a net weekly circulation of 5%. 47 C.F.R. §76.5(i).

6. As justification for its use of county-wide audience data, KXTX-TV argues that the ruling of the Copyright Office respecting KXTX-TV's specialty status is directly analogous to other status changes which the Commission has recognized warrant considering a station "new" for purposes of §76.54 of the Rules, citing, *e.g.*, *HR Broadcasting Corp. of Milwaukee, Inc.* (*WCGV-TV*), Cable Television Actions Report No. 3212 (released April 10, 1989) (STV to commercial); *Golden West Broadcasters of Oklahoma, Inc.* (*KAUT*), Cable Television Actions Report No. 3110 (released September 8, 1987) (STV to commercial); *Independent Broadcasting Company* (*KOLR-TV*), 54 RR 2d 712 (1983) (technical improvements); and *Calvert Telecommunications Corporation d/b/a CALTEC*, 63 FCC 2d 1022 (1977) (technical improvements). Accordingly, KXTX-TV seeks to be treated as a "new" station, allowing it to utilize county-wide data pursuant to §76.54(d) of the Commission's Rules. Further, KXTX-TV contends that its upcoming loss of specialty station status is too abrupt to permit it the time necessary to conduct community-specific surveys, particularly given the speed with which cable operators will move in making carriage decisions where copyright royalty fees are involved. Petitioner notes, in this regard, that it cannot afford to lose cable carriage in its market, particularly in the outlying counties in which the station's programming is most appealing. In any event, KXTX-TV asserts that community-specific audience surveys would be prohibitively expensive--costing approximately $150,000 according to an estimate obtained by the station from VideProbeIndex, Inc. ("VPI"). Finally, petitioner notes that one of its competitors, Television Broadcast Station KXTA (Ind., Channel 21), Fort Worth, Texas, has sought significantly viewed status based upon county-wide data in several of the counties in which KXTX-TV seeks this status.[7] It would not be fair to prevent KXTX-TV from also using county-wide data, contends the station, particularly as its own viewership levels exceed those for KXTA in some cases.[8]

7. In opposition to KXTX-TV, KDAF argues that by KXTX-TV's own admission, its programming changes upon which a loss of specialty status should be based occurred by 1981, and thus the station has had a full decade in which to demonstrate that it is significantly viewed. In addition, KXTX-TV has been on notice for over two years that the Copyright Office would no longer consider the station a specialty station, pursuant to the Copyright Office's initial interpretation, *Inquiry in Docket No. RM 87-7*, 53 FR 5591 (1988), formally adopted last fall, *Policy Decision in Docket No. RM 87-7*, 54 FR 38461 (1989). Not only can KXTX-TV not claim surprise at its exclusion from the Copyright Office's revised list of specialty stations, *Cable Compulsory License*; *Specialty Station Determination*: *Preliminary Findings and Request for Comments*, 55 FR 12575 (1990), KDAF argues that KXTX-TV did not even petition to be included in the revised list. KXTX-TV could have avoided its perceived hardships, which in fact, contends KDAF, may not be as great as assumed. KDAF notes that the affidavit from VPI submitted by KXTX-TV indicates that community survey results can be ready for filing by September 25, 1990, well in advance of January 1, 1991, which in fact may be six months prior to the date by which cable systems will make carriage decisions based upon the rules and regulations of the Copyright Office. In any event, states KDAF, if KXTX-TV's programming is as popular as the station believes, it should be able to arrange easily for its continued cable carriage. KXTX-TV is a commercial station competing in its marketplace, notes KDAF, and it is not the duty of the Commission to protect an individual licensee's financial health.

8. Nor does it appear, KDAF argues, that the cost to KXTX-TV of community-specific surveys would in fact be $150,000. Based upon VPI's own report, and excluding systems exempt from the Copyright Office's 3.75% fee, KDAF suggests the cost of necessary surveys is in fact less than $25,000, a cost that could be borne in part by affected area cable operators. Even if the systems subject to the Copyright fee were to drop KXTX-TV, this would amount to a loss of only 11,000 cable subscribers in Athens and Greenville, Texas, contends KDAF, a total not likely to impact KXTX-TV adversely. That KTXA is using county-wide data is irrelevant, asserts KDAF. The rules permit KTXA to use such data, as a new station commencing operations subsequent to the Commission's establishing its initial list of significantly viewed stations in the *Reconsideration of the Cable Television Report and Order*, 36 FCC 2d 326, 378-463 app. B (1972). 47 C.F.R. §76.54(d). KXTX-TV was on the air at the time of the Commission's surveys establishing this list, and thus must now demonstrate significantly viewed status using community-specific data. 47 C.F.R. §76.54(b). KXTX-TV's programming changes do not warrant treating KXTX-TV as a "new" station, argues KDAF. Granting KXTX-TV's petition, KDAF contends, would eviscerate the rule KXTX-TV seeks to waive.

9. In reply to KDAF, KXTX-TV argues that it has amply justified its waiver request, and that KDAF refutes neither the Arbitron data nor KXTX-TV's financial data. A station's financial situation is relevant in waiver proceedings, KXTX-TV contends, citing *KOIN - TV, Inc.*, 93 FCC 2d 186 (1983) and *Fresno Cable TV Co., Inc.*, 48 FCC 2d 116 (1974). KXTX-TV's money will be better spent on providing diverse programming than on conducting unnecessary surveys. KXTX-TV disputes KDAF's analysis of VPI survey needs and costs, but notes that in any event, the surveys would still cost KXTX-TV thousands of dollars. KXTX-TV had no need to conduct any surveys prior to April of this year, states the station, and even if KDAF's postulated June 30, 1991 date is correct for cable systems' carriage decisions, there is no guarantee that Commission action or necessary negotiations with cable systems could be completed even by then. Grant of KXTX-TV's waiver would be in the public interest, argues the station, and will not undermine §76.54 of the Rules.

10. On September 19, 1990, the staff directed an inquiry to KXTX-TV, seeking to clarify certain matters raised in its petition. Specifically, the staff requested "[t]he exact date of KXTX-TV's loss of specialty station status pursuant to Commission rules and policies." KXTX-TV replied on October 15, 1990, stating that this is "not legally relevant." The loss of status, according to KXTX-TV, is due to rules and regulations of the Copyright Office, and will occur on January 1, 1991. KXTX-TV nevertheless states in its letter that "the last year in which [it] programmed one-third of both its prime time and average week with religious programming was 1980." Even if the Commission considers this relevant, KXTX-TV asserts, it still should be allowed to use current coun-

ty-wide data to demonstrate the station's significantly viewed status. Such data would, like the required community-specific data, be current, and would also be more accurate than data from earlier years, states KXTX-TV, particularly given the station's 1981 technical improvements. In addition, contends KXTX-TV, though the Commission in other cases has required data from a three-year period immediately following a change in station operations to determine the station's significantly viewed status, radical changes were made by these stations, a factor not present in KXTX-TV's case. KDAF commented on this letter, arguing that the facts set forth demonstrate no need for relief. KXTX-TV responded, continuing to urge swift relief.

11. KXTX-TV misapprehends the underlying rationale of what constitutes a "new" station for purposes of §76.54 of the Rules. In those cases in which we have permitted stations already on the air to be treated as "new" for such purposes, the station in question had done more than merely seek to offer programming thought to be more attractive to its existing potential audience base. Rather, the station had undergone very extensive technical improvements so as to increase significantly its coverage potential, *e.g.*, *Independent Broadcasting Company*, *supra*; *CALTEC*, *supra*, or alternatively, the station had switched from an STV or non-commercial mode of operations to a commercial mode of operations, *e.g.*, *HR Broadcasting Corp. of Milwaukee, Inc.*, *supra* (STV); *Golden West Broadcasters of Oklahoma, Inc.*, *supra* (STV); *Blair Broadcasting of Oklahoma, Inc.* (*KOKH - TV)*, Cable Television Actions Report No. 2800 (released October 14, 1983) (non-commercial), changes which altered the basic terms of providing its broadcast service.[9] In the present case, however, KXTX-TV has merely decided to offer different programming to its existing potential audience base. In fact, KXTX-TV states that it continues to present only "family-oriented" and religious programming, and that its program content changes are not radical. Determining when changes in entertainment format are substantial enough to warrant categorization as a "new" station would reinvolve the Commission in subjective judgments, from which it has previously sought to extricate itself. *FCC v. WNCN Listeners Guild*, 450 U.S. 582 (1981). Moreover, we have previously established that a change in network affilation and in non-network program offerings were insufficient to warrant an existing station's loss of significantly viewed status. *Boston Broadcasters, Inc.*, 42 FCC 2d 669 (1973). We see no reason today why a similar change in program content should warrant treatment as a "new" station for purposes of establishing significantly viewed status. Moreover, KXTX-TV's assertions notwithstanding, for purposes of the Commission's rules and policies, a station's status -- as a specialty station or otherwise -- is to be determined by the rules and policies of this Commission. What is relevant to this determination in the present case is not how another federal agency has chosen to treat KXTX-TV, but when KXTX-TV ceased to broadcast a programming format that met the standards of former §76.5(kk) of the Rules.[10] This occurred, by KXTX-TV's own admission, by May 1980. This, then, would be the relevant date at which KXTX-TV would be considered to have become a "new" station, if we were to find that a change in programming format warranted such treatment. The survey data submitted by KXTX-TV would, therefore, be unavailing even were the station declared "new."

12. Although we have determined that KXTX-TV's change of program content does not entitle it to be treated as a "new" station for purposes of demonstrating significantly viewed status, KXTX-TV may still seek a waiver of §76.54 of the Rules on other grounds. As we have previously stated, "our Rules are not so inflexible that they cannot be waived to meet a unique situation. . . ." *Amherst Cablevision, Inc.*, 60 FCC 2d at 746. Nevertheless, "[a]n applicant for waiver faces a high hurdle even at the starting gate." *WAIT Radio v. FCC*, 418 F. 2d 1153, 1157 (D. C. Cir. 1969). "[S]imply submitting a showing that purports to demonstrate the requisite [need] does not satisfy the burden of proof." *Pappas Television, Inc.*, 61 FCC 2d 1051, 1056 (1976). In the present case, while KXTX-TV has submitted selected financial data purporting to demonstrate its need for continued cable carriage to be furthered by a declaration of significantly viewed status, we do not find KXTX-TV's showing to be persuasive. KXTX-TV has not rebutted KDAF's analysis of the VPI report, which indicates that the cost to KXTX-TV of any requisite community surveys -- even if the cost is not shared by area cable operators, whose subscribers, KXTX-TV alleges, desire the station's programming -- is less than $25,000. KXTX-TV does not demonstrate that it cannot absorb this incremental cost, nor what impact the cost of improving its facilities in 1981 has had on the station's finances. Indeed, KXTX-TV does not present full financial data, particularly with reference to its cash flow. Nor does KXTX-TV demonstrate what impact, if any, a loss of 11,000 cable viewers (as projected by KDAF) would have on the station. Indeed, KXTX-TV presents only speculation that area cable systems will choose to drop a station allegedly as popular as KXTX-TV is. KXTX-TV has operated and competed in the Dallas - Fort Worth, Texas market for years, and has made its operating and programming decisions presumably in response to the desires of the market's viewers. These decisions, and those of area cable operators concerning the station's carriage, are not decisions this Commission should attempt to alter without a showing of a convincing public interest reason to do so. KXTX-TV has simply failed to present "a substantial showing containing specificity of fact," *Continental Cablevision of Lansing, Inc.*, 57 FCC 2d 86, 89 (1975), to convince us that any determination by the Copyright Office as to how that agency will treat KXTX-TV warrants a waiver of our rules.

13. We note, finally, that KXTX-TV may still seek to demonstrate its status as significantly viewed through current community-specific data, pursuant to §76.54(b) of the Rules.[11] To date, however, KXTX-TV has not done so. Accordingly, we cannot find KXTX-TV to be significantly viewed in Fannin, Grayson, Hunt, Henderson, McLennan, Navarro, or Parker Counties, Texas.

14. In view of the foregoing, we find that grant of KXTX-TV's petition is not in the public interest.

15. Accordingly, IT IS ORDERED, That the petition for special relief (CSR-3408) filed May 10, 1990, by KXTX, Inc. IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] KXTX-TV also seeks significantly viewed status in Montague County, Texas. KXTX-TV is already considered to be significantly viewed in that county, having been found to be so in the Commission's initial survey (as Station KDTV). *Reconsideration of the Cable Television Report and Order*, 36 FCC 2d 326, 452 app. B (1972). Consequently, this portion of KXTX-TV's request is dismissed.

[2] Former §76.5(kk) of the Rules defined a specialty station as: "A commercial television broadcast station that generally carries foreign-language, religious, and/or automated programming in one-third of the hours of an average broadcast week and one-third of weekly prime-time hours."

[3] *See Memorandum Opinion and Order in Docket No. 20553*, 60 FCC 2d 661, 670 app. B. (1976).

[4] In 1987, the Copyright Office initiated an inquiry into the status under the copyright rules of stations which had been designated as specialty stations by the FCC in previous years. The Copyright Office concluded in 1989 that stations seeking the benefits of such status from the Copyright Office pursuant to its rules must demonstrate that the stations meet the specialty criteria currently. *Policy Decision in Docket No. 87-7*, 54 FR 38461 (1989). Given its station's increased amount of non-religious programming, KXTX-TV did not seek to demonstrate that is continues to meet the specialty criteria.

[5] KXTX-TV also states that it improved its transmitter and antenna facilities in 1981, boosting its power by 50%, and increasing its Grade B contour coverage area by less than 10%.

[6] In 1985, states KXTX-TV, the station's gross revenues exceeded $16.0 million, while in 1989 its revenues decreased to only $12.7 million. Net losses during this period exceed $11.0 million, with losses in 1989 alone of nearly $5.0 million, including a net write down of program value of $2.4 million. In that same year, KXTX-TV paid only $6.3 million of current program liabilities totalling $16.3 million, including liabilities carried over from prior years.

[7] *TVX of Fort Worth - Dallas, Inc.*, Cable Television Actions Report No. 3282 (released June 6, 1990).

[8] In Grayson County, KXTX-TV achieved a 4% share of total viewing hours and a 44% net weekly circulation in 1989, compared with KXTA's 1983 levels of 3% and 17%. In Hunt County, KXTX-TV achieved a 3% share of total viewing hours and a 34% net weekly circulation in 1989, compared with KXTA's 1983 levels of 2% and 39%. In Navarro County, KXTX-TV achieved a 3% share of total viewing hours and a 30% net weekly circulation, compared with KXTA's 1983 levels of 2% and 30%.

[9] In this regard, we note that in *Blair Broadcasting of Oklahoma, Inc., supra*, the Commission's staff granted a waiver to a non-commercial educational station which had changed to a commercial station, allowing it to use county-wide data during its first three-years of commercial operation. The waiver was based upon the fact that non-commercial educational stations were not included in the Commission's 1972 list of significantly viewed stations. *See* paragraph 3, *supra*. In this instance, however, KXTX-TV was surveyed because it was a commercial station, but was found not to have the necessary audience shares to be included on the 1972 list of significantly viewed stations in the relevant counties.

[10] Of course, once former §76.5(kk) of the Rules was deleted, *see* paragraph 2, *supra*, the concept of specialty status for purposes of the Commission's rules no longer existed.

[11] This does not treat KXTX-TV disparately with respect to KTXA. KXTX-TV was on the air at the time of the Commission's initial determination of significantly viewed signals, and was in fact then found to be significantly viewed in certain counties. *See, e.g.*, note 1, *supra*. KTXA was not then on the air. In addition, KTXA submitted data from its first three years of operation, including viewership surveys from May 1982 to February 1983. *TVX of Fort Worth - Dallas, Inc., supra*. KXTX-TV submits 1989 data to support a change that occurred in 1980. Even were we to consider the change decisional, KXTX-TV's data would be several years too late.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Hughes Communications Galaxy, Inc. File No. 20-DSS-P/LA-90

and

Satellite Transponder Leasing Corporation

Application for Replacement Satellite for
SBS-4 and for Modification of Construction
Permit and License of Galaxy 6 Satellite

ORDER AND AUTHORIZATION

Adopted: December 28, 1990; Released: January 10, 1991

By the Commission:

INTRODUCTION

1. Hughes Communications Galaxy, Inc. (Hughes) and Satellite Transponder Leasing Corporation (STLC)[1] have applied to construct, launch and operate a hybrid domestic fixed communications satellite to be known as Galaxy 7-H. At 4/6 GHz (C-band), this proposed satellite will be a substitute for Hughes's Galaxy 6 satellite. At 12/14 GHz (Ku-band), the proposed satellite will be a replacement for STLC's in-orbit SBS-4 satellite. Hughes proposes both to sell and lease the transponders on this satellite on a non-common carrier basis. GE American Communications, Inc. (GE Americom) has filed a Petition to Deny Hughes's application. Hughes filed a reply to GE Americom's petition, and GE Americom responded. For the reasons discussed below, Hughes's applications are granted.

2. The C-band portion of the proposed hybrid is to serve as a substitute for the Galaxy 6 satellite. Galaxy 6 -- formerly Westar 6° -- was authorized in 1985 as an emergency replacement for the Westar 6 satellite that was involved in a launch failure the previous year.[2] It was assigned to 91^0 W.L. [3] Recently Hughes was granted authority to operate Galaxy 6 at 99° W.L. for the period between the retirement of its Westar 4 satellite -- which is currently operating at 99^0 W.L. -- in late 1991 and the launch of its replacement Galaxy 4-H hybrid satellite into 99^0 W.L. in 1993.[4] Galaxy 6 was launched in October 1990.

3. The Ku-band portion of Galaxy 7-H is to serve as a replacement for SBS-4 which is currently operating at 91^0 W.L. SBS-4 is licensed to STLC which was recently acquired by Hughes.[5] It is expected to reach its end-of-service life in 1994.[6]

4. Hughes's proposed hybrid satellite will carry 24 12/14 GHz transponders, eight wideband with a bandwidth of 54 MHz and sixteen narrowband with a bandwidth of 27 MHz. Each transponder will have a nominal transmitter output power of 50 watts. The satellite also will carry 24 4/6 GHz transponders, each with a bandwidth of 36 MHz and a nominal transmitter output power of 16 watts. According to Hughes, this will offer better performance than Galaxy 6 with its ten-watt transponder design. Four transponder channels (2 in the C-band and 2 in the Ku-band) within the communications payload are equipped with "cross-strap" switches, permitting switching among the bands. The 4/6 GHz portion of the satellite will be designed to serve the 48 contiguous United States (CONUS), Alaska, Hawaii, Puerto Rico and the U.S. Virgin Islands with a CONUS nominal equivalent isotropically radiated power (E.I.R.P.) of 38.0 dBW. The 12/14 GHz portion will be designed to serve all of the above areas in the receive pattern and CONUS in the transmit pattern with a nominal E.I.R.P. of 45.0 dBW. The satellite will have the capability to switch four specific transponder channels from CONUS coverage to CONUS plus off-shore coverage to serve Alaska, Hawaii, Puerto Rico and the Virgin Islands in the Ku-band transmit beams. Hughes asserts that the design of Galaxy 7-H is in compliance with the Commission's requirements regarding interference and two degree orbital spacing. Hughes proposes to launch its hybrid satellite in December 1992.

5. Hughes states that a hybrid satellite using recently developed technology can better serve the public than two single band satellites. It asserts that cross-strapping techniques and power efficiencies will better satisfy customer demands. In addition, Hughes states that permitting it to launch its hybrid will restore C-band capacity at 91^0 W.L. more quickly than otherwise, because Galaxy 7-H is to be launched in December 1992 whereas Galaxy 6 is not scheduled to be relocated to 91^0 W.L. until July 1993, when it is no longer needed at 99^0 W.L. Hughes also states that the grant of this proposal will not require the assignment of any new orbital locations.

6. GE Americom contends that Hughes's application violates the Commission's orbital assignment policies. According to GE Americom, if Hughes's request is granted, Hughes will be permitted to hold 91^0 W.L. as a "replacement" location despite the fact that Westar 3 is no longer operating at that location and Hughes does not intend to restore regular service there until 1993.[7] GE Americom asserts that this constitutes "warehousing" of an orbital location in contravention of Commission policy. According to GE Americom, grant of Hughes's application would allow it to receive a desirable hybrid location outside of a regular domestic fixed-satellite processing proceeding to the disadvantage of other operators. GE Americom concludes that 91^0 W.L. at C-band should be returned to the pool of locations available for reassignment.

7. GE Americom's second objection is directed to the future use of SBS-4 after Galaxy 7-H is launched as its replacement in the Ku-band.[8] It notes that SBS-4 may have some useful life after Galaxy 7-H is launched, and asserts that any request by Hughes for a new or additional location for SBS-4 should be treated as part of a new domestic fixed-satellite processing round.

DISCUSSION

8. Operating a state-of-the-art hybrid satellite at a particular orbital location may be more efficient than operating two single-band satellites at that location. Construction, launch and operational costs for one, albeit larger, satellite will be lower than for two satellites. Moreover, advances over the past several years have made it possible to construct hybrid satellites that have technical capabilities equivalent to single-band satellites. Thus, hybrid satellites can provide cost savings to operators and customers with no decrease in technical performance. Consequently, in the last domestic fixed-satellite processing group, the Commission attempted to assign operators to corresponding C-band and Ku-band orbital locations, when possible, to provide them the opportunity to construct and launch hybrid satellites in current or future generations.

9. By virtue of its acquisition of STLC, Hughes is assigned to both the C-band and Ku-band portions of the 91° W.L. location. Hughes now proposes to operate a hybrid satellite from that location. The proposed satellite fully conforms with the Commission's technical standards, and Hughes meets all financial and legal requirements. However, because the hybrid will not be launched until late 1992 at the earliest, the C-band location at 91° W.L. will remain vacant for several years and questions have been raised by GE Americom regarding Hughes's continued assignment to that location. We find that these concerns do not justify denying Hughes's application.

10. We disagree with GE Americom's assertion that Hughes is attempting to "warehouse" an orbital location. Our policy regarding warehousing is designed to prevent orbital locations from being retained by licensees who have not decided whether to proceed with their plans to the exclusion of others who would use the location.[9] This is not the case here. To take advantage of its corresponding locations at 91° W.L., Hughes has decided to implement a hybrid satellite, which it plans to launch in December 1992. If Hughes is to meet its proposed launch date, it must begin construction of Galaxy 7-H expeditiously and be provided with some degree of certainty.[10] Hughes appears committed to implementing its satellite as soon as possible and is not holding the location to afford itself additional time to decide whether to proceed.[11]

11. Moreover, operators wishing to replace two single-band satellites with a hybrid satellite may anticipate finding that the end-of-service lives of the single-band satellites do not coincide. Faced with this situation, an operator may launch the hybrid after the first satellite is ready to be retired, thus incurring an economic loss by prematurely terminating service on the other satellite. Alternatively, it may wait to launch the hybrid after both single-band satellites have reached their end-of-service lives and cause a gap in service at that location in one frequency band. The satellite operator is in the best position to weigh the economic tradeoffs involved and, absent overriding public interest considerations, that judgment is entitled to deference.[12]

12. In this case, Hughes has chosen a middle ground and has decided to launch its proposed hybrid satellite in December 1992, two years before SBS-4's license term expires but two years after Westar 3's retirement. While this will mean that Galaxy 7-H will not strictly be a replacement satellite for Westar 3 as we have defined replacement in the past,[13] this conclusion does not require return of this location to the pool of locations available for reassignment, as GE Americom contends. Galaxy 7-H is a replacement satellite for SBS-4 and obviously both C-band and Ku-band portions of the hybrid must be launched at the same time. We find no merit in GE Americom's claim that by launching its hybrid in the time frame proposed in its application, Hughes is attempting to retain desirable orbital locations despite their underuse or nonuse.[14] Hughes's proposed hybrid satellite appears to offer better service potential to its customers and grant will not violate any domestic fixed-satellite policies. As Hughes notes, it will not acquire any additional orbit locations as a result of this proceeding.

13. With respect to GE's concerns about the future disposition of SBS-4, Hughes is correct in stating that this issue is not currently before the Commission. SBS-4 was launched in September 1984 and will presumably have some remaining service life when Galaxy 7-H is launched in late 1992 or early 1993. However, Hughes is on notice that any request for an additional orbit location for SBS-4 will be processed in conformity with our orbital assignment policies and may require institution of a new processing group.

14. In addition, based on Hughes's representations in its application, the proposed transponder transactions will be noncommon carrier in nature.[15] There have been no objections to this request. We find that these transactions are consistent with our transponder sales policies.[16]

CONCLUSION

15. Accordingly, IT IS ORDERED that Application File No. 20-DSS-P/LA-90 IS GRANTED and Hughes Communications Galaxy, Inc. IS AUTHORIZED to consolidate its Galaxy 6 and SBS-4 satellites into the hybrid Galaxy 7-H satellite as proposed in its application.

16. IT IS FURTHER ORDERED that construction of Galaxy 7-H shall begin promptly, if it has not already begun, upon release of this authorization. Unless extended by the Commission for good cause shown, this authorization shall become null and void in the event the space station is not constructed, launched, and successfully placed into operation in accordance with the technical parameters and terms and conditions of this authorization by the following dates, as certified in writing to the Commission by the licensee:

	Construction Commenced not Later than:	Construction Completed not Later than:	Launched not Later than:
Galaxy 7-H	January 1991	January 1993	March 1993

17. IT IS FURTHER ORDERED that Hughes Communications Galaxy, Inc. IS AUTHORIZED to sell all of the transponders on Galaxy 7-H in accordance with Commission policies articulated in *Domestic Fixed-Satellite Transponder Sales*, 90 FCC 2d 1238 (1982), *aff'd sub nom.*, *Wold Communications, Inc. v. FCC*, 735 F.2d 1465 (D.C. Cir. 1984).

18. IT IS FURTHER ORDERED that the Orbital Assignment Plan set forth in the Appendix to *Assignment of Space Stations in the Domestic Fixed-Satellite Service*, 3 FCC Rcd 6972 (1988), modified, 5 FCC Rcd 179 (1990), further modified in *American Satellite Company*, 5 FCC Rcd 1186 (Com. Car. Bur. 1990), in *GTE Spacenet Cor-*

poration, 5 FCC Rcd 1182 (Com. Car. Bur. 1990), and *Hughes Communications Galaxy, Inc.* 5 FCC Rcd 3423 (Com. Car. Bur. 1990), IS FURTHER MODIFIED to assign Galaxy 7-H to 91^0 W.L.

19. Hughes Communications Galaxy, Inc. is afforded thirty days from the date of release of this order and authorization to decline this authorization as conditioned. Failure to respond within that time period will constitute formal acceptance of this authorization as conditioned.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] After this application was filed and pursuant to Commission consent, control of STLC was transferred to Hughes from International Business Machines Corporation (IBM). *See* International Business Machine Corporation, 5 FCC Rcd 1655 (Com. Car. Bur. 1990). We will refer to the applicant as Hughes.

[2] The satellite was to be launched initially in 1986, but due to the series of launch failures and disruption in launch services that year it could not be launched on schedule. Western Union and Hughes were subsequently granted additional time in which to launch the satellite.

[3] *See* The Western Union Telegraph Company, Mimeo No. 6929 (released September 11, 1985). The satellite's name was changed to Galaxy 6 when Hughes acquired Western Union's domestic fixed-satellite system in 1988. *See* Western Union Corporation, 3 FCC Rcd 6792 (Com. Car. Bur. 1988). C-band capacity at 91-S W.L. has not been used since Westar 3 was retired in February 1990.

[4] Hughes Communications Galaxy, Inc. 5 FCC Rcd 4497 (Com. Car. Bur. 1990). *See also* Hughes Communications Galaxy, Inc., 5 FCC Rcd 3423 (Com. Car. Bur. 1990) (*Galaxy 4 - H Order*). Hughes has acknowledged that any request for a new location for Galaxy 6 after Galaxy 4-H is launched may trigger a new domestic fixed-satellite processing group.

[5] *See* note 1, *supra*.

[6] Hughes has requested that any license for Galaxy 7-H be issued in the name of Hughes alone. *See* Amendment filed August 14, 1990.

[7] Replacement satellites are those that operators launch into the same locations as existing satellites that are reaching their end-of-service lives. This enables customers to continue to be served without interruption or need to repoint their antennas. To provide operators with some assurance that they will be able to continue to serve their customers, replacement satellites are generally authorized provided that the location remains available for assignment to a U.S. satellite and provided that the technical characteristics of the proposed replacement allow it to be assigned to that location (*e.g.*, high power density satellites may need to be assigned to a different portion of the orbital arc). *See* Licensing of Space Stations in the Domestic Fixed-Satellite Service, 50 Fed. Reg. 36071 (1985), at paras. 26-27; Assignment of Orbital Locations to Space Stations in the Domestic Fixed-Satellite Service, 3 FCC Rcd 6973, 6976 n. 31 (1988).

[8] GE Americom also objects to Hughes' statement that it may locate Galaxy 6 at 72^0 W.L. after it is no longer needed at 99^0 W.L. because GE Americom's Satcom 2R satellite is currently located at 72^0 W.L. However, Hughes, in its Reply, clarified that the reference to 72^0 W.L. was an error and that it was suggesting possible relocation of Galaxy 6 to 74^0 W.L., not 72^0 W.L., as a replacement for Galaxy 2.

[9] *See generally*, Licensing of Space Stations in the Domestic Fixed-Satellite Service, *supra* note 7, at paras. 16-25. *See also Galaxy 4 - H Order*, *supra* note 4 at para. 11.

[10] Generally, it takes several years to construct a space station.

[11] In this regard, Hughes requested and was granted a Section 319(d) waiver to begin construction of Galaxy 7-H at its own risk prior to Commission action on its underlying application for a construction permit. *See* Letter from Chief, Domestic Facilities Division to James F. Rogers, June 25, 1990.

[12] The Common Carrier Bureau recently granted an extension of a C-band launch date when an applicant sought to launch a new hybrid satellite in conformance with the Ku-band deadline, although no gap in service was involved. *Galaxy 4-H Order*, *supra* note 4.

[13] *See* discussion, *supra* note 7.

[14] GE Americom's Petition to Deny at 4.

[15] Hughes's Application at 4, 57.

[16] *See* Domestic Fixed-Satellite Service Transponder Sales, 90 FCC 2d 1238 (1982), *aff'd sub nom.*, Wold Communications, Inc. v. FCC, 735 F.2d 1564 (D.C. Cir. 1984). *See also* Martin Marietta Communications Systems, Inc., FCC 86-232 (June 10, 1986). Because all of the transponders on SBS-4 and ten of the twenty-four transponders on Galaxy 6 have already been authorized for noncommon carrier service, our action on this application results in the authorization for sale of only an additional fourteen C-band transponders.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

MCI
TELECOMMUNICATIONS
CORPORATION,
SATELLITE
BUSINESS SYSTEMS,
WESTERN UNION
INTERNATIONAL, INC.,
Complainants,

v.

GTE NORTH INCORPORATED,	File No. E-90-412
GTE ALASKA INCORPORATED,	File No. E-90-413
GTE CALIFORNIA INCORPORATED,	File No. E-90-414
GTE FLORIDA INCORPORATED,	File No. E-90-415
GTE NORTHWEST INCORPORATED,	File No. E-90-416
GTE SOUTH INCORPORATED,	File No. E-90-417
GTE SOUTHWEST INCORPORATED,	File No. E-90-418
GTE HAWAIIAN TELEPHONE COMPANY INCORPORATED,	File No. E-90-419

Defendants.

ORDER

Adopted: January 3, 1991; Released: January 10, 1991

By the Chief, Enforcement Division, Common Carrier Bureau:

1. On August 31, 1990, MCI Telecommunications Corporation, Satellite Business Systems and Western Union International, Inc. (hereinafter the "Complainants") filed the above-captioned formal complaints against GTE North Incorporated, GTE Alaska Incorporated, GTE California Incorporated, GTE Florida Incorporated, GTE Northwest Incorporated, GTE South Incorporated, GTE Southwest Incorporated, and GTE Hawaiian Telephone Company Incorporated (hereinafter the "Defendants") seeking recovery of damages for Defendants' alleged overearnings on interstate access charges for the period January 1, 1987 through December 31, 1988. On December 27, 1990, however, Complainants and Defendants filed a joint motion for dismissal of the complaints with prejudice stating that the parties had reached an agreement to settle the differences underlying the actions and, as a result, the complaints had become moot.

2. We are satisfied that dismissal of the complaints will serve the public interest by eliminating the need for further litigation and the expenditure of further time and resources of the parties and of this Commission.

3. Accordingly, IT IS ORDERED, pursuant to the authority delegated by Section 0.291 of the Commission's Rules, 47 C.F.R. 0.291, that Complainants' and Defendants' Joint Motion for Dismissal of Complaint IS GRANTED and that the above-captioned proceedings ARE TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Mary Beth Richards
Chief, Enforcement Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 85-166
Phase II, Part 1

In the Matter of

Investigation of Special Access
Tariffs of Local Exchange Carriers

ORDER ON FURTHER RECONSIDERATION

Adopted: December 21, 1990; Released: January 10, 1991

By the Chief, Common Carrier Bureau:

I. INTRODUCTION

1. This Order considers a petition for partial reconsideration of the Commission's *Order on Reconsideration* [1] which modified aspects of its *Strategic Pricing Order*.[2] The petition was filed by Ad Hoc Telecommunications Users Committee (Ad Hoc). [3] Ad Hoc principally requests that the Commission alter the determination, first announced in the *Strategic Pricing Order* and affirmed upon reconsideration, to use a range of presumed reasonableness to compare and evaluate special access rates for voice grade (VG) and high capacity (HiCap) services. For the following reasons, the Common Carrier Bureau dismisses this petition in accordance with Section 1.429(i) of the Commission's Rules.

II. BACKGROUND

2. The *Strategic Pricing Order* addressed the efforts of local exchange carriers (LECs) to price their HiCap services at levels that reflected strategic objectives as well as relative cost. The Commission determined that LEC strategic pricing of VG and HiCap services to discourage bypass of local carrier networks and the migration from VG to HiCap services could be reasonable under certain circumstances. *Strategic Pricing Order*, 4 FCC Rcd at 4804. The record before the Commission demonstrated that the cost of one HiCap circuit was typically equivalent to the cost of six 4-wire VG circuits. Using that six-to-one crossover point to define the center of the range, the Commission concluded that rates for HiCap facilities that were no less than four times and no more than eight times the rate of a 4-wire VG circuit would not require a special justification in the future. *Id.*

3. The *Reconsideration Order* held that changed circumstances had removed any justification for strategic pricing. Instead, LECs would now be required to "implement more fully cost-based pricing of special access service." *Reconsideration Order*, 5 FCC Rcd at 408. The Commission reaffirmed prospective reliance on the crossover range to assess the lawfulness of special access rates. *Id.*

4. Ad Hoc argues that the crossover range is not based on the record and is an unreasonable approximation of cost-based pricing. *See* Ad Hoc Petition at 4-7. Ad Hoc contends that the use of any range is unsound and should be replaced by a truly cost-based method for analyzing a rate's reasonableness. *Id.* at 9. According to Ad Hoc, the Commission's rationale for relying on the crossover range had been the need to manage demand migration from VG to HiCap services. *Id.* at 10. Ad Hoc argues that, because the Commission determined, in the *Reconsideration Order*, that demand migration management no longer justifies strategic pricing, the rationale for using a crossover range has been eliminated. Ad Hoc urges that if the crossover range remains, the Commission should require the filing of service specific, as well as rate element specific, cost data. *Id.* at 18.

III. DISCUSSION

5. Our review of Ad Hoc's petition reveals that most of its contentions merely repeat arguments raised in its initial petition for reconsideration filed in this proceeding on January 3, 1989 (Ad Hoc 1989 Petition). For example, in its initial petition for reconsideration as well as here, Ad Hoc argued that the record did not support a six-to-one crossover. *Compare* Ad Hoc Petition at 4 *with* Ad Hoc 1989 Petition at 20-22. Ad Hoc also repeats its argument that a crossover range is an improper tool for the analysis of rates. *Compare* Ad Hoc Petition at 8-12 *with* Ad Hoc 1989 Petition at 6-7, 9-10. Furthermore, Ad Hoc argues in both petitions that the use of actual cost data is the proper method for establishing special access rates. *Compare* Ad Hoc Petition at 13-16 *with* Ad Hoc 1989 Petition at 7-10.

6. The *Reconsideration Order* fully considered the merit of these Ad Hoc arguments. The Commission rejected them at that time, and Ad Hoc has presented no procedural or substantive basis for now doing otherwise. Accordingly, we dismiss Ad Hoc's petition to the extent it repeats its previously unsuccessful arguments. *See* 47 C.F.R. §§ 1.106(k)(3), 1.429(i).

7. Upon review of the balance of Ad Hoc's petition, we conclude that none of the arguments are a proper subject for a petition for further reconsideration. Section 1.429(i) of the Commission's Rules specifies that:

> Any order disposing of a petition for reconsideration which modifies rules adopted by the original order is, *to the extent of such modification*, subject to reconsideration in the same manner as the original order.

47 C.F.R. § 1.429(i) (emphasis added). Thus, under the Commission's rules, the *Reconsideration Order* is itself subject to reconsideration only to the extent that the Order modified the *Strategic Pricing Order*. Ad Hoc's arguments concern aspects of the *Reconsideration Order* that did not modify the *Strategic Pricing Order*. Therefore, Ad Hoc's arguments addressing reliance on the crossover range to evaluate future tariff filings are not a proper subject for further reconsideration.

IV. ORDERING CLAUSE

8. Accordingly, IT IS ORDERED that the petition for partial reconsideration filed in the above-captioned proceeding by Ad Hoc Telecommunications Users Committee IS DISMISSED for the above noted reasons.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Firestone
Chief, Common Carrier Bureau

FOOTNOTES

[1] Investigation of Special Access Tariffs of Local Exchange Carriers, CC Docket No. 85-166, Phase II, Part 1, Order on Reconsideration, 5 FCC Rcd 400 (1990) (*Reconsideration Order*).

[2] Investigation of Special Access Tariffs of Local Exchange Carriers, CC Docket No. 85-166, Phase II, Part 1, Memorandum Opinion and Order, 4 FCC Rcd 4797 (1988) (*Strategic Pricing Order*).

[3] On March 7, 1990, comments in support of Ad Hoc's petition were filed by the American Petroleum Institute, Aeronautical Radio, Inc., and the Independent Data Communications Manufacturers Association, Inc. The Ameritech Operating Companies and Pacific Telesis filed oppositions to the Ad Hoc petition on that date.

Before the
Federal Communications Commission
Washington, D.C. 20554

LETTER
January 2, 1991

Released: January 10, 1991

8910-KMS

Vincent J. Curtis, Esquire
Fletcher, Heald & Hildreth
1225 Connecticut Avenue, N.W.
Suite 400
Washington, DC 20036-2679

In re: WAPA(AM), File No. BAL-900723EA
San Juan, Puerto Rico

Dear Mr. Curtis:

This is in reference to the above-captioned application for assignment of license of station WAPA(AM), San Juan, Puerto Rico, from Hearst Radio, Inc. to Carlos J. Colon Ventura and Wifredo G. Blanco Pi, a General Partnership ("VBP"). Mr. Blanco Pi, a principal of the proposed assignee, is also the licensee of WMTI(AM), Morovis, Puerto Rico, and grant of the instant application would result in a violation of 47 C.F.R. Section 73.3555 (a)(1) due to the overlap of the 5 mV/m service contours of both stations.[1] Accordingly, you have requested a twelve-month waiver of Section 73.3555(a)(1) in order to allow time for Mr. Blanco Pi to divest WMTI(AM) in an orderly manner.

In support of your waiver request, you assert that the overlap area is well served by other media;[2] that the respective communities of license, Morovis and San Juan, Puerto Rico, are approximately 25 miles apart and constitute separate radio markets; that until WMTI is sold, the two stations will be operated as separate facilities; and that grant of the temporary waiver would "foster the acquisition by a minority entity of an AM station in Puerto Rico's largest broadcast market." In this regard, you note that VBP is a 100% Hispanic-controlled entity. You further note that Mr. Blanco Pi is "presently in negotiations to sell WMTI" to a qualified purchaser.

The ultimate objectives of the Commission's multiple ownership rules are to promote economic competition and diversity of programming and viewpoints in order to further the public interest. *See Amendment of Section 73. 3555 of the Commission's Rules*, 4 FCC Rcd 1723 (1989), *recon. granted in part and denied in part*, 4 FCC Rcd 6489 (1989); *Multiple Ownership Rules*, 97 FCC Rcd 997 (1984), *recon. granted in part and denied in part*, 1 FCC Rcd 802 (1986). The Commission is not, however, without flexibility to respond to situations where application of fixed multiple ownership standards would be contrary to other public interest concerns. Before such a waiver can be granted, even on a temporary basis, an applicant must sustain the burden of showing that the benefits to be achieved by its proposal are in the public interest and that a waiver would not compromise the fundamental policies served by the rule.

On the basis of the representations before us and the circumstances of this case, we find that a temporary waiver of the overlap prohibitions contained in our multiple ownership rules would be consistent with the public interest and precedent. The San Juan and Morovis markets are separate and are well served by an abundance of various media services, and the waiver sought is for a limited period. In addition, until WMTI is sold, the two stations will be operated as separate facilities. Furthermore, negotiations are already underway for the sale of WMTI. In similar circumstances, the Commission has granted temporary waivers of the contour overlap provisions of the multiple ownership rules. *See KRTH (AM)*, 5 FCC Rcd 2059 (1990); *KKWM (AM)*, FCC 90-352, released October 26, 1990. We are therefore persuaded that no undue concentration of media would result by grant of the temporary relief requested.

Accordingly, the contour overlap provisions of 47 C.F.R. Section 73.3555(a)(1) ARE HEREBY WAIVED in accordance with VBP's request. Moreover, finding that the applicants are fully qualified and the public interest would be served thereby, the application (File No. BAL-900723EA) for assignment of license of WAPA(AM), San Juan, Puerto Rico from Hearst Radio, Inc., to Carlos J. Colon Ventura and Wifredo G. Blanco Pi, a General Partnership, IS HEREBY GRANTED.[3]

BY DIRECTION OF THE COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

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[1] Section 73.3555 states in pertinent part: (a) No license for an AM . . . broadcast station shall be granted to any party (including all parties under common control) if such party directly or indirectly owns, operates or controls one or more broadcast stations in the same service and the grant of such license will result in:

(1) Any overlap of the predicted or measured 5 mV/m groundwave contours of the existing and proposed AM stations.

[2] Specifically, you represent that the overlap area is served by 17 AM stations with between 0.5 mV/m and 8 mV/m average signal strength; by 22 FM stations; by 12 TV stations and 1 CATV system; and by 3 weekly and 4 daily newspapers.

[3] The Chief, Mass Media Bureau, is hereby delegated authority to act on requests for temporary waiver of the contour overlap provisions of 47 C.F.R. Section 73.3555 for the AM, FM and TV services when the requests are for twelve months or less, consistent with precedent, and involve no new or novel issues. In such cases, applicants will be required to demonstrate that efforts have been undertaken to effect the sale of the station to be divested.

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: December 21, 1990

ADVISORY COMMITTEE ON ADVANCED TELEVISION SERVICE IMPLEMENTATION SUBCOMMITTEE MEETING

A meeting of the Implementation Subcommittee of the Advisory Committee on Advanced Television Service will be held on:

January 31, 1991
10:00 A.M.
Commission Meeting Room (Room 856)
1919 M Street, N.W.
Washington, D.C.

The agenda for the meeting will consist of:

1. Introduction
2. Minutes of Last Meeting
3. Report of Working Party 1
   Policy and Regulation
4. Report of Working Party 2
   Transition Scenarios
5. General Discussion
6. Other Business
7. Date and Location of Next Meeting
8. Adjournment

All interested persons are invited to attend. Those interested also may submit written statements at the meeting. Oral statements and discussion will be permitted under the direction of the Implementation Subcommittee Chairman.

Any questions regarding this meeting should be directed to Dr. James J. Tietjen at (609) 734-2237 or David R. Siddall at (202) 632-7792.

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 89-624

In the Matter of

Represcribing the
Authorized Rate of Return
for the Interstate Services
of Local Exchange Carriers

ERRATUM

Released: December 21, 1990

1. On December 7, 1990, the Commission released an Order represcribing the authorized rate of return for interstate services.[1] Appendix F, page 8 of the Order has several headings mislabeled as thousands of dollars. These headings should be millions of dollars. In addition, Appendix G of the Order was inadvertently omitted from publication. By this erratum, a revised Appendix F, page 8 and Appendix G are included as part of the Order.

2. The Order failed to state that a summary would be published in the Federal Register. Accordingly, the following paragraph is added:

> 241. IT IS FURTHER ORDERED, That the Secretary shall cause a summary of this Order to be published in the Federal Register.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTE

[1] Represcribing the Authorized Rate of Return for Interstate Services of Local Exchange Carriers, CC Docket No. 89-624, FCC 90-315 (released December 7, 1990).

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Application of

GILLETT BROADCASTING
OF MARYLAND, INC.
(Assignor)

and File No. BALCT-900810KE

SCRIPPS HOWARD
BROADCASTING COMPANY
(Assignee)

For Consent to the Assignment
of the License of WMAR-TV,
Baltimore, Maryland

MEMORANDUM OPINION AND ORDER

Adopted: December 19, 1990 Released: December 19, 1990

By the Commission:

1. The Commission has before it for consideration an application to assign the license of television station WMAR-TV (NBC, Channel 2), Baltimore, Maryland, from Gillett Broadcasting of Maryland, Inc. ("Gillett") to Scripps Howard Broadcasting Company ("Scripps"), which is also the licensee of station WBSB(FM), Baltimore, Maryland. The acquisition of WMAR-TV by Scripps will result in a television/radio combination where the Grade A contour of the television station encompasses the city of license of the radio station. Such television/radio combinations are generally inconsistent with the one-to-a-market provisions of Section 73.3555(b) of the Commission's Rules. Accordingly, Scripps has requested a waiver pursuant to Note 7 of the rule. A petition to deny the assignment was filed by Chesapeake Television, Inc. ("Chesapeake"), licensee of WBFF(TV)(Ind./Fox, Channel 45), Baltimore, Maryland, and Scripps filed a reply.

2. In support of its waiver request, Scripps notes that the Commission stated that it would "look favorably upon" and would be "predisposed to grant" requests for waiver of the one-to-a-market rule "when the radio and television stations involved are located in the top 25 ADI television markets as defined by Arbitron Rating Company and in addition where, following the proposed combination, there will remain at least 30 separately owned, operated and controlled broadcast licensees or 'voices.'" *Amendment of Section 73.3555,* 4 F.C.C. Rcd. 1741, 1751, *reconsidered in part,* 4 F.C.C. Rcd. 6489 (1989) (*Second Report and Order*). Scripps further states that Arbitron ranks Baltimore, Maryland as the 22nd largest market. Scripps also notes that, after the proposed purchase, there will be 35 separate broadcast voices in that market. Thus, Scripps states that, because this case falls within the presumptive waiver standard established by the Commission in the *Second Report and Order,* we should grant the requested waiver.

3. In its petition to deny, Chesapeake asserts that several facts exist in this case that raise serious questions concerning the propriety of approving the WMAR-TV assignment application. First, Chesapeake states that the Baltimore market is on the outer limits of the Commission's "Top 25 Markets/30 Voices" presumption, being the 22nd market with 35 voices, and that it is far outside the "65 Stations/45 Voices" standard suggested as the appropriate rule by Commissioner Dennis in her dissent in the *Second Report and Order.* Chesapeake also notes that the Commission's determination in the *Second Report and Order,* to draw the line at the top 25 markets/30 voices, was based on the fact that the average number of broadcast stations in the top 25 markets includes 13.4 television stations, 29.8 commercial AM stations, and 29.2 commercial FM stations. Thus, Chesapeake states that the circumstances existing in the Baltimore market, which has just over half as many broadcast stations as the "average" top 25 market, were not contemplated by the Commission in the *Second Report and Order.*

4. Next, Chesapeake contends that the combination proposed by Scripps, which is composed of an NBC affiliate (VHF) with the most desirable channel position and a Class B commercial FM station, as opposed to a UHF/AM combination, would reduce diversity over a broad area. Moreover, Chesapeake asserts that grant of the proposed combination would harm diversity of views on Baltimore issues because there are only 28 stations licensed to serve Baltimore itself, which are operated by only 22 "voices," nearly one-third less than the Commission deemed to be sufficient in the *Second Report and Order.* Chesapeake also asserts that the proposed combination would cause severe "competitive dislocation." Specifically, Chesapeake states that the cross-promotion resulting from approval of the proposed assignment will further tilt the market in favor of the network affiliates to the competitive disadvantage of the independent stations, especially in light of the facts that three of the five commercial television stations in the Baltimore market are already VHF network affiliates and that the CBS affiliate is already cross-owned with a powerful AM/FM combination. Chesapeake also states that the approval of this assignment would set a precedent that will lead to further concentration in the Baltimore market as other stations attempt to create new combinations. These future combinations, Chesapeake contends, will further threaten the viability of independents, thereby ultimately reducing diversity. Finally, Chesapeake states that no public interest benefits will be generated by grant of the instant waiver request. In support of this contention, Chesapeake alleges that neither station needs the other's help to survive or to provide better programming.

5. In its opposition, Scripps argues that Chesapeake's petition merely reargues against the Commission policy adopted in the *Second Report and Order,* which adopted the new Note 7 to Section 73.3555 of the Rules. Moreover, Scripps states that Chesapeake has pleaded no specific facts to show why the general presumption should not apply in this case.

DISCUSSION

6. In the *Second Report and Order,* we set out standards for reviewing requests for waivers of the one-to-a-market rule. We concluded that we would look favorably on waiver requests in the top 25 markets, where 30 or more voices would remain after the proposed combination. 4 F.C.C. Rcd. at 1751. Because Scripps has established that Baltimore is the 22nd largest market, and that there will be more than 30 separate voices in the market after the proposed assignment, a fact which Chesapeake does not dispute, Scripps meets the standard.[1] We further agree with Scripps that Chesapeake has largely reargued points specifically considered and discussed fully in the *Second Report and* Order, rather than stating specific facts to rebut the presumption that grant of the instant assignment would be in the public interest.

7. In establishing the "Top 25 Markets/30 Voices" presumption, we stated that "[a]lthough liberalizing the radio-TV cross ownership rule may affect diversity of ownership to some minimal degree even in markets with many separate licensees, we believe that any such effect must be weighed against the efficiency gains, cost savings and other benefits of allowing such combinations." *Second Report and Order,* 4 F.C.C. Rcd. at 1752, para. 83. We also note, contrary to Chesapeake's suggestion, that there is nothing in the *Second Report and Order* indicating that we would evaluate a waiver request involving the 22nd ranked market any differently than the 1st ranked market. Moreover, Chesapeake's argument that the Baltimore market is not representative of other top 25 markets in that it has less than the so-called "average" number of voices, discussed in the *Second Report and Order,* is likewise inapposite. While we did compute and identify the average number of voices in the top 25 markets in the *Second Report and Order,* we did not utilize that data to determine the cutoff number for purposes of evaluating waiver requests. Rather, we cited the data to demonstrate the increasing availability of media outlets in top 25 markets generally. 4 F.C.C. Rcd. at 1743, para. 14. Thus, the fact that the Baltimore market may or may not have the same number of broadcast stations as an average top 25 market is not of decisional significance here, where both the top 25 market and 30 voices factors are met.

8. With respect to Chesapeake's argument involving the distinction between VHF/FM combinations and UHF/AM combinations, we note that this also was discussed in the *Second Report and Order*. We specifically considered limiting one-to-a-market waivers to specified media combinations, *e.g.* UHF/AM, but determined that such a limitation "overemphasizes the possible adverse impact that local FM-VHF TV combinations would have on economic competition or viewpoint diversity relative to that of AM and UHF TV combinations and, in that sense, would unjustifiably prevent the public and broadcasters from taking advantage of the efficiencies [including cross-promotion] inherent in joint FM-VHF TV operations." 4 F.C.C. Rcd. at 1750, para. 72. While we stated in the *Second Report and Order* that we would evaluate the types of facilities at issue under our case-by-case analysis, such an evaluation is not relevant under the top 25 market/30 voices presumption, in the absence of specific relevant rebuttal facts. *Compare id.* at para. 84 with *id.* at para. 91.

9. We also find that Chesapeake's arguments regarding the negative effects of such mergers on independent stations are speculative. Moreover, Chesapeake merely speculates that there will be no public interest benefits from the proposed combination because both stations are financially sound. Again, we note that while we stated in the *Second Report and Order* that specific effects on competition and specific evidence on public interest benefits would be part of the case-by-case analysis, such evaluations are not relevant under the 25 market/30 voices presumption in the absence of specific relevant rebuttal facts. *Compare id.* at para. 84 with *id.* at paras. 91 and 92. It is simply not sufficient to rebut the presumption by speculative suggestions that a waiver might not be justified under the case-by-case approach.

10. In view of the foregoing, we find that Chesapeake has failed to present a substantial and material question of fact that grant of the instant assignment application would be inconsistent with the public interest. Accordingly, IT IS ORDERED, That the petition to deny filed by Chesapeake Television, Inc., IS DENIED.

11. Further, having concluded that the applicants are fully qualified, we find that a grant of the captioned assignment application pursuant to Note 7 of Section 73.3555 of the Commission's Rules would be in the public interest. Therefore, IT IS ORDERED, That the above-captioned application (BALCT-900810KE) for consent to the assignment of the license of WMAR-TV, Baltimore, Maryland, from Gillett Broadcasting of Maryland, Inc. to Scripps Howard Broadcasting Company, IS GRANTED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTE

[1] We also note that in determining the number of voices, we will look at the market as a whole, in accordance with the *Second Report and Order,* rather than any particular local community in the market, as suggested by Chesapeake.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

WESTERN UNION CORPORATION — File No. I-T-D-90-011

Application for Authority to
Discontinue the Provision of
International Telex Service

ORDER, AUTHORIZATION AND CERTIFICATE

Adopted: December 21, 1990; Released: December 28, 1990

By the Chief, Common Carrier Bureau:

THE APPLICATION

1. On August 10, 1990, the Western Union Corporation (WUC) filed an application requesting authority for the discontinuance of its international telex authorizations. WUC also requested waivers of the 120 day notice requirement set forth in Section 63.10(c) of the Commission's Rules and the content of notice requirement set forth in Section 63.71(b) of the Rules, 47 C.F.R. §§ 63.10(c) and 63.71(b). The application was placed on public notice on August 22, 1990. No comments were received in response to the public notice.

2. WUC states that it is engaged in financial restructuring which is necessary because it faces both near-term and long-term liquidity crises resulting from annual cash interest obligations that cannot be supported by WUC's operating cash flow. In order to protect its core business and to acquire vitally needed additional capital, WUC now proposes to sell its Business Services assets, which include its telex facilities and operations, to the American Telephone and Telegraph Company (AT&T). Consequently, WUC requests authority to discontinue the provision of international telex service. Specifically, WUC requests discontinuance of the Commission's Section 214 authorizations[1] set forth in the instant application to the extent that those authorizations relate to WUC's provision of international telex service. WUC states that there will be no actual discontinuance of service to customers as AT&T will continue to provide the international telex service now provided by WUC upon WUC's discontinuance of that service.

DISCUSSION

3. We find that WUC has demonstrated that neither the present nor future public convenience and necessity will be adversely affected by its proposed discontinuance of the provision of international telex service. We note in this regard that there will be no actual discontinuance of service to WUC customers as AT&T will provide international telex service to those customers upon WUC's discontinuance of that service. In view of the fact that AT&T will continue the provision of international telex service to WUC's customers upon WUC's discontinuance of that service, we also find that grant of WUC's request for waiver of the 120 day notice of discontinuance of service provision of Section 63.10(c) of the Commission's Rules will not inconvenience WUC's customers. Therefore we shall grant WUC's requested waiver. We shall also grant WUC's requested waiver of the content of notice requirements of Section 63.71(b) of the Commission's Rules. We find that the language used by WUC in the notice it sent to its customers on July 3, 1990 sufficiently informed them of the proposed transfer of international telex service from WUC to AT&T. Therefore, we grant WUC's requested waiver.

4. We note that completion of the proposed sale of WUC's telex operations are also the subject of an application filed by AT&T, File Nos. W-P-C-6622 and I-T-C-90-163, seeking authority pursuant to Section 214 to acquire the WUC facilities used in the provision of telex service. Because of the relevance of our action on that AT&T application to the sale of WUC's telex operations and WUC's discontinuance of international telex service, we shall make the authorization we grant here subject to the ultimate disposition of AT&T's application.

ORDERING CLAUSES

5. In view of the foregoing, IT IS HEREBY CERTIFIED that neither the present nor future public convenience and necessity will be adversely affected by WUC's discontinuance of the provision of international telex service.

6. Accordingly, IT IS ORDERED that application File No. I-T-D-90-011 of Western Union Corporation IS GRANTED and WUC is authorized to discontinue its provision of international telex service.

7. IT IS FURTHER ORDERED that WUC's request for waiver of the 120 day notice provision of Section 63.10(c) of the Commission's Rules IS GRANTED.

8. IT IS FURTHER ORDERED that WUC's request for waiver of the content of notice requirement of Section 63.71(b) of the Commission's Rules IS GRANTED.

9. IT IS FURTHER ORDERED that this authorization is subject to the Commission's action on AT&T's application File Nos. W-P-C-6622 and I-T-C-90-163.

10. This order is issued under Section 0.291 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.1115 of the Commissions's Rules may be filed within 30 days of the date of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Firestone
Chief, Common Carrier Bureau

FOOTNOTE

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[1] WUC's application lists the Commission Section 214 authorizations granted to WUC but does not list those Commission Section 214 authorizations originally granted to ITT World Communications Inc. (ITT Worldcom) which WUC acquired at

the time WUC acquired the telex operations of that company. WUC states that the records of the ITT Worldcom authorizations were lost and recreation of a list of those authorizations from the Commission's files would be extremely difficult. Therefore, WUC requests a waiver of the requirement to provide Section 214 file numbers for those former ITT Worldcom authorizations. We grant this WUC request. The authority to discontinue the provision of international telex service granted by this decision applies to the authority to provide telex service contained in both the Section 214 authorizations issued to WUC and those transferred to WUC from ITT Worldcom.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-263

In the Matter of

Amendment of Section 73.3525 of the
Commission's Rules Regarding
Settlement Agreements Among
Applicants for Construction Permits

REPORT AND ORDER

Adopted: December 13, 1990; Released: December 21, 1990

By the Commission:

1. As part of our continuing effort to eliminate abuse of Commission processes, we issued a *Notice of Proposed Rule Making* in this proceeding.[1] The *Notice* considered whether to limit the payments that can be made to settle cases involving competing applications for construction permits for new broadcast stations or modifications to facilities of existing stations.[2] We now decide to limit payments that may be received by applicants to legitimate and prudent out-of-pocket expenses up until the point that the trial phase of the hearing commences and prohibit any payments at all thereafter. This new rule will become effective on March 21, 1991, subject to Office of Management and Budget approval.

I. LIMITATIONS ON SETTLEMENT PAYMENTS

2. Some commenters[3] observe that the current policy permitting unlimited settlement payments in comparative new proceedings may create positive inducements to settle.[4] Indeed, in enacting the current version of the statute governing comparative new settlements (*i.e.*, 47 U.S.C. § 311(c)), Congress stated that settlement agreements "generally serve the public interest because they often avoid lengthy hearing appeals, thus expediting the start of the new broadcast service involved in the proceeding."[5] The record in this proceeding nonetheless persuades us that we should curtail payments made in comparative new settlements. We agree with NAB and others[6] that allowing unlimited settlement payments also creates an incentive to file frivolous applications. Deterrence of such sham applications was also clearly a Congressional objective when it enacted the current version of Section 311(c).[7] Thus, our decision to limit settlement payments not only will serve this important statutory goal, but also, as some suggest, should reduce or eliminate "profiteering" on Commission processes.[8] Such limitations will also further another purpose underlying Section 311(c), that of expediting hearings,[9] by reducing the number of non-*bona fide* applicants, and hence the complexity of proceedings.[10] Moreover, our decision to forbid payments once the trial stage of a case has begun will encourage earlier settlements, accelerating the resolution of proceedings and easing the burden both on litigants and on administrative resources. Finally, the disclosure requirements we are adopting will enable us to enforce compliance with payment limitations.[11]

3. The *Notice* solicited comment on ways to limit settlement payments. It proposed as one alternative limiting payments to expenses until a date certain -- such as a special settlement conference -- and reducing permissible payments thereafter.[12] In light of the hearing reforms adopted in General Docket No. 90-264, we do not here adopt the proposed settlement conference as the date on which recovery will be cut off.[13] We do, however, agree with the concept underlying such a demarcation point.[14]

4. We will permit applicants settling before the trial phase of the hearing commences to recover their legitimate and prudent expenses. This policy will encourage *bona fide* applicants to apply, as they will be able to recoup expenses up until the point at which they can make a realistic assessment of their probabilities of success. Once discovery is complete, the parties possess enough factual information to make a reasoned judgment on the probable outcome of their applications. Moreover, it is at this post-discovery point that the new voluntary settlement conference procedure provided for in General Docket No. 90-264 will become available to the parties. The settlement conference will provide a means for applicants to obtain an impartial assessment of their relative chances of prevailing over their competitors. In this way, an applicant's own assessment of its chances of success can be supplemented by the views of a third-party expert. Based on this information, applicants should be sufficiently apprised of the strengths and weaknesses of their cases so that an informed decision either to settle for expenses, or to continue with the comparative process, can be made. In the interest of expediting the delivery of new service to the public,[15] we wish to encourage settlement as soon as possible after the settlement conference is held, or after discovery is complete if no voluntary settlement conference is held. We believe that prohibiting payments made in exchange for dismissing applications will accomplish this result. The start of the trial phase of the hearing is a logical point for such a prohibition to attach.[16] This is a date certain of which all the parties have notice.[17] At this stage the applicants begin to incur significant additional expenses in the litigation of a case. Settlement at this point would be particularly beneficial to the successful applicant. The winning party would not have to expend resources litigating against less meritorious contenders in hearing. Instead, it would be able to use those resources to offer service to the public from a new station. Finally, commencement of the trial is a point at which parties traditionally attempt to settle.[18] We thus will prohibit all payments to settling parties after the trial phase of the hearing commences, *i.e.*, as of the first day of the trial phase of the hearing.

5. The *Notice* also specifically suggested that we permit reimbursement after the settlement conference, but only of a lesser amount (*e.g.*, 50 percent) of expenses.[19] Proponents of a graduated reduction in the amount of permissible recovery argue that this approach would encourage prompt settlements.[20] However, precluding settlement payments altogether after a point certain in the process will provide the greatest incentive toward early settlements and will therefore expedite the overall hearing process. Further consideration of this issue, moreover, suggested that any settlement plan turning on percentages

of expenses could be particularly prone to manipulation. To minimize this potential, we would be required to increase the expenditure of staff resources needed to review such agreements. It would be inconsistent with our intent to make our processes both efficient and fair to introduce a potential new source of delay and manipulation. Thus, on balance, we have determined that precluding settlement for payment after a specific point in the process would be preferable to allowing any form of settlement for expenses after such a cutoff. For the reasons explained above, we have found that the start of the trial phase of the hearing will provide a suitable point after which all settlements can be precluded.

6. The *Notice* also proposed, and some parties advocate, limiting settlement payments to out-of-pocket expenses throughout the comparative new process.[21] We find, however, that prohibiting all recovery after the trial phase starts will more effectively deter frivolous filings and encourage early settlements. Nevertheless, we do not adopt proposals to ban or severely limit payments at all stages in a comparative new case.[22] We fear that such a proposal might deter good faith applicants. Our new rule permits *bona fide* applicants to settle for expenses up until the point at which they can make an objective assessment of the probabilities of success. At such point -- the trial stage of the case -- the good faith applicant with a relatively weaker case is still able to recover its expenses. By encouraging settlement at this point, we lessen the likelihood that other parties with relatively stronger cases, as well as the resources of the agency, will be burdened by having to litigate a more complex case. Our new rule therefore will encourage both the filing of good faith applications and the continued prosecution of such *bona fide* applications as have an objective probability of succeeding at trial. Contrary to the fears of some parties,[23] we believe that our new rule will encourage *bona fide*, qualified, but less financially able applicants to continue to apply.

7. We also agree with those commenters fearing that allowing any recovery above expenses may encourage abuse and discourage less wealthy, yet *bona fide*, applicants that lack the wherewithal to finance large settlements but that nevertheless wish to own and operate a station.[24] Consequently, we do not adopt proposals either to allow uncapped payments for even a limited period,[25] or to permit recovery of a percentage above expenses, even if only until a date certain.[26]

8. Several parties urge alternative reforms that are beyond the scope of this docket. For example, NAACP and others advocate a limited exception for minorities to what they view as a general prohibition on third-party buyouts.[27] NAACP, among others, also advocates creation of a "Minority Media Ownership Trust" to be funded from a portion of the excess over expenses paid in settlements that would be used to support and train minority entrepreneurs.[28] BCFM and CBC advocate tightening the anti-trafficking rules[29] as an additional deterrent to abuse.[30] We express no opinion on the merits of these alternative proposals, which are not within the scope of this proceeding.

II. LEGAL AUTHORITY

9. Prior to 1982, Section 311(c) of the Communications Act authorized the Commission to approve comparative new settlements only if settlement payments did not exceed the legitimate and prudent expenses incurred by the applicant in prosecuting its application.[31] In 1982, Congress amended Section 311(c), striking the expense limitation.[32] It substituted the broader language that it had added to Section 311(d) (governing comparative renewals) a year earlier. In *Texas Television, Inc.*, the Commission determined (without any detailed explanation) that the Mass Media Bureau's interim policy of continuing to limit settlement payments, pending the outcome of a proceeding to determine whether to modify this restriction, conflicted with new Section 311(c).[33] The Commission thereafter (without notice and comment) modified Section 73.3525 of its Rules, 47 C.F.R. § 73.3525, to eliminate the out-of-pocket expense limitation.[34]

10. The *Notice* requested comment on the tentative conclusion that the Commission had the legal authority to impose settlement limitations under Section 311(c) of the Communications Act. Only one commenter doubts whether Section 311(c) permits such limitations. English contends that the Conference Report indicates that Congress' overriding statutory goal was to expedite settlements. English argues that reinstatement of settlement limits would require time-consuming Commission scrutiny, an administrative outcome that Congress explicitly rejected. English also argues that while the language of Sections 311(c) and 311(d) are the same, their purposes are different. It states that, in contrast to Section 311(c), Section 311(d) did not have as an objective encouraging settlements. Thus, according to English, even if restrictions on comparative renewal settlement payments are consistent with Section 311(d), this is irrelevant for purposes of interpreting Section 311(c).[35]

11. Contrary to our decision in *Texas Television* (which we hereby reverse), we agree with NAB and BCFM that Section 311(c) permits us to impose settlement limitations in the public interest.[36] We conclude, with NAB, that the deletion of the statutory language limiting settlement payments was intended to broaden, not narrow, Commission discretion in reviewing settlements. On its face, the statutory language in no way conflicts with our interpretation. Moreover, the language of the statute and the legislative history indicate that the statute permits approval of settlement agreements only if the Commission can determine that no party filed a "sham" application, *i.e.*, an application filed for the purpose of effectuating a settlement.[37] We may reasonably determine that the best way to ensure that applicants do not file such frivolous applications is to limit settlement payments as we have. Moreover, as observed above,[38] settlement payment limitations, by deterring speculative applications, can expedite the comparative new process, one goal of Section 311(c). By banning payments after the trial phase commences, we are contributing further to such expedition, by encouraging settlements early in the proceeding. Furthermore, the manner in which we implement our new rules ensures that Commission review of comparative new settlement agreements will be expeditious.[39] Finally, we find that Congress intended that both Section 311(c) and Section 311(d) deter sham applications in the comparative new and renewal contexts, respectively.[40] Thus, we believe it

correct to interpret both statutes in the same way, taking account of Congress' concerns for expediting the resolution of comparative new proceedings.

III. TREATMENT OF PENDING APPLICATIONS AND SETTLEMENT AGREEMENTS

12. We recently applied settlement limitations to all pending comparative renewal applications except those that had already been designated for hearing at the time the new rules became effective. We found it important to the public interest to implement those reforms as quickly and as broadly as possible. We excepted post-designation applicants because they, in contrast to applicants at the pre-hearing stage, may have relied on our previous policies in expending considerable resources in litigation.[41] In the comparative new arena it is also important to implement the reforms we adopt herein as soon as possible. For this reason we will not apply our new rules to new applicants only, as AWRT suggests.[42] At the same time, we believe that some accommodation must be made for existing applicants that have relied on our previous policies and could be prejudiced by the rule change.[43] Because some of our concerns in the comparative new context differ from those we have for comparative renewals, the form this accommodation takes will also differ.

13. Expeditious resolution of proceedings to facilitate the offering of new service to the public is a primary concern in comparative new cases. In the renewal context, by contrast, an incumbent generally will continue to provide service throughout the pendency of a proceeding. Thus, while applicants' reliance on existing rules in expending resources was a basis for not applying limitations to pending renewal proceedings already in hearing, the need to expedite service to the public through early settlements outweighs that reliance in the comparative new context. However, we must delay the effective date of the new rules beyond the normal 30 days required by the Administrative Procedure Act in order to obtain the approval of the Office of Management and Budget for the information collection requirements we adopt herein.[44] The effect of this delay is to provide a brief grace period for applicants before the new rules become effective, an alternative advocated by AWRT.[45] This brief postponement will also provide a reasonable protection of parties' reliance interests, while not interfering with our goal of encouraging early settlements among applicants in pending comparative new proceedings. Accordingly, as of the effective date of the new rules, March 21, 1991, the settlement payment limitations will apply to all applications, including those which are pending at that point. Any settlement agreements filed before this date will be considered under our former rules and policies.

IV. DISCLOSURE AND CERTIFICATION REQUIREMENTS

14. The *Notice* proposed to add to Section 73.3525 of our Rules a requirement that parties seeking approval of a settlement also submit (1) certifications that they have not received and will not receive any money or other consideration in excess of their legitimate and prudent expenses; (2) the exact nature and amount of any consideration paid or promised; (3) an itemized accounting of the expenses for which they seek reimbursement; and (4) the terms of any oral agreement relating to the dismissal or amendment of the application in question.[46] Upon review of the record, we adopt these requirements for applicants settling prior to the commencement of the trial phase of a comparative new proceeding. Any applicant seeking to dismiss or withdraw after the commencement of the trial phase must certify that it has received no consideration in exchange for such dismissal or withdrawal.

15. We decline to establish a bifurcated procedure, as HRO suggests,[47] of certification in the first instance by all applicants, followed by expense itemizations required of some fraction of applicants in the discretion of the administrative law judge and according to random selection. We believe that requiring a full disclosure of the consideration paid in each instance comports better with the overriding goal of this proceeding, to deter abuse of our processes. As noted above,[48] the time periods for oppositions to proposed settlements will remain the same as under our former rules. This factor, together with the approach we intend to follow in implementing these procedures articulated below, should ensure expeditious approval of settlements that are in the public interest. Finally, the certification and disclosure requirements we adopt herein are essentially the same as those adopted in the comparative renewal context.[49] This parallelism makes our procedures easier to understand and simpler to administer.

16. Two parties request that we clarify our policy on what expenses may be reimbursed, and in particular, on whether expenses incurred in negotiating a settlement are recoverable.[50] Because of the intervening change in the language of Section 311,[51] we do not adopt wholesale the administrative interpretation of reimbursable expenses used prior to the 1982 amendment to that statute. For example, the governing statute no longer constrains us to limit settlement payments to those expenses incurred in "preparing, filing and advocating the granting" of an application.[52] Indeed, the legislative history of the 1982 amendment evinces an intent to expedite proceedings via settlements. We agree with the FCBA that expenses legitimately and prudently incurred in preparing and negotiating a settlement are recoverable.[53]

17. We also believe that it will be beneficial to provide some additional guidance to the staff and interested parties in three areas. First, we clarify that itemizations of professional expenses may be submitted in statement form.[54] Second, as a general matter, principals of applicants are not entitled to reimbursement for services performed on behalf of the applicant.[55] Third, settling parties are required either to submit any ancillary agreements they have made, such as consulting agreements, or to certify that these do not exist.[56]

V. CONCLUSION

18. The policy and rule changes we adopt herein constitute another important step toward our goal of eliminating abuse of Commission processes, while preserving the opportunity for meaningful participation in the comparative hearing process, and of ensuring that new service to the public is expedited.

FINAL REGULATORY FLEXIBILITY ANALYSIS STATEMENT

I. Need and Purpose of this Action:

19. This action is taken as part of the Commission's continuing effort to eliminate abuse of its processes. It is additionally intended to expedite the comparative licensing process by reducing the volume of applications filed and by removing profit as a factor in settlement agreements, and to facilitate the provision of new service to the public.

II. Summary of Issues Raised by the Public Comments in Response to the Initial Regulatory Flexibility Analysis:

20. No comments were received relating to the Initial Regulatory Flexibility Analysis.

III. Significant Alternatives Considered and Rejected:

21. The Commission considered prohibiting all or nearly all settlement payments at any stage in a comparative new case. However, such a stringent restriction might deter good faith applicants.

22. A second option considered would have permitted recovery of expenses up to a point certain in the proceeding and after such point, recovery only of a portion (*e.g.*, 50 percent) of expenses. The Commission found that precluding all settlement payments after a point certain in the proceeding would provide the greatest incentive toward early settlement and would therefore expedite the overall hearing process.

23. A third option considered and rejected would have allowed the recovery of expenses throughout a comparative new proceeding. The Commission found that prohibiting all recovery after the trial phase starts will more effectively deter frivolous filings, encourage early settlements and conserve applicants' and Commission resources.

24. Finally, the Commission considered allowing settlement payments to reimburse some set figure above expenses. This option would not sufficiently deter sham applications and might prevent *bona fide* applicants with limited financial resources from filing.

25. The Secretary shall send a copy of this *Report and Order*, including the Final Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration in accordance with paragraph 603(a) of the Regulatory Flexibility Act (Pub. L. No. 96-354, 94 Stat. 1164, 5 U.S.C. Section 601 *et seq*. (1981)).

PAPERWORK REDUCTION ACT STATEMENT

26. The decision contained herein has been analyzed with respect to the Paperwork Reduction Act of 1980, and found to impose a new or modified requirement or burden upon the public. Implementation of any new or modified requirement will be subject to approval by the Office of Management and Budget as prescribed by the Act.

ORDERING CLAUSE

27. Accordingly, IT IS ORDERED that pursuant to the authority contained in Sections 4, 303 and 311 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154, 303, and 311, Part 73 of the Commission Rules, 47 C.F.R. Part 73, IS AMENDED as set forth below, effective March 21, 1991, subject to Office of Management and Budget approval.

28. Further information on this proceeding may be obtained by contacting Gina Harrison, Mass Media Bureau at (202) 632-7792.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX A

PARTIES FILING COMMENTS

American Women in Radio and Television, Inc. (AWRT)

William O. Barry (Barry)

Black Citizens for a Fair Media, Chinese for Affirmative Action, District of Columbia Chapter of the National Association of Puerto Rican Women, Hispanic Bar Association of the District of Columbia, Media Access Project, Mexican American Legal Defense and Educational Fund, National Association for Better Broadcasting, National Council of La Raza, Philadelphia Lesbian and Gay Task Force, and Telecommunications Research and Action Center (BCFM)

English Communications Limited Partnership, Hampton Broadcasting Limited Partnership, Sundial Radio Broadcasters, a California Limited Partnership, Anchor Broadcasting Limited Partnership, Clarksville Broadcasting Limited Partnership, Ellwood Beach Broadcasting, Ltd., Fernandina Beach FM Limited Partnership, Fresno FM Limited Partnerhsip, Hamptons Communications Limited Partnership, Highland Communications, Ltd., Hillside Broadcasting Limited Partnership, Jupiter Broadcasting Limited Partnership, Port St. Lucie Broadcasting Limited Partnership, Radio Lompoc Limited Partnership, Salinas Broadcasting Limited Partnership, a California Limited Partnership, and Weyburn Broadcasting Limited Partnership (English)

Comments of the Federal Communications Bar Association (FCBA)

Henderson Broadcasting of Memphis, Inc. (Henderson)

Michael J. Hirrel (Hirrel)

Holme Roberts & Owen (HRO)

J.M. Broadcasting Ltd. (J.M.)

National Association for the Advancement of Colored People, the League of United Latin American Citizens, and the National Black Media Coalition (NAACP)

National Association of Broadcasters (NAB)

Elinor Lewis Stephens (Stephens)

Vince Lee Broadcasting Ltd. (Vince Lee)

PARTIES FILING REPLY COMMENTS

Black Citizens for a Fair Media, Chinese for Affirmative Action, D.C. Chapter of the National Conference of Puerto Rican Women, Hispanic Bar Association of the District of Columbia, Media Access Project, Mexican American Legal Defense and Educational Fund, National Association for Better Broadcasting, National Council of La Raza, Philadelphia Lesbian and Gay Task Force, Telecommunications Research and Action Center (BCFM)

Congressional Black Caucus (CBC)

Howard University Small Business Center (Howard)

Michael J. Hirrel (Hirrel)

Kirk Johnson (Johnson)

Mid-West Family Group (Mid-West)

National Bar Association and the National Association of Black-Owned Broadcasters (NBA)

Keith L. Reising (Reising)

Smithwick & Belendiuk, P.C. (S&B)

APPENDIX B

Part 73 of the Title 47 of the Code of Federal Regulations is amended to read as follows:

1. The authority citation for Part 73 continues to read as follows:

AUTHORITY: 47 U.S.C. §§ 154, 303.

2. Section 73.3525 is amended by revising introductory paragraph (a), removing the final word "and" in paragraph (a)(1), substituting a semicolon for the period at the end of paragraph (a)(2), adding new paragraphs (a)(3), (a)(4), (a)(5), (a)(6), adding new paragraph (b), redesignating existing paragraphs (b) through (h) as paragraphs (c) through (i), and adding new paragraphs (j), (k), and (l) to read as follows:

§ 73.3525 Agreements for removing application conflicts.

(a) Except as provided in § 73.2523 regarding dismissal of applications in comparative renewal proceedings, whenever applicants for a construction permit for a broadcast station, prior to the commencement of the trial phase of the proceeding, enter into an agreement to procure the removal of a conflict among applications pending before the FCC by withdrawal or amendment of an application or by its dismissal pursuant to § 73.3568, all parties thereto shall, within 5 days after entering into the agreement, file with the FCC a joint request for approval of such agreement. The joint request shall be accompanied by a copy of the agreement, including any ancillary agreements, and an affidavit of each party to the agreement setting forth:

(1) The reasons why it is considered that such agreement is in the public interest;

(2) A statement that its application was not filed for the purpose of reaching or carrying out such agreement;

(3) A certification that neither the applicant nor its principals has received any money or other consideration in excess of the legitimate and prudent expenses of the applicant;

(4) The exact nature and amount of any consideration paid or promised;

(5) An itemized accounting of the expenses for which it seeks reimbursement; and

(6) The terms of any oral agreement relating to the dismissal or withdrawal of its application.

(b) If a competing applicant seeks to dismiss or withdraw its application after commencement of the trial phase of the proceeding, it must submit to the Commission a request for approval of the dismissal or withdrawal of its application, a copy of any written agreement related to the dismissal or withdrawal of its application, and an affidavit setting forth:

(1) A certification that neither the applicant nor its principals has received or will receive any money or other consideration in exchange for dismissing or withdrawing its application;

(2) A statement that its application was not filed for the purpose of reaching or carrying out an agreement with any other applicant regarding the dismissal or withdrawal of its application; and

(3) The terms of any oral agreement relating to the dismissal or withdrawal of its application.

In addition, within 5 days of the applicant's request for approval, each remaining competing applicant must submit an affidavit setting forth:

(4) A certification that neither the remaining applicant nor its principals has paid or will pay any money or other consideration to the withdrawing applicant in exchange for the dismissal or withdrawal of the application; and

(5) The terms of any oral agreement relating to the dismissal or withdrawal of the application.

* * * * *

(j) For purposes of this section, "legitimate and prudent expenses" are those expenses reasonably incurred by a petitioner in preparing, filing, prosecuting, and settling its petition and for which reimbursement is being sought.

(k) For purposes of this section, "other consideration" consists of financial concessions, including, but not limited to, the transfer of assets or the provision of tangible pecuniary benefit, as well as non-financial concessions that confer any type of benefit on the recipient.

(l) For purposes of this section, an "ancillary agreement" means any agreement relating to the dismissal of an application or settling of a proceeding, including any agreement on the part of an applicant or principal of an applicant to render consulting services to another party or principal of another party in the proceeding.

FOOTNOTES

[1] *Notice of Proposed Rule Making* in MM Docket No. 90-263, 5 FCC Rcd 3921 (1990) (*Notice*).

[2] Comparative hearings are held in the new licensing context when there are mutually exclusive (or competing) applications for new stations or conflicts between applications for new stations and applications by existing licensees to modify their facilities. In both proceedings (hereinafter "comparative new" proceedings), one (or more) of the applicants may pay the others either to dismiss or amend their applications to eliminate the mutual exclusivity.

[3] A list of parties filing comments and reply comments, together with the abbreviations for these parties, are contained in Appendix A. In this proceeding, 13 parties filed timely com-

ments and seven parties filed timely replies. Two parties, CBC and Howard, submitted replies one and two days late, respectively, together with requests to file out of time. We grant these requests and accept these two pleadings.

[4] FCBA Comments at 4; Henderson Comments at 3; J.M. Comments at 3; Vince Lee Comments at 3; Mid-West Reply at 6. The FCBA membership is divided on the question of whether to limit settlement payments. One faction believes that the current policy permitting unlimited settlement payments creates positive incentives to settle. The other faction, composed of the FCBA executive committee and much of its membership, however, believes that there is a need for settlement payment limitations. FCBA Comments at 2-3.

[5] H. R. Rep. No. 765, 97th Cong., 2nd Sess. 50 (1982) (Conference Report), *reprinted in* RR 2d (Finding Aids) 10:643. *See also* English Comments at 2-4.

[6] NAB Comments at 2. *See generally* BCFM Comments at 5-6; Hirrel Comments at 8-9; HRO Comments at 2-3.

[7] Conference Report at 50, *reprinted in* RR 2d (Finding Aids) 10:642.

[8] *See, e.g.*, NAB Comments at 2; HRO Comments at 2-3.

[9] Conference Report at 50, *reprinted in* RR 2d (Finding Aids) 10:642; *see also* 47 U.S.C. § 155(d).

[10] *See generally* NAB Comments at 3; BCFM Comments at 5-6; BCFM Reply at 4; NBA Reply at 3-4. An unlimited settlement payment policy may tend to expedite the later stages of a case, facilitating dismissals once applications have been filed. On the other hand, limiting settlement payments accelerates the process at the initial stages of a case by deterring frivolous filings before a proceeding has commenced and thus reducing the number of applications from the outset. In addition, our policy banning payments after the trial stage begins encourages applicants that do file, at a relatively early point in the case and based on the facts they have obtained through discovery, to make a realistic assessment of their likelihood of winning.

[11] *See infra* Section IV. Of course, any attempts to evade our rules, as the S&B Reply at 2 hypothesizes will occur, will be subject to sanctions, including designation of a permit or license for revocation and imposition of forfeitures and prosecution for misrepresentation of a material fact. 47 U.S.C. § § 312, 503; 18 U.S.C. § 1001. We would reject any settlement tainted by such conduct. A character issue would be designated against any dismissing party participating in such evasion, which issue would have to be resolved before any subsequent applications the party filed were granted. *Cf. West Jersey Broadcasting Co.*, 90 FCC 2d 363 (Rev. Bd. 1982) (denying license renewal for violation of 47 U.S.C. § 311 and accompanying misrepresentations).

[12] *Notice*, 5 FCC Rcd at 3923.

[13] The *Report and Order* in Gen. Docket No. 90-264, adopted today, establishes a procedure for voluntary settlement conferences before an impartial settlement judge. *Proposals To Reform the Commission's Comparative Hearing Process To Expedite the Resolution of Cases*, Gen. Docket No. 90-264, FCC Rcd, FCC 90-410, (adopted Dec. 13, 1990; released Dec. 21, 1990). Because of its voluntary nature, the settlement conference could not be used as a cut-off point for settlement payments in all cases.

[14] *See generally* HRO Comments at 4-5 & n.4; NAB Comments at 2-3 n.9 & at 4.

[15] Conference Report at 50, *reprinted in* RR 2d (Finding Aids) 10:643.

[16] *See generally* Stephens Comments at 1 (arguing for reduction of permissible amount of recovery after a date certain in order to encourage early settlements).

[17] The date is set in an order issued by the Administrative Law Judge after the judge is assigned to the case.

[18] Several parties suggest other dates in the context of their specific proposals for permitting or denying settlement payments in varying degrees. *See, e.g.*, HRO Comments at 4-5 (proposing settlement "windows" with first cut-off prior to date motions to enlarge are due). For the reasons stated in the text, we believe that commencement of the trial phase of the case is the superior alternative.

[19] *Notice*, 5 FCC Rcd at 3923.

[20] *See, e.g.*, Stephens Comments at 1. *Cf.* AWRT Comments at 3 (alternatively advocating applying multiplier to expenses, to be reduced as the hearing advances, and arguing that such progressively decreasing payments could provide an incentive for early settlement).

[21] 5 FCC Rcd 3922-23. *See, e.g.*, BCFM Comments at 6-7; FCBA Comments at 2-3; Hirrel Reply at 3.

[22] NAB Comments at 2; Barry Comments at 1 (no expenses allowed until after the Initial Decision, at which time payment should be limited to the amount of filing fees). Our policy differs somewhat in the comparative renewal context. There, we completely prohibit settlement payments prior to an Initial Decision (and limit them to expenses thereafter) because an incumbent licensee with a greater stake in the outcome is particularly vulnerable to settlement demands early in the proceeding. By contrast, early stages of the comparative new process, where all applicants have made about the same level of investment, are less vulnerable to abuse. *Notice*, 5 FCC Rcd at 3922-23. On the other hand, we are particularly concerned with expediting resolution of comparative new cases, and therefore, with encouraging early settlements. Prohibiting settlement payments after the start of the trial phase effectively accomplishes this result. We also believe that it would undermine our goal of encouraging early settlements in the comparative new context to permit recovery, as we do for comparative renewals, after the Initial Decision.

[23] *See, e.g.*, BCFM Reply at 2; NBA Reply at 4-5.

[24] *See, e.g.*, BCFM Reply at 3-5; NBA Reply at 5-6.

[25] AWRT Comments at 2-3.

[26] FCBA Comments at 3 (part of FCBA constituency would support a cap equal to 125% of expenses, or alternatively, a 25% increase above expenses only until a date certain); AWRT Comments at 2-3 (alternatively proposes to limit expenses by use of a multiplier, which is reduced as the hearing advances).

[27] NAACP Comments at 7-8; Howard Reply at 3; CBC Reply at 5-6; Johnson Reply at 1. "Third-party buyout" refers to settlement payments made by a would-be permittee who is a non-party to a comparative proceeding in exchange for the withdrawal or dismissal of applications on the part of parties to the proceeding. BCFM opposes the NAACP proposal regarding third-party buyouts for several reasons, including a concern that it will create incentives for sham applications. BCFM Reply at 8-9.

[28] NAACP Comments at 9-16; Howard Reply at 3; CBC Reply at 4; Johnson Reply at 1. BCFM, while acknowledging the need for such a trust, believes that the funds for it should come from another source. BCFM Reply at 7.

[29] 47 C.F.R. § 73.3597.

[30] BCFM Comments at 7 n.2. On the other hand, some parties suggest that recent reform measures, such as imposition of the hearing fee and revisions to FCC Form 301, are more effective than limiting settlement payments. 47 C.F.R. § 1.1104; *Revision of Application for Construction Permit for Commercial Broadcast Station (FCC Form 301)*, 4 FCC Rcd 3853 (1989), *recon. denied*,

FCC 90-396, FCC Rcd (adopted Nov. 20, 1990; released Dec. 5, 1990); Henderson Comments at 3-4; Vince Lee Comments at 3-4; J.M. Comments at 3-4. We still perceive a need for reforms in addition to those cited by these commenters, a need addressed by the settlement limitations we now impose.

[31] Communications Act Amendments, 1960, Pub. L. No. 86-752, 74 Stat. 889 (1960), *formerly codified at* 47 U.S.C. § 311 (c) (1960 Amendment), *amended by* Pub. L. No. 97-259, 96 Stat. 1087, 1095 (Sept. 3, 1982).

[32] This current version of the statute provides that "[t]he Commission shall approve the agreement only if it determines that (A) the agreement is consistent with the public interest, convenience, or necessity; and (B) no party to the agreement filed its application for the purpose of reaching or carrying out such agreement." 47 U.S.C. § 311(c)(3).

[33] *Texas Television, Inc.*, FCC 83-95, Mimeo 95003 (Mar. 9, 1983).

[34] *Order re Amendment of Part 73*, 53 RR 2d 823 (1983), *recon. denied*, FCC 83-503, Mimeo No. 33980 (released Nov. 2, 1983).

[35] English Comments at 2-5.

[36] NAB Comments at 2 n.6; BCFM Reply at 10-11.

[37] 47 U.S.C. § 311 (c)(3)(B); Conference Report at 50, *reprinted in* RR 2d (Finding Aids) 10:642.

[38] *See supra* paras. 2-6 and note 10.

[39] *See infra* Section IV. We observe that the responsive pleading cycle applied to requests for settlement approval under our new rules is the same as under our former rules. 47 C.F.R. § 1.294.

[40] The Conference Report states:

> "Section 311(d) was intended to prevent the filing of frivolous applications calculated to harass an incumbent or coerce payment of expenses to the competing applicant. This provision imposes identical standards and furthers the same goals in proceedings involving competing applications for new broadcast facilities."

Conference Report at 50, *reprinted in* RR 2d (Finding Aids) 10:642. The Conference Report, however, recognized the importance of expediting comparative new proceedings, where settlement means the initiation of new service to the public. Conference Report at 50, *reprinted in* RR 2d (Finding Aids) 10:643. In the comparative renewal arena, by contrast, the public is already being served by an incumbent during the hearing.

[41] *Formulation of Policies and Rules Relating to Broadcast Renewal Applicants, Competing Applicants, and Other Participants to the Comparative Renewal Process and to the Prevention of Abuses of the Renewal Process*, 4 FCC Rcd 4780, 4788 (1989) (*Comparative Renewal Order*), *recon. granted in part on other grounds*, 5 FCC Rcd 3902 (1990), *further recon. pending*.

[42] AWRT Comments at 3-4.

[43] Thus, while we apply our new rules to all pending applications, whether designated for hearing or not (as suggested in Barry Comments at 1 and BCFM Reply at 9) we also make a modest allowance for hardships that this may impose on those that relied on our prior rules.

[44] *See* 5 U.S.C. § 553(d); 5 C.F.R. § 1320.14(c).

[45] AWRT Comments at 3-4.

[46] 5 FCC Rcd at 3923.

[47] HRO Comments at 6-7.

[48] *See supra* note 39.

[49] *Comparative Renewal Order*, 4 FCC Rcd at 4787-88.

[50] FCBA Comments at 4-5; BCFM Reply at 3 n.1.

[51] The former statute described the allowable amount as that "determined by the Commission to have been legitimately and prudently expended and to be expended by such applicant in connection with preparing, filing, and advocating the granting of his application." 1960 Amendment, *supra* note 31. The current statute deletes this language and leaves us considerably more discretion in passing on settlement agreements.

[52] 1960 Amendment, *supra* note 31.

[53] FCBA Comments at 4-5. We thus do not intend to apply the interpretation used under the pre-1982 version of Section 311(c). *See,e.g., Keith L. Reising,* 4 FCC 2d 868 (Rev. Bd. 1966) (expenses incurred in settling a case not recoverable).

[54] It would not be necessary, however, to submit detailed descriptions of the number and job levels of persons providing professional services, or information as to hours and billings for professionals of various job levels. Nevertheless, a brief description of the nature of the specific activity and its connection with the comparative new proceeding should be provided. For example, the following descriptive phrases would be acceptable: "meeting with opposing counsel in connection with settlement," "research in connection with preparing motion to enlarge." *See generally Re-evaluation of Standards for Professionals Seeking Reimbursement Pursuant to Rule 73.3525*, 88 FCC 2d 1047 (1982).

[55] *Gray-Schwartz Broadcasting,* 47 RR 2d 1670, 1675 & n.14 (1980); *Communications Properties, Inc.*, 27 RR 2d 1600 (1973).

[56] *See generally Texas Television, Inc.*, 91 FCC 2d 1047 (Rev. Bd. 1982) (describing pre-1982 policy on consultancy agreements). *See also Venton Corporation*, 90 FCC 2d 307 (1982).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Local Exchange Carriers'
January 1, 1991
Access Tariff Revisions

National Exchange
Carrier Association

Tariff F.C.C. No. 5 Transmittal No. 427

ORDER

Adopted: December 21, 1990; Released: December 21, 1990

By the Chief, Common Carrier Bureau:

I. OVERVIEW

1. On November 1, 1990, the Nation's local exchange carriers (LECs) as well as the National Exchange Carrier Association (NECA) filed access tariff revisions[1] implementing the Commission's recent reduction in the authorized rate of return (ROR) from 12.0 percent to 11.25 percent.[2] These revisions would reduce access charges by approximately $372 million.

2. In the same filings, the Bell Operating Companies (BOCs) and GTOC [3] filed access charge revisions pursuant to the Commission's mandatory price cap rules, while United Telephone and Contel made voluntary price cap filings.[4] These filings both implement the Commission's reduction in the authorized rate of return and represent these LECs' first tariff filings under the Commission's recent *LEC Price Cap Order*.[5] The price cap indexes for carriers subject to price cap regulation include rate reductions of approximately $342 million to reflect the Commission's reduction in the authorized rate of return.

3. In addition to its tariff implementing the rate of return represcription,[6] NECA filed three other transmittals proposing various increases.[7]

4. On November 16, 1990, eight parties[8] filed petitions against one or more of the proposed tariff revisions implementing the rate of return represcription and price cap regulation. Both AT&T and MCI filed additional petitions against NECA's USF tariff revisions.[9] Both the LECs whose tariff revisions were challenged and NECA filed replies to these petitions.[10]

5. Following submission of these tariff revisions, several carriers either filed errata to correct their November 1 filings or requested special permission to correct those November 1 filings.[11] To achieve uniformity and coordination in the correction of these filings, the Bureau issued a Public Notice on November 28, 1990, specifying the forms and procedures to be utilized to make such corrections to the materials filed on November 1.[12] Generally the Bureau directed the LECs to submit requests for special permission to file errata materials subject to the same January 1 effective date as the original materials.

6. The November 1 access filings are primarily designed to reduce rates to retarget the carriers' rates of return from 12 percent to 11.25 percent. Additionally, for carriers subject to price cap regulation, the filings endeavor to show the correct computation of the price cap indexes. With respect to the price cap tariffs, many petitioners raise index calculation issues. Our review indicates that most indexes and the rate levels filed, including rates for high capacity DS1 and DS3 services, comply with cap and band requirements. In some cases, we require carriers to file revisions to the tariffs on December 28, 1990. A separate Order To Show Cause addresses the issues presented by the Nevada Bell Special Access tariff.[13]

7. In general, we conclude that the filings show the carriers' rates of return have been properly retargeted to 11.25 percent. Price cap index values are, for the most part, computed accurately. Variations in rates, including rates for high capacity services, appear to be within the applicable bands. The revisions required by this Order must be filed on December 28, 1990, so that the tariffs may become effective on January 1, 1991.

II. DISCUSSION OF ISSUES

A. Services Excluded From Price Cap Regulation

1. Pleadings

8. Ad Hoc asserts that Bell Atlantic improperly fails to adjust rates for services excluded from the price cap system to reflect the reduction in the prescribed rate of return.[14] Ad Hoc states that the Commission directed LECs to effect an across-the-board rate reduction since the effect of the rate of return represcription is to reduce the return component of existing rates. The resultant rate reductions, Ad Hoc states, should be approximately equal (on a percentage basis). Ad Hoc Petition at 8. Specifically, Ad Hoc claims that Bell Atlantic fails to reduce the rate elements for the Switched Access Service Public Data Network, which it excluded from price cap regulation, and that those rates therefore remain targeted to earn a 12 percent return. *Id.* at 9. Ad Hoc therefore urges that Bell Atlantic (and any other price cap LECs which have not reduced rates for services not included in the price cap system) should be directed to revise those rates. *Id.* Ad Hoc also contends that the required rate of return represcription should apply to new services not yet subject to price cap regulation. *Id.*

9. While Bell Atlantic does not address this issue in its reply, NYNEX asserts that Ad Hoc is incorrect in arguing that the LECs must apply the rate of return represcription exogenous changes to new services. Citing the *TRP Order*, NYNEX says LECs must apply the rate of return represcription changes to the Price Cap Index (PCI) and then employ those changes to adjust their rates in accordance with the Commission's Rules. Since new services are temporarily held outside of price cap regulation, LECs were, in the view of NYNEX, correct in not adjusting rates for new services to reflect exogenous adjustments. NYNEX Reply at Appendix G, p. 1-2.

2. Discussion

10. As it acknowledges in its reply, NYNEX has not lowered its rates for new services to reflect the change in the authorized rate of return. *See* NYNEX Reply at Appendix G, p.2. However, we note that it has adjusted its PCI for the full effect of the rate of return represcription, including the effect associated with the rate base for the new services. Accordingly, overall rates in the relevant baskets are currently set to earn 11.25 percent and are consistent with the Commission's price cap rules. We have examined Bell Atlantic's rate reductions as well. Bell Atlantic also flowed through the full amount of the reduction arising from the lower rate of return. In the process of flowing through the required amount to specific rates, we find that the relatively minor variations that occurred from a strict across-the-board reduction in all rates are not inconsistent with applicable Commission Rules.

11. We note that for NYNEX and Bell Atlantic as well as other LECs, the services excluded from price cap regulation -- such as new services and services provided on an individual case basis (ICBs) -- represent a relatively small part of the total access services offered. Accordingly, in view of the fact that these LECs have fully flowed through to their access services the represcription related revenue requirement reduction, we deny Ad Hoc's petition on this issue.

B. Reduced State Tax Expense Following Represcription

1. Pleadings

12. Ad Hoc charges that the BOCs, GTOC, Contel, and United improperly failed to flow through to ratepayers the benefit of the reduced state tax expenses that will likely result from the represcribed earnings ceiling. Ad Hoc declares that LECs were required to flow through to ratepayers the full benefit of the reduction in the authorized rate of return which includes the revenue effect associated with the reduction in income tax expense that will result from the lower earnings ceiling. Ad Hoc Petition at 3. *See also* Sprint Petition at 3; MCI Petition at 9-10. Ad Hoc states that some LECs that elected not to participate in price cap regulation, such as Cincinnati Bell, include the full amount of the flow-through in their reductions, but that other carriers do not include the associated tax effect in their calculations. The result, Ad Hoc charges, is a targeted return of 11.53 percent rather than the required 11.25 percent, a rate-savings loss of approximately $130 million. Ad Hoc Petition at 3.

13. MCI similarly contends that LECs were to use the forecasted July 1, 1990 through June 30, 1991 rate as a basis for computing the dollar amount of the effect of the rate of return represcription and revise the earnings impact to include Federal, state, and local income tax effects. MCI Petition at 9-10. MCI alleges its own calculations demonstrate that Ameritech, Bell Atlantic, NET, GTOC, and United each used incorrect tax rates in calculating the impact of state and local taxes. MCI also claims that NECA, in Transmittal 424, used only a Federal tax adjustment factor and did not include any reductions for state and local tax effects. *Id.* at 10.

14. Basing its estimates on a Federal corporate income tax rate of 34 percent, Sprint claims that the tax adjustment factors of Cincinnati Bell, NYT, and Southwestern Bell are understated, resulting in exogenous cost decreases which are too low and PCI values which are too high. Sprint Petition at 3-4. For example, Sprint asserts that Cincinnati Bell's tax factor does not include Ohio's corporate state income tax or its tax on corporate net worth. *Id.* Sprint further contends that Southwestern Bell used two different tax adjustment factors that result in inconsistent reports and that Southwestern Bell shows inconsistent amounts as exogenous costs in two tables, Figures 2A-1 and amounts shown for EXG-1. *Id.* at 5.

15. Ameritech claims Ad Hoc incorrectly infers that the revenue effect shown on its TRP Forms refers solely to the return on investment and does not include the full tax impact of the rate of return represcription. Ameritech Reply at 5. Ameritech says the amount shown on the revenue effects line of those forms refers to the effect on revenues, including recomputed taxes from the change in the rate of return. Ameritech notes that it calculated that change in return due to the represcription, applied the applicable tax adjustment factor, and listed that amount in the revenue effects line. *Id.* at 5. Ameritech contends that under Ad Hoc's method the tax effect of the change in the rate of return would be counted twice. *Id.* NYNEX makes similar arguments in response to Ad Hoc's challenge to the NYNEX TRP Form EXG-1. NYNEX Reply at 4. Nevada Bell and Pacific Bell make a similar reply to Ad Hoc's contentions. Nevada Bell Reply at 5; Pacific Bell Reply at 4-5.

16. Ameritech disputes MCI's contentions that it failed to use the correct state and local tax rates and that it did not use the state gross receipts tax factor in all states where it applied. Ameritech Reply at 6. Citing relevant sections of the applicable state tax codes, Ameritech supports the tax rate calculations it made in its filings. *Id.* at 6-8. Similarly, Ameritech documents its application of a state gross receipts tax factor whenever such a factor was required. *Id.* at 6. Southwestern Bell claims that Ad Hoc incorrectly adds $12.495 million in additional "tax effect" to Southwestern Bell's established revenue effect, thereby improperly raising the total "revenue effect" of the required change in the ROR prescription to $47.602 million. Southwestern Bell reviews its calculations of the impact of the required change and asserts that its earlier calculations remain correct. Southwestern Bell Reply at 4-5.

17. NYNEX claims that Sprint ignores the fact that NYT recovers the bulk of the state gross receipts taxes through a separate Gross Income Tax Surcharge which is not subject to the price cap formula. To the extent that state gross receipts taxes are embedded in NYT's rates, NYNEX asserts that NYT has properly revised its exogenous cost factor to account for the rate of return represcription to include the effect of those taxes. NYNEX Reply at 4. NYNEX argues that MCI's attempt to show an understatement of NET's tax-related revisions in connection with the represcription is replete with errors. NYNEX seeks to demonstrate that its calculations are generally correct and complete. NYNEX acknowledges one error correction of which would increase the exogenous factor by only $62,000 and would therefore have only a *de minimis* effect on NET's rates. *Id.* at 4 n.9.

18. Bell Atlantic contests MCI's claims that it did not reduce the state and local components of its revenue requirement sufficiently and, as a result, overstated its revenue requirement. Bell Atlantic finds several errors in MCI's analysis, corrects those errors in its reply, and continues to assert that it has included appropriate rev-

enue requirement reductions in light of the savings in tax expense to be experienced at the reduced rate of return. Bell Atlantic Reply at Appendix A, Item 3, pp. 1-3. Bell Atlantic suggests that Ad Hoc erroneously assumes that the "revenue effects" amounts on Form EXG-1 consist solely of the revenue reduction to be experienced due to the change in required rate of return and do not include any revenue requirement reductions for taxes. Bell Atlantic shows that "revenue effects" amounts include both items. *Id.* at Appendix A, Item 3, pp. 1-4.

19. BellSouth seeks to demonstrate that its calculations are correct, charging that Ad Hoc misreads the TRP forms accompanying BellSouth's price cap filing and incorrectly assumes that the tax expense reduction associated with reduced earnings was not flowed through to ratepayers. BellSouth Reply at 5-6. US West contends that Ad Hoc incorrectly argues that certain tax effects are not included in US West's calculations. US West Reply at 5-6. US West illustrates that its transmittal includes the reduction in Federal, state, and local income taxes in the revenue effect associated with retargeting rates to comply with the rate of return represcription. *Id.* Southwestern Bell explains that the exogenous cost amounts shown on the EXG-1 Form do not come from Figure 2A-1 and that Sprint is not correct in using data listed on the EXG-1 Form to calculate Southwestern Bell's tax adjustment factor. Southwestern Bell explains how it calculated the Common Line (CL) basket tax adjustment factor appearing on the EXG-1 Form and asserts that such calculations are correct. Southwestern Bell Reply at 2-3.

20. GTOC notes that MCI's tax calculations were based on correct methodologies but contain certain erroneous state income tax rates. GTOC Reply at 3. GTOC claims that it accurately included all Federal, state, and local income tax effects due to the rate of return represcription. *Id.* Contel disputes Ad Hoc's contentions and asserts that its cost support clearly shows the correct derivation of the tax effect, rate of return reduction impact, and the total revenue effect. Contel Reply at 3. United asserts with regard to the United Telephone Company of Ohio (UTO), that MCI misstated UTO's tax calculation, applied a non-existent Ohio state tax rate, and made other errors in its petition on this point. Accordingly, United urges rejection of MCI's arguments as incorrect and unsupported. United Reply at 2-3. Also, United claims that Ad Hoc did not support its claim that United has failed to flow through properly the tax effects of the change in the rate of return prescription. *Id.* at 3.

21. NECA rejects MCI's claim that it understated the reduction resulting from the Commission's ROR represcription to reflect a reduced Federal tax adjustment factor. NECA claims that MCI failed to incorporate certain changes in fixed charges and therefore overstated the required reduction in Federal income tax expense. NECA Reply at 2-3. Also, in response to MCI's claim that it ignored state and local taxes in calculating revised revenue requirement, NECA acknowledges that it did not make an estimated allowance for such taxes but argues that such an estimate would be highly theoretical and would not produce a measurable impact on rates. NECA finds MCI's assumed tax rate of 5 percent to be arbitrary and its calculated understatement to be excessive. *Id.* at 3-5. On the basis of available information, NECA estimates such taxes would result in a decrease of $546,000, which represents only 0.04 percent of NECA's Carrier Common Line (CCL) and Traffic Sensitive (TS) pool revenue requirement of $1.4 billion. *Id.* at 4-5.

2. Discussion

22. In general, the RBOCs, GTOC, Contel, United, and Cincinnati Bell are correct that they used the proper state tax rates. Cincinnati Bell does concede it made a de *minimis*. With regard to NECA's proposed tariff revisions in Transmittal 424, further change does not appear needed to account for Federal and other tax effects on the basis of the foregoing information.

C. Retroactive Tax Rate Changes

1. Pleadings

23. MCI notes that NYT's revenue requirement underlying its current rates incorporates a one-time retroactive recovery of $7.87 million in gross income and gross receipts tax changes. MCI states that, while recovering the impact of the retroactive rate change may be appropriate, NYT's inclusion of that amount in the revenue requirement inflates the PCI and NYT's rates, which could lead to ongoing overcharges to the ratepayer. MCI Petition at 10. MCI requests therefore that the Commission require an exogenous change in NYT's PCI calculation to remove the effect of the retroactive tax expense. *Id.*

24. NYNEX argues that MCI is incorrect regarding the appropriate timing to reflect rate changes resulting from these tax changes. NYNEX contends that an exogenous adjustment should be included in NYT's April 1, 1991 price cap filing to remove the tax expense beginning July 1, 1991. NYNEX Reply at 5.

2. Discussion

25. We agree with NYNEX that the tax expense should be removed in NYT's July 1, 1991 rates. NYT is currently including recovery of approximately $8 million for gross receipts tax due for January 1, 1990 through June 30, 1990, and payable after July 1, 1990. This expense should be removed from NYT's PCI, but that adjustment should not occur until July 1, 1991.

D. High Capacity Services

1. Allegations That High Capacity Rates Are Excessive

a. *Pleadings*

(1) Petitions

26. MCI contends that Ameritech and Bell Atlantic have inappropriately excluded certain High Capacity services from the rate of return represcription. MCI Petition at 6. MCI acknowledges in a footnote that Ameritech's rate reductions were first filed in an August 1990 transmittal.[15] MCI asserts that Ameritech did not apply the rate of return rate adjustment factor (RAF) to its OPTINET DS1 Local Distribution Channels, Channel Mileage, or Optional Features, and did not adjust the RAF for the exclusion of those services. *Id.* MCI charges

that Bell Atlantic arbitrarily targeted the represcription effects to DS1 services while adjusting all other recurring Special Access services, excluding DS3 service, back to the July 1, 1990 rates. MCI declares that if Bell Atlantic had applied the Special Access exogenous changes equally to all services, a decrease of $346,000 in DS3 revenues would have resulted.[16]

27. Similarly, Ad Hoc submits that Bell Atlantic and Ameritech improperly failed to effect represcription-based reductions in rates for those services whose rates had been reduced subsequent to July 1. Ad Hoc Petition at 10.

(2) Replies

28. Bell Atlantic rejects claims of Ad Hoc and MCI that it should have further reduced its DS3 rates in order to pass through to DS3 customers the full benefits of the reduction in the authorized rate of return. For several reasons, Bell Atlantic contends that the Bureau should dismiss petitions urging further reductions in the rates for its DS3 services. First, Bell Atlantic notes that the Commission has not mandated *pro rata* allocation of the represcription revenue requirement reduction; second, Bell Atlantic says further reductions would place DS3 rates below the applicable band limit; third, Bell Atlantic asserts that Ad Hoc and MCI have made several incorrect assumptions regarding its rate of return targets for Special Access services. Bell Atlantic Reply at Appendix A, Item 7, p. 3.

29. Since DS1 rate reductions have already become effective, Ameritech says MFS's claim that Ameritech's reductions should be limited to ROR reductions is now moot. Ameritech Reply at 15.

b. *Discussion*

30. We find that MCI and Ad Hoc present no basis for requiring further reductions in Bell Atlantic's rates to implement the represcribed ROR. Our review indicates that Bell Atlantic has made the full reduction in July 1, 1990 Special Access category rates contemplated in the *TRP Order*. We did not require that Bell Atlantic or other carriers make additional rate reductions if they elected to make intermediate rate reductions, but simply waived cost support requirements for recalculating the lower band Service Band Index (SBI). *See TRP Order* at para. 11.

31. We also find that MCI and Ad Hoc present no basis for requiring further reductions in Ameritech's rates to implement the represcribed ROR. Our review indicates that Ameritech has made the full reduction in July 1, 1990 Special Access category rates contemplated in the *TRP Order*. Also, on November 23, 1990, the Bureau released an Order reflecting our finding that Ameritech's reductions for this service were not so patently unlawful as to require rejection and that an investigation was not necessary at this time.[17]

32. Pacific Bell filed a reduction in its DS3 rates prior to November 1, 1990 and lowered those rates no further in this filing. On December 21, 1990, the Bureau released an Order which declined to find Pacific Bell's reduction of DS3 and DS3x3 rates to be unlawful, or otherwise to require investigation.[18] The filing also introduced Pacific's new DS3x12 service. We conclude that further reductions are not required for the same reasons such reductions are not required for Bell Atlantic or Ameritech. Nevada Bell reduced only its recurring charges, not its non-recurring charges. As rate of return represcription reductions have been fully allocated to Nevada Bell's access services, we conclude that further reductions are not required.

33. We note that BellSouth lowered its Information rates less than the other rates in the TS switched basket. BellSouth explains that Information has less investment associated with, and is thus less affected by, the rate of return represcription. As represcription reductions have been fully allocated to BellSouth's access services, we conclude that further reductions are not required.

2. Allegations That High Capacity Rates Are Too Low

a. *Pleadings*

(1) Petitions

34. Ad Hoc alleges that Ameritech, Bell Atlantic, BellSouth, and Nevada Bell have strategically manipulated the flow-through of the effects of the reduction in the authorized rate of return. Ad Hoc charges that, despite instructions to LECs in the *LEC Price Cap Order* to file service rates that, on a percentage basis, are approximately equal, these carriers selectively reduced certain rates.[19] Ad Hoc notes that Ameritech and Nevada Bell's PCIs differ from their SBIs in Special Access, and also presents BellSouth's PCI and SBIs in the Switched Access Basket to illustrate selective rate reductions. *Id.*

35. Ad Hoc also asserts that Bell Atlantic effected disproportionate reductions in the rates for DS3 and DS1 services. As evidence, Ad Hoc notes that while Bell Atlantic's PCI and Actual Price Index (API) for the Special Access Basket is 98.14, the only SBI not set at 100 is found in the High Capacity DDS category. That SBI is set instead at 95.80. Ad Hoc finds similar disparities in the Digital Services category. Ad Hoc notes that DS1 and DS3 rates are set at 95.0 and 92.3, respectively. Ad Hoc Petition at 7-8.

36. MFS expresses concern that Bell Atlantic's tariff revisions involve below-service band rate changes. MFS claims that the cumulative effect of Bell Atlantic's DS3 rate reductions exceeds the service subindex established by the Commission but is not accompanied by the required support material. MFS Petition at 6. Further, MFS asserts that the reasonableness of the proposed reductions has not been determined since Commission review is not completed. *Id.* MFS concludes that the reduction cannot provide the basis to reduce the SBI to a level below that prescribed by the Commission. *Id.* at 7.

37. Both Eastern and ICC filed petitions charging that the rate reductions in Bell Atlantic's Transmittal 394 (its January 1, 1991, access filing) merely perpetuate unlawful rates first filed in Bell Atlantic's earlier Transmittal 389. Eastern Petition at 2; ICC Petition at 6. Both claim that Bell Atlantic's rate decreases for Special Access High Capacity DS3, DS3C, and DS3-to-DS1 multiplexing service do not comply with price cap rules. Eastern Petition at 3; ICC Petition at 6. Eastern and ICC also claim the rate reductions violate price cap rules which limit LECs' pricing flexibility for DS3 services to an annual change of 5 percent relative to the percentage change in the PCI for the Special Access services basket. Eastern Petition at 3; ICC Petition at 6. ICC also argues that Bell Atlantic's DDS and DS1 rate reductions are contrary to the instructions to LECs in the *TRP Order* that no rate modifications would be permitted other than to retarget rates to an

11.25 percent rate of return. ICC Petition at 5. ICC further states that Bell Atlantic's DS3 subindex of 92.73 warrants correction by the Commission to reflect any rate reductions required as a result of Transmittals 389 and 394. *Id.* at 3.

(2) Replies

38. In response to claims that it made disproportionate rate reductions for its DS3 service, Bell Atlantic contends that such reductions are within applicable guidelines and are not unlawful under the *LEC Price Cap Order* or applicable rules. Bell Atlantic Reply at Appendix A, Item 6, pp. 1-2. While Bell Atlantic acknowledges that its DS3 Service Band Sub-Index falls slightly under the range specified by the Rules, Bell Atlantic contends that the relevant rate changes are nonetheless permitted under the transitional procedures adopted by the Commission. *Id.* at Appendix A, Item 6, p. 2 n.*. *See also id.*, Appendix A, Item 7, p. 2.

39. As the *LEC Price Cap Order* and the *TRP Order* each contemplated rate reductions during the transition period, Bell Atlantic rejects MFS's contention that its various DS3 rate reductions violate the Commission's price cap plan. *Id.* In response to ICC's claim that it has not adequately reduced its DS3 sub-index, Bell Atlantic explains that limited demand, the recent offering of the service, and other factors prevented this sub-index from declining more in light of the pending rate reductions. Thus, Bell Atlantic contends that its calculations are in compliance with the Commission's Rules. *Id.* at Appendix A, Item 7, pp. 1-2.

40. Ameritech denies Ad Hoc's claim that it "strategically manipulated" the flow-through of the ROR reduction. Ameritech notes that its SBIs are not equal because of its earlier reductions in DS1 service rates. Ameritech Reply at 15. Ameritech contends that it applied the ROR reduction to each Special Access service in a consistent manner, thus reducing rates uniformly across all services, but that in the case of DS1 rates no additional reduction was taken beyond the reductions that became effective on November 25, 1990. Ameritech Reply at 14 n.22. Ameritech notes that the earlier DS1 rate reduction is greater than the reduction that a simple ROR flow-through would have produced. Ameritech says it could have further reduced its DS1 service rates to account fully for the ROR reduction but it did not do so because such a further reduction would have resulted in rates below the applicable SBI band. *Id.* at 14.

41. Nevada Bell states that Ad Hoc's petition ignores its Description and Justification (D&J), which shows the methods it used to calculate a uniform rate adjustment factor. It further declares that the methods used have been endorsed by the Commission. Accordingly, Nevada Bell argues that Ad Hoc's objections are groundless. Nevada Bell Reply at 6.

42. In response to MFS, Pacific Bell notes first that since the Commission is currently evaluating the changes to DS3 rates independently of this proceeding, MFS is in the wrong arena. Second, Pacific Bell notes that the Commission expressly permitted adjustments to the July 1, 1990 rates prior to the implementation of price cap regulation. Thus, Pacific Bell concludes that its adjustments are in accordance with the Commission's directions. Pacific Bell Reply at 4.

43. Responding to Ad Hoc's charges, BellSouth notes that its service category SBIs reflect exogenous changes due to a disallowance adjustment which, like the rate of return adjustment, was flowed through to each service category. BellSouth Reply at 7.

b. ***Discussion***

44. In the *LEC Price Cap Order* the Commission expressly permitted adjustments to July 1, 1990 rates -- including reductions -- prior to the implementation of price cap regulation, if these rates are properly justified and supported.[20] Beginning January 1, 1991, these rates must also comply with the represcribed 11.25 percent rate of return and, for price cap companies, the price cap indexes and bands.

45. Bell Atlantic lowered its DS3 rates prior to November 1, 1990, and has lowered them no further in this filing.[21] Petitioners claim that the intermediate rate reductions, *i.e.*, reductions to rates for DS1 and DS3 services, are excessive. That issue is properly addressed to the merits of Bell Atlantic's earlier transmittal, not to the current filing which leaves these rates unchanged.

46. Ameritech reduced its DS1 rates on November 25, 1990, below the level required by the rate of return represcription. Ameritech is making no further reduction in DS1 rates here. Petitioners claim that Ameritech's intermediate rate reductions for certain High Capacity services were excessive. As is the case with Bell Atlantic, we believe that this issue is properly addressed to the merits of the earlier tariff transmittal, not to the current filing which leaves these rates unchanged.[22]

47. With regard to BellSouth and Nevada Bell, we do not find either their flow through of the represcription adjustments or their establishment of initial indexes under price cap regulation to be inconsistent with applicable Rules and Orders. Accordingly, we deny Ad Hoc's petition to the contrary.

E. Price Cap Base Period

1. Pleadings

48. Allnet asserts that certain carriers used incorrect base periods in calculating their revenue and indexes. Allnet argues that the *TRP Order* directs LECs to use forecasted July 1, 1990 through June 30, 1991 demand as the base period in the instant filing. Allnet alleges that Ameritech, Bell Atlantic, and Southwestern Bell -- and possibly others -- used historical demand from January 1, 1989 through December 30, 1989 as the base period for their tariff filings. Allnet Petition at 2. Allnet states that the error causes understated revenue projections. *Id.* at 3. Allnet further charges that by using historical demand versus forecasted demand, the carriers' APIs, SBIs, and PCIs are all incorrect since the relative weighted revenue used to develop each index is based on incorrect demand data. *Id.*

49. Ameritech responds that it correctly uses the forecasted demand period for its calculation of the effect of the represcription. Ameritech Reply at 9. Ameritech further asserts that it properly used base period demand, from January 1989 through December 1989, for the calculation of APIs and SBIs. *Id.* at 9. Bell Atlantic asserts that Allnet misunderstood the Commission's Rules and instructions regarding computation of indexes. Bell Atlantic Reply at Appendix A, Item 5, pp. 1-2. Noting that

forecasted demand is used only to compute the effect of the represcription, Bell Atlantic endeavors to show that it has correctly made all index computations. *Id.*; *see also* Southwestern Bell Reply at 10. Although not specifically named in Allnet's petition, NYNEX responds to Allnet's charges. NYNEX says Allnet is not correct in claiming that price cap LECs have erred in their SBI, API, and PCI calculations by relying upon historical demand (*i.e.*, base year 1989) rather than setting each of these indexes on the basis of forecasted demand for July 1990 to June 1991. Citing the *TRP Order*, NYNEX asserts that forecast period demand is used only to calculate the exogenous impact on the PCI of the rate of return represcription and the disallowance adjustments permitted under recent Commission Orders. NYNEX also construes the Commission's Rules to require use of historical demand data for all other purposes, including development of APIs and SBIs. NYNEX Reply at 6-7 & Appendix H.

2. Discussion

50. Allnet is incorrect. Data for July 1, 1990 through June 30, 1991 were to be used to compute the changes in the PCI for disallowance adjustments, for changes due to the rate of return represcription, and for changes in long term support due to the rate of return represcription. Data for calendar year 1989 were to be used to compute carriers' APIs and SBIs, as well as the DS1 and DS3 subindexes. Our review of the tariffs reveals that the carriers correctly employed the base periods required by the *TRP Order*.

51. We note that Contel incorrectly used forecasted demand data for July 1, 1990 through June 30, 1991 to compute its CCL rate cap. We direct Contel to recompute its CCL rate cap using historical 1989 demand.

F. PCI Changes To Reflect Disallowance Adjustments

1. Pleadings

52. Sprint claims that New England Telephone (NET) has overstated the disallowance adjustments associated with its January 1, 1991 access filing. Sprint charges that NET does not explain why the disallowance adjustments it filed on July 1, 1990 exceed the adjustments that are derived by computing the difference between the disallowances originally ordered in the *June 21 Order* and the revised disallowances ordered in the *October 3 Order*.[23] Sprint Petition at 8. Because the ratio of disallowance adjustments to revenues is used in the computation of total exogenous changes, Sprint argues that NET should be required either to provide an explanation for the difference in disallowance adjustments or to adjust its price cap index calculations. *Id.* at 9.

53. In its reply, NYNEX explains NET's calculations of the effects of the adjusted disallowances for both revenue requirements and demand. On the basis of its review of these calculations, NYNEX contends that NET correctly calculated the disallowance adjustments. NYNEX Reply at Appendix E, pp. 1-3.

2. Discussion

54. We have reviewed NET's calculations and conclude that Sprint is incorrect. NET computed the adjustments correctly.

G. Other Post-Employment Benefits (OPEB)

1. Pleadings

55. AT&T argues that Bell Atlantic, BellSouth, US West, Nevada Bell, and Pacific Bell should not be permitted to include in their rates approximately $86 million in increased costs caused by those LECs voluntarily changing their accounting treatment of Other Post-Employment Benefits (OPEB). AT&T Petition at 7. AT&T notes the OPEB costs, reflected in the July 1 rates, are embedded in the carriers' initial January 1, 1991 PCIs. AT&T states that the Commission did not permit AT&T to treat the conversion to accrual treatment of OPEB expenses as an exogenous change in calculating its PCIs because the Financial Accounting Standards Board's (FASB) proposal had not yet been adopted as a change in Generally Accepted Accounting Principles (GAAP) prior to AT&T's 1990 annual price cap filing. *Id.* at 8. AT&T further states that, although the *LEC Price Cap Order* denies exogenous treatment to LECs that convert to accrual treatment of OPEB expenses after the LECs commence price cap regulation but before FASB takes final action, the Order is silent with respect to those LECs that commenced accrual treatment of OPEB expenses on or before July 1, 1990 as part of the rates underlying their initial PCIs. *Id.* at 8-9. AT&T urges that the Order be clarified to require consistent treatment of exogenous changes that would conform to a uniform scheme for all price cap carriers. *Id.* at 9.

56. Ameritech, Bell Atlantic, and US West submit that no additional OPEB expenses were included as exogenous costs due to any change in their accounting methods. Ameritech Reply at 16-18; Bell Atlantic Reply at Appendix A, Item 1, p.1; US West Reply at 3. Nevada Bell and BellSouth assert that AT&T's objection to the LECs' OPEB accounting treatment is in reality a policy difference between AT&T and the Commission that is appropriately considered through a petition for reconsideration. Nevada Bell Reply at 2-4; BellSouth Reply at 3. Pacific Bell counters that AT&T is attempting to resurrect an issue already decided in the annual 1990 access tariff proceeding. Since the Commission has made clear that these tariff proceedings should not be a vehicle for reexamining the justification for earlier rates, these carriers urge the Commission to disregard AT&T's objections. *Eg.*, Pacific Bell Reply at 2-3.

2. Discussion

57. Prior to July 1, 1990, some LECs had, under rate of return regulation, included in their rates the cost of the change to an accrual method for accounting for OPEB expenses. Under rate of return regulation, this change occurred at the LECs' option, subject to Commission review of the issue of whether the accounting change was reasonable and prudent. The costs associated with accrual accounting for OPEB were embedded in July 1, 1990 rates for those carriers. In the *LEC Price Cap Order*, the Commission found July 1, 1990 rates to be a reasonable starting point from which to launch price cap regulation. The indirect inclusion of these OPEB expenses in these rates is accordingly consistent with the *LEC Price Cap Order*.

H. Computation of SBI Bands

1. Pleadings

58. Ad Hoc contends that all the price cap LECs have incorrectly calculated SBI upper and lower limit pricing bands applicable to the individual service categories within the various service baskets. Ad Hoc Petition at 11. Ad Hoc claims that the LECs have incorrectly calculated SBI upper and lower limit pricing bands since the LECs did not base those bands on service category SBIs. *Id.* at 12-13. Since the LECs' methodology allows for less pricing flexibility than that outlined by the Commission, Ad Hoc does not object so long as the LECs' method conforms to the intent of the Commission's Rules. *Id.* at 12.

59. Pacific Bell and the other LECs filing replies all contend that they calculated their upper and lower Service Band Indexes in accordance with the Commission's Rules and the *LEC Price Cap Order* and that Ad Hoc is incorrect in its calculation of those SBIs. *E.g.*, Pacific Bell Reply at 5. Contrary to Ad Hoc's method, which would set SBI band limits without any relationship to changes in the PCI and previous years' SBIs, Ameritech notes that it set its SBI band limits with reference to the PCI it calculated earlier. Ameritech Reply at 10-11.

60. Contel and others reply that they calculated SBI banding values consistently with the formula set forth in Appendix E, page 3, of the *LEC Price Cap Order*. Contel Reply at 5 (noting Ad Hoc's method does not comply with Section 61.47 of the Commission's Rules); US West Reply at 7; Southwestern Bell Reply at 11-12; NYNEX Reply at 6. Contel further alleges that Ad Hoc's method of calculation does not comply with Section 61.47(e) of the Commission's Rules, which limits pricing flexibility of a service category to an annual increase or decrease of 5 percent, relative to the percentage change in the PCI. Contel Reply at 4.

61. Similarly, Bell Atlantic rejects Ad Hoc's claim that it has incorrectly computed the upper and lower limits of its SBIs. Citing the procedures specified by the Commission's Rules and the *TRP Order*, Bell Atlantic asserts that it has correctly adjusted the upper and lower bands of the SBIs to correspond with the PCI range. Bell Atlantic Reply at Appendix A, Item 2, p. 1. BellSouth states that although it believes it has properly implemented the rules, it agrees with Ad Hoc that because AT&T and the LECs are subject to the same rule regarding the calculation of upper and lower SBI limits, that the same methodology must be employed. BellSouth Reply at 7-8. To the extent AT&T employs a different method, as Ad Hoc implies, BellSouth looks to the Commission for direction as to which method of SBI calculation LECs should use. *Id.* at 8.

2. Discussion

62. Contrary to the contentions of Ad Hoc, the carriers involved have correctly employed their July 1, 1990 rates adjusted for the change in their PCIs, plus or minus 5 percent, to compute their SBI limits.[24] Since the July 1, 1990 SBIs equal the July 1, 1990 PCIs, this is equivalent to computing the SBI limits as plus or minus 5 percent of the January 1, 1991 PCI. We note that the Commission followed a similar approach in setting SBIs for AT&T.[25] Accordingly, we find no reason to require revision of these LECs' SBIs on this matter.

I. Common Line PCI Adjustments To Reflect Reduced LTS

1. Pleadings

63. Sprint and MCI contend that Bell Atlantic and Southwestern Bell erred in their Common Line PCI adjustments. Sprint contends that the carriers failed to flow through the total amount of their reduced Long Term Support (LTS) obligations. Sprint Petition at 6. Sprint contends that these carriers adjusted their CL PCIs to reflect far lower amounts than would be expected, given their share of total LTS contributions. Sprint states that the understatement of savings accruing from the reduction in their LTS payments means that these LECs have not adjusted their PCIs or reduced their rates by an amount that correctly reflects their revised LTS payments. *Id.*

64. MCI complains that Bell Atlantic has twice counted its payments to NECA for Long Term and Transitional Support in its CL PCI calculations. MCI Petition at 5. Sprint contends that neither Bell Atlantic nor Southwestern Bell has explained the reasons for alleged discrepancies between its Tier 1 LTS adjustments and the corresponding exogenous cost adjustments. Sprint concludes that both carriers should be required to reduce their CL rates and their CL PCIs to reflect their full share of LTS payment reductions. Sprint Petition at 7.

65. Contrary to MCI's assertions of double counting, Bell Atlantic contends that it only includes these payments once in the calculation at issue. Bell Atlantic Reply at Appendix A, Item 4, p. 1. Also, Bell Atlantic rejects Sprint's contention that it used an incorrect amount of LTS in its filing. *Id.* at Appendix A, Item 4, p.2. Southwestern Bell also reviews its computations and asserts that it properly computed the impact of the change in its LTS obligations. Southwestern Bell Reply at 6-7.

2. Discussion

66. The carriers have computed the adjustments correctly. As Bell Atlantic and Southwestern Bell both note, their LTS amounts were raised after July 1, 1990, and the reduction in the pending filing is partially offset by that earlier increase.

J. Errors in Computing Common Line PCI for January 1, 1991

1. Pleadings

67. AT&T states that Southwestern Bell, GTOC, Ameritech, and BellSouth made errors that overstate their PCI for the CL basket. AT&T Petition at 2. AT&T asserts that the overstatements result in $7.6 million in overcharges to ratepayers, and that the erroneous calculations could continue for all subsequent PCIs through successive years. *Id.* AT&T states that Southwestern Bell excluded certain rate of return represcription exogenous costs from the PCI formula. AT&T asserts that, since Southwestern Bell included only the reduced CCL component but excluded the subscriber line charge component from its PCI calculation, Southwestern Bell's PCI appears overstated by an amount that could result in excess rates of approximately $3.9 million. *Id.* at 4. AT&T asserts that GTOC and BellSouth inappropriately included Transitional Support receipts as part of their revenue, causing inflated PCIs. AT&T charges that these revenues are inappropriate

for inclusion since the revenues are received by the LECs directly from the Transitional Support fund independently of the rates to be paid by access customers established under the price cap mechanism, and thus are not appropriate for inclusion in the "R" component of the price cap formula. *Id.* at 5. Finally, AT&T asserts that Ameritech's Common Line minutes of use rate appears overstated because Ameritech double counted the effects of certain rate increases in the July 1 - October 1, 1990 period. *Id.* at 5-6.

68. MCI argues that Bell Atlantic and Southwestern Bell miscalculated the PCI in their CL Baskets. MCI states that Bell Atlantic included its Long Term and Transitional Support payments to NECA twice in the denominator of its CL PCI calculation. MCI Petition at 2. MCI further charges that Southwestern Bell double counted the reduction in its End User Common Line (EUCL) revenues in determining the resultant PCI for the CL Basket and CCL rates. *Id.* MCI asserts that the revision Bell Atlantic filed to correct a similar error indicates that Bell Atlantic is double counting its Long Term and Transitional Support payments to NECA. *Id.* at 5. MCI states that the double counting causes inflation in the revenue term in the PCI formula, which ultimately causes higher CCL rates. *Id.*

69. Sprint says Southwestern Bell has not adjusted its PCI or reduced its rates enough to reflect the reduced amount of its LTS payments, and that rather than the current reduction of only $211,000, Southwestern Bell should make a further reduction of $281,000 to bring the total reduction to $492,000 and thereby fully account for the LTS reduction. Sprint Petition at 6-7.

70. While acknowledging that its CL_{MOU} factor was overstated, Ameritech attributes this to an error made in calculation of its SLC_{MOU} factor and not due to the use of any incorrect rates as AT&T asserts. As Ameritech corrected this error in a recent transmittal and as the dollar impact of the correction is the same as the impact of the errors asserted by AT&T, Ameritech argues that these circumstances render AT&T's claim moot. Ameritech Reply at 19. In response to Sprint, Southwestern Bell contends that its rates do reflect an LTS amount higher by $492,000 as compared with the LTS included in its present rates. However, Southwestern Bell asserts that this $492,000 amount is not the correct amount to be included in the calculation of its exogenous cost adjustment. Rather, Southwestern Bell supports with calculations its contention that its original reduction of $211,000 continues to be correct. Southwestern Bell Reply at 6-7.

71. In response to the objections of MCI and Sprint, Southwestern Bell asserts that it properly calculated its price cap CCL rates by proportionately reducing the amount of the overall reduction in the target rates or return (*i.e.*, by 75 basis points). Southwestern Bell notes that imposing the exogenous cost reductions associated with both the CCL and EUCL on CCL rates would result in a total reduction in Common Line annualized revenue of $20.8 million, $3.3 million more than is required by the represcription revenue requirement reduction. *Id.* at 8. Accordingly, Southwestern Bell concludes that its terminating premium CCL rate of $.0104 is correct. *Id.* at 8-9.

2. Discussion

72. *Southwestern Bell.* This company has excluded some of the CL effect of the rate of return represcription in computing its CL PCI. In its reply, Southwestern Bell states it did this so that it would reduce its CCL rates by the same amount it would have under rate of return regulation. The price cap rules require a greater reduction because there was a greater than proportional change in premium terminating minutes (22 percent versus about 6 percent for originating premium minutes) in 1990 and 1991 over 1989. Thus, a change in the premium terminating rate has a greater effect using the projected 1990 and 1991 demand, as would have been done under rate of return, than it does using 1989 demand, as under price caps. Southwestern Bell should include the entire CL effect of the rate of return represcription in its PCI. In fact, Southwestern Bell has filed an application for special permission to revise its rates to correct this calculation. We grant this application in this Order.

73. *BellSouth and GTOC.* Both LECs used a footnote on Chart EXG-1 of the TRP equating "Base Revenue" to "Revenue Requirement," as the basis for including the Transitional Support revenue requirement in the computation of the PCI. However, the text of the *TRP Order* instructs the companies to use rates times demand as the Base Revenue. *See TRP Order* at para. 10. Since Transitional Support is not changing in this filing, the only way to change the revenue received by the companies is to change their rates. Thus, these companies are directed to recompute using base rates times demand, rather than revenue requirement, to compute their PCIs.

74. *Bell Atlantic.* As did BellSouth and GTOC, Bell Atlantic used revenue requirement rather than rates times demand in computing its CL PCI. Bell Atlantic computed revenue requirement by adding the April 1, 1990 filed revenue requirement, Long Term Support, and disallowances. Bell Atlantic also made other errors. It added only the cost disallowances, leaving out the demand disallowances. It also computed the change to the PCI in one step instead of in two steps as instructed in the *TRP Order*. Bell Atlantic should recompute its PCI using rates times demand, and in two steps.

75. *Ameritech.* AT&T's objection to Ameritech's PCI is unfounded. Ameritech used its July 1, 1990 rates as the base, and properly included subscriber line charge revenue from Lifeline customers at the full end user rate, rather than at the rate the Lifeline end user pays. *See* 47 C.F.R. § 69.502.

76. *Nevada Bell and United.* We note Nevada Bell has incorrectly computed a PCI for CCL_{MOU} rather than using the formula required by our Rules.[26] United has computed its CCL_{MOU} using the rate of return method. We direct these carriers to compute their CCL_{MOU} caps as required in the Rules and adjust their CCL rates as necessary.

77. None of the carriers that erred in computing the PCI has attempted to justify rates as above cap filings. Each carrier attempted to file rates that do comply with the applicable cap. In these circumstances, affected carriers that filed above cap rates should be required to refile rates that do not exceed the applicable cap.

K. US West SPUR Designation

78. We note that US West has removed the Service Provided Upon Request (SPUR) designation for certain Private Line Transport Services (PLTS) in this filing. The SPUR designation was introduced in the tariff filing that was first filed when US West started to aggregate separate state rates into single company rates and later into regional rates. The "SPUR" designation was developed to indicate the availability of specific PLTS rate elements within a state and required the recalculation of the company rate to include the cost of adding a new state to the regional rate. US West states that under the price cap rules, rates will no longer need to be recalculated each time a service is introduced in a state.[27]

79. We find that this revision is a restructure of the existing tariff. Both the Commission's *LEC Price Cap Order* and the *TRP Order* contemplated that price cap LECs would be limited in their January 1, 1991 filings to the following changes: implementation of price caps and represcription of the rate of return. *LEC Price Cap Order* at paras. 245-50; *TRP Order* at paras. 1, 4-5. Accordingly, we have determined that US West should reinstate the earlier SPUR arrangements. Should US West desire to restructure its offerings, it may file a separate transmittal with appropriate support information.

L. NECA Transmittal No. 427

80. This transmittal would increase rates interexchange carriers (ICs) are required to pay to NECA to fund the Universal Service Fund (USF) by 30.5 percent and the Lifeline Assistance (LA) program by 51.4 percent. MCI filed a petition seeking rejection or an investigation of the increases and suspension of the portion of the USF increase not associated with a transition scheduled by Commission Rules[28] and the full increase in the LA rate. In its petition, AT&T requests investigation and suspension of the USF rate but does not oppose the LA rate.

81. With respect to the USF increase, MCI argues that the increase in USF revenue requirement not associated with the scheduled transition is too high and is calculated using flawed and erroneous data, citing instances of what it describes as "unusually large increases in loop costs unaccompanied by commensurate increases in the number of working loops." MCI USF Petition at 5. MCI also believes that NECA has failed to screen the loop cost data submitted to it by individual LECs to eliminate inconsistent and erroneous data. MCI calculates that if only the transitional portion of the USF rate is allowed, the rate would increase from $0.2367 to $0.2674 per pre-subscribed line per month rather than to $0.3090 as proposed by NECA. AT&T argues that the significant USF increase is inadequately explained and unjustified, but presents no specific claim that the rate was calculated incorrectly, except to claim that "a disporportionate share of the USF expense growth . . . is attributable to growth in corporate overhead expense." AT&T USF Petition at 3-4.

82. MCI also contends that the LA rate increase, which is based in part on a prior shortfall caused by increases in the states adding programs and the number of participants, is a reversal of historical trends. It contends NECA has not provided evidence to demonstrate the increase is justified.

83. NECA replies that both the USF and LA rates are fully supported and justified. According to NECA, MCI's analysis of USF data is misleading and inaccurate, failing to consider the effects of LEC conversions from average schedule to cost based settlements and mergers or acquisitions. It claims the growth in loop costs for USF companies is consistent with data from comparable non-USF companies and defends its data validation process as extensive and thorough. NECA USF Reply at i-ii and *passim*.

84. We conclude that MCI has not demonstrated that the LA increases warrant investigation.[29] We have not completed our analysis of the USF increases, but some increase appears to be justified. We accordingly permit the LA increase to become effective. We defer the USF portion of the transmittal until February 1, 1991, but NECA may refile a USF rate increase of $0.2696 to take effect January 1.

III. ORDERING CLAUSES

85. Accordingly, IT IS ORDERED that tariff revisions in compliance with this Order shall be filed on **December 28, 1990,** with a scheduled effective date of **January 1, 1991.**

86. IT IS FURTHER ORDERED that the Bell Atlantic Telephone Companies, BellSouth Telephone Companies, Contel Corporation, GTE Telephone Operating Companies, Nevada Bell, Southwestern Bell Telephone Companies, and United Telephone System Companies, SHALL REVISE rates reflecting recalculations for errors in their Common Line Price Cap Index computation, as indicated in paragraphs 51, 72-74, 76, *supra*.

87. IT IS FURTHER ORDERED that US West SHALL REINSTATE tariff provisions for its Service Provided Upon Request (SPUR) designation for certain Private Line Transport Services in its filing, as indicated in paragraphs 78 and 79, *supra*.

88. IT IS FURTHER ORDERED that the National Exchange Carrier Association, Inc., SHALL DEFER the effective date of the tariff revisions relating to the Universal Service Fund filed under Transmittal No. 427 from January 1, 1991 to February 1, 1991 pursuant to authority delegated to the Chief, Common Carrier Bureau, in Section 61.58(a)(2) of the Commission's Rules, 47 C.F.R. § 61.58(a)(2).

89. IT IS FURTHER ORDERED that the National Exchange Carrier Association, Inc., MAY FILE tariff revisions relating to the Universal Service Fund as specified in paragraph 84, *supra*.

90. IT IS FURTHER ORDERED that Bay Springs Telephone Company, Inc., Application Nos. 18 and 19; Centel Telephone Companies, Application No. 81; Nevada Bell, Application No. 50; Pacific Bell, Application No. 181; and Southwestern Bell, Application Nos. 242 and 245 ARE GRANTED. Tariff revisions reflecting grant of these applications should be filed on December 28, 1990 to become effective January 1, 1991.

91. IT IS FURTHER ORDERED that Sections 61.56, 61.58, and 61.59 of the Commission's Rules, 47 C.F.R. §§ 61.56, 61.58, 61.59, ARE WAIVED for the purpose of compliance with this Order and Special Permission No. 90-1312 IS ASSIGNED.

92. IT IS FURTHER ORDERED that, to the extent a local exchange carrier has previously reduced rates or adjusted its calculations, either in response to the *Erratum Notice* or in any other previous filing, and to the extent those reductions or adjustments duplicate directions in

this Order, the local exchange carrier need not make further reductions or other adjustments. Any local exchange carrier covered by the provisions of this paragraph SHALL FILE notice to that effect with the Secretary of the Commission on December 28, 1990.

93. IT IS FURTHER ORDERED that the petitions to suspend and investigate or to reject the January 1, 1991 Access Tariff Filings, filed by Ad Hoc Telecommunications Users Committee, Allnet Communications Services, Inc., American Telephone and Telegraph Company, Eastern TeleLogic Corporation, Institutional Communications Company, Metropolitan Fiber Systems, Inc., and US Sprint Communications Company Limited Partnership, ARE GRANTED to the extent indicated herein but otherwise ARE DENIED.

94. IT IS FURTHER ORDERED that the petition to suspend and investigate the January 1, 1991 Access Tariff Filings, filed by MCI Telecommunications Corporation, except as it pertains to Nevada Bell, IS GRANTED to the extent indicated herein but otherwise IS DENIED. To the extent the petition of MCI Telecommunications Corporation pertains to Nevada Bell, consideration of the petition is deferred pending a review of Nevada Bell's response to the Bureau's Order To Show Cause noted herein.

95. IT IS FURTHER ORDERED that the petition to reject or suspend and investigate NECA Transmittal No. 427 filed by MCI Telecommunications Corporation IS DENIED to the extent that it concerns the rate for Lifeline Assistance. To the extent the petition pertains to the Universal Service Fund rate, consideration of the petition is deferred pending further review.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Firestone
Chief, Common Carrier Bureau

FOOTNOTES

[1] Approximately 54 transmittals proposing tariff revisions were filed, of which 12 involved both price cap and represcription filings. The remainder of the transmittals were limited to represcription filings.

[2] Represcribing the Authorized Rate of Return for Interstate Services of Local Exchange Carriers, CC Docket No. 89-624, Memorandum Opinion and Order, FCC 90-315, released Dec. 7, 1990 (*Represcription Order)*; Commission Requirements for Cost Support Material To Be Filed with January 1, 1991 Access Tariff Revisions, DA 90-1499, released Oct. 24, 1990 (Com.Car.Bur.) (*TRP Order)*.

[3] The full names and corresponding abbreviations of the petitioners and the parties filing replies are listed in the Appendix.

[4] Mandatory filings pursuant to Section 61.41(a)(2) of the Commission's Rules, 47 C.F.R. § 61.41(a)(2), were made by the following LECs: Ameritech, Trans. No. 485; Bell Atlantic, Trans. No. 394; BellSouth, Trans. No. 353; Southwestern Bell, Trans. No. 2038; US West, Trans. No. 126; Illinois Bell Telephone Company (Illinois Bell), Trans. No. 882; NET, Trans. No. 1099; NYT, Trans. No. 1093; Nevada Bell, Trans. No. 113; Pacific Bell, Trans. No. 1507; GTOC, Trans. No. 633. Voluntary filing pursuant to Section 61.41(a)(3) of the Commission's Rules, 47 C.F.R. § 61.41(a)(3), were made by the following carriers: Contel, Trans. No. 74; United, Trans. No. 268. As a result of their voluntary filings, United and Contel will become subject to mandatory price cap regulation as of the date their price cap tariff revisions become effective. *See* 47 C.F.R. § 61.41(d). Filings by these price cap LECs address the changes mandated by price cap regulation as well as the reduction in the authorized rate of return. In addition, several of the LECs listed in this footnote have filed errata to their original transmittals.

[5] Policy and Rules Concerning Rates for Dominant Carriers, CC Docket No. 87-313, Second Report and Order, FCC 90-314, released Oct. 4, 1990 (*LEC Price Cap Order), recon. pending*; Erratum, released Oct. 31, 1990 (*Erratum)*.

[6] NECA, Revisions to Tariff F.C.C. No. 5, Transmittal No. 424.

[7] NECA, Revisions to Tariff F.C.C. No. 5, Transmittal No. 425, filed Nov. 1, 1990; Transmittal No. 426, filed Nov. 26, 1990; and Transmittal No. 427, also filed Nov. 26, 1990. NECA Transmittal Nos. 425 and 426 are being deferred in separate letters. We address some questions relating to NECA Transmittal No. 427 in this Order. *See* paras. 80-84, 88-89, and 95, *infra*.

[8] AT&T, Ad Hoc Telecommunications Users Committee, MCI, Sprint, Metropolitan Fiber Systems, Inc., Allnet, Eastern TeleLogic Corporation, and Institutional Communications Company.

[9] MCI Petition To Reject or To Suspend and Investigate NECA Tariff F.C.C. No. 5, Trans. No. 427 (MCI USF Petition); AT&T Petition To Suspend and Investigate NECA Tariff F.C.C. No. 5, Trans. No. 427 (AT&T USF Petition).

[10] *See* the Appendix for a list of the parties that filed replies. *See also* NECA Reply to Petitions to Reject or, in the Alternative, Suspend and Investigate NECA Transmittal No. 427 (NECA USF Reply).

[11] *TRP Order* at paras. 16-17.

[12] Procedures for Filing Errata to Support Information for Annual 1991 Access Tariffs, DA 90-1740, released Nov. 28, 1990 (Com.Car.Bur.) (*Erratum Notice)*.

[13] Nevada Bell, Tariff F.C.C. No. 1, Transmittal No. 113, Order To Show Cause, CC Docket No. 90-1862, released Dec. 21, 1990 (Com.Car.Bur.).

[14] Ad Hoc Petition at 8, citing *LEC Price Cap Order* at para. 249.

[15] *See* MCI Petition at 6 n.8. On November 23, 1990 the Bureau released an Order denying petitions against the Ameritech tariff. *See* Ameritech Operating Companies, Revisions to Tariff F.C.C. No. 2, Transmittal No. 468, Order, DA 90-1712, released Nov. 23, 1990 (Com.Car.Bur.).

[16] MCI Petition at 7. On December 21, 1990 the Bureau released an Order denying petitions against the Bell Atlantic tariff. *See* Bell Atlantic Telephone Company, Tariff F.C.C. No. 1, Transmittal No. 389, Order, DA 90-1859, released Dec. 21, 1990 (Com.Car.Bur.).

[17] *See* note 15, *supra*.

[18] *See* Pacific Bell, Tariff F.C.C. No. 128, Transmittal No. 1506, Order, DA 90-1857, released Dec. 21, 1990 (Com.Car.Bur.).

[19] Ad Hoc Petition at 7. *See also* MFS Petition at 3-5. Additionally, MFS asserts that during the transition to price cap regulation, Ameritech should not be permitted to lower rates beyond the specific reductions required by the Bureau's *TRP Order*. MFS Petition at 2-5.

[20] *See LEC Price Cap Order* at para. 245.

[21] Bell Atlantic Transmittal 389, which lowered DS3 rates, took effect on December 21, 1990. *See* note 16, *supra*.

[22] The earlier Ameritech transmittal has been permitted to take effect. *See* note 15, *supra*.

[23] *See* Annual 1990 Access Tariff Filings, CC Docket No. 90-320, Memorandum Opinion and Order, DA 90-845, released June 21, 1990 (Com.Car.Bur.) *(June 21 Order)*; Annual 1990 Access Tariff Filings, CC Docket No. 90-320, Memorandum Opinion and Order, DA 90-1303, released Oct. 3, 1990 (Com.Car.Bur.) *(October 3 Order)*.

[24] Section 61.47(e) of the Commission's Rules provides that "each band shall limit pricing flexibility of the service category as reflected in the SBI to an annual increase or decrease of 5 percent, relative to the percentage change in the PCI for that basket . . . ."

[25] *See* Part 61.47 of the Commission's Rules, 47 C.F.R. § 61.47.

[26] Section 61.46(d) of the Commission's Rules, 47 C.F.R. § 61.46(d).

[27] *See* US West, D&J, Section 3.1, pp. 3-1 and 3-2. While other carriers have similar arrangements where regional rates are employed, none of those carriers eliminated those arrangements in this filing.

[28] *See* Section 36.641 of the Commission's Rules, 47 C.F.R. § 36.641.

[29] NECA has filed a correction to its Lifeline Assistance rate to reflect two changes. In New Jersey, the End User Common Line reduction and waiver portion of the Lifeline Assistance program, which was expected to take effect January 1, 1991, is now not expected to take effect before July 1, 1991. In Wisconsin, this program will be in effect in June, rather than in February as originally expected. NECA has therefore filed an amendment to Transmittal No. 427 to remove the revenue requirement associated with these two programs.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-643

In the Matter of

Amendment of Section 73.202(b), RM-7579
Table of Allotments,
FM Broadcast Stations.
(Columbia, Illinois)

NOTICE OF PROPOSED RULE MAKING

Adopted: December 26, 1990; Released: January 10, 1991

By the Acting Chief, Allocations Branch:

1. WCBW, Inc. ("petitioner"), licensee of Station WCBW(FM), Channel 285A, Columbia, Illinois, requests the substitution of Channel 285C3 for Channel 285A at Columbia, Illinois, and modification of its license for Station WCBW(FM) to specify operation on the higher powered channel. Petitioner states that it will apply for the channel, if allotted.

2. We believe petitioner's proposal warrants consideration since it could provide a wide coverage area FM station to Columbia. An engineering analysis has determined that Channel 285C3 can be substituted for Channel 285A at Columbia in compliance with the Commission's minimum distance separation requirements with a site restriction of 18.2 kilometers (11.3 miles) northwest of the community.[1] The site restriction is necessary in order to avoid a short-spacing to a construction permit for Station WQHC(FM), Channel 284A, Nashville, Illinois. Channel 285C3 is short-spaced to Channel 285A, Station WTAO, Murphysboro, Illinois. That station was ordered to Channel 286B1 in MM Docket 89-526. *See* 5 FCC Rcd 3776 (1990). The allotment at Columbia is therefore contingent on the licensing of Station WTAO(FM) on the new channel, and issuance of a license for Channel 285C3 at Columbia may be withheld until Station WTAO(FM) is licensed on Channel 286B1. We shall also propose to modify the license of Station WCBW(FM) to specify operation on Channel 285C3 in accordance with Section 1.420(g) of the Commission's Rules.

3. In view of the above, the Commission believes it would be in the public interest to seek comments on the proposal to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to the following community:

	Channel No.	
City	Present	Proposed
Columbia, Illinois	285A	285C3

4. IT IS FURTHER ORDERED, That the Secretary of the Commission SHALL SEND BY CERTIFIED MAIL, RETURN RECEIPT REQUESTED, a copy of this *Order* to the licensee of Station WTAO(FM), Murphysboro, Illinois.

C R Broadcasting, Inc.
344 Old Pinson Road
Jackson, TN 38305

5. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

6. Interested parties may file comments on or before **March 4, 1991,** and reply comments on or before **March 19, 1991,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

David M. Hunsaker
John C. Trent
Putbrese, Hunsaker & Ruddy
6800 Fleetwood Road, Suite 100
P.O. Box 539
McLean, Virginia 22101
(Attorneys for petitioner)

7. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202 (b), 73.504 and 73.606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

8. For further information concerning this proceeding, contact Nancy J. Walls, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Andrew J. Rhodes
Acting Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

> (a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (*See* Section 1.420(d) of the Commission's Rules.)
>
> (b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.
>
> (c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. (*See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTE

[1] The coordinates for Channel 285C3 are North Latitude 38-34-24 and West Longitude 90-19-30.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-644

In the Matter of

Amendment of Section 73.202(b), RM-7543
Table of Allotments,
FM Broadcast Stations.
(Crozet, Virginia)

NOTICE OF PROPOSED RULE MAKING

Adopted: December 26, 1990; Released: January 10, 1991

By the Acting Chief, Allocations Branch:

1. The Commission has before it the petition for rule making filed by James Madison University ("petitioner") requesting the allotment of Channel 230A to Crozet, Virginia, as the community's second local FM service. Although petitioner requests that the Commission reserve Channel 230A for noncommercial use, petitioner states that it will apply for Channel 230A if allotted to Crozet as a commercial channel.

2. The Commission does not generally reserve a channel within the commercial band of the FM spectrum for noncommercial use, but instead reserves Channels 201-220 for such use. Exceptions to this policy have been made where channels in the noncommercial band are not available because of Canadian or Mexican allotments and where the use of the channels in the noncommercial educational band may result in potential interference to television operations on VHF Channel 6. *See Comobabi, Arizona*, 47 Fed. Reg. 32717, published July 29, 1982, and *Burlington and Newport, Vermont*, 45 R.R. 2d 786 (1979). In this instance, neither exception applies. Therefore, we will not propose the allotment of Channel 230A to Crozet as a noncommercial educational allotment, but rather as a commercial allotment. If so allotted, petitioner may, of course, apply for a license on Channel 230A as a noncommercial educational station.

3. Channel 230A can be allotted to Crozet in compliance with the Commission's minimum distance separation requirements with a site restriction of 9.5 kilometers (5.9 miles) south of the community,[1] in order to avoid short-spacings to Stations WAZR-FM, Channel 229B1, Woodstock, Virginia, and WKYS-FM, Channel 230B, Washington, D.C. Since the proposal is located within the protected areas of the National Radio Astronomy Observatory "Quiet Zone" at Green Bank, West Virginia, petitioner will be required to comply with the notification requirement of Section 73.1030(a) of the Commission's Rules.

4. We believe the public interest would be served by proposing the allotment of Channel 230A to Crozet, Virginia, since it would provide the community with a second local FM service. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the community listed below, to read as follows:

	Channel No.	
City	Present	Proposed
Crozet, Virginia	272A	272A, 230A

5. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

6. Interested parties may file comments on or before **March 4, 1991,** and reply comments on or before **March 19, 1991,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

James Madison University
Harrisonburg, Virginia 22807
Attn: Ms. Brenda Hankey
(Petitioner)

7. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202 (b), 73.504 and 73.606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

8. For further information concerning this proceeding, contact Pamela Blumenthal, Mass Media Bureau, (202) 632-6302. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Andrew J. Rhodes
Acting Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

> (a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)
>
> (b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.
>
> (c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTE

[1] The coordinates for Channel 230A at the restricted site are North Latitude 37-59-02 and West Longitude 78-43-04.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-645

In the Matter of

Amendment of Section 73.202(b), RM-7556
Table of Allotments,
FM Broadcast Stations.
(Jesup and Midway, Georgia)

NOTICE OF PROPOSED RULE MAKING

Adopted: December 26, 1990; Released: January 10, 1991

By the Acting Chief, Allocations Branch:

1. The Commission has before it the petition for rule making filed by InterMart Broadcasting Georgia Coast, Inc. ("petitioner"), licensee of Station WGCO(FM), Channel 252C1, Jesup, Georgia, requesting the reallotment of Channel 252C1 from Jesup, Georgia, to Midway, Georgia, and the modification of Station WGCO(FM)'s license to specify Midway as its community of license.

2. Petitioner submits that the allotment of Channel 252C1 at Midway is mutually exclusive with its present allotment to Jesup. Petitioner points out that the reallotment of Channel 252C1 to Midway will provide that community with its first local FM service but will not deprive Jesup of its only local aural transmission service.[1] Petitioner states that Midway, an incorporated city with a mayor and council government, had a 1970 population of 167, a 1980 population of 457 and an estimated 1988 population of 760 persons. The city provides city services such as fire and police protection. Finally, petitioner states that in changing its community of license, Station WGCO will not be required to move its transmitter site.

3. A staff engineering analysis has determined that Channel 252C1 can be allotted to Midway in compliance with the Commission's minimum distance separation requirements with a site restriction of 22.5 kilometers (14 miles) south of the community at petitioner's current transmitter site.[2]

4. We believe the proposal warrants further consideration, as it could provide Midway with its first local FM transmission service. The proposal would not deprive Jesup of its only aural transmission service and the use of Channel 252C1 at Midway is mutually exclusive with its present allotment at Jesup. As requested, we will also propose to modify petitioner's license for Station WGCO(FM) to specify Midway as its community of license. In accordance with Section 1.420(i) of the Commission's Rules, we will not accept competing expressions of interest in use of Channel 252C1 at Midway or require the petitioner to demonstrate the availability of an additional equivalent class channel for use by such parties.

5. Accordingly, we seek comments on the proposal to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to the following communities:

	Channel No.	
City	Present	Proposed
Jesup, Georgia	252C1, 288A	288A
Midway, Georgia	--	252C1

6. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

7. Interested parties may file comments on or before **March 4, 1991,** and reply comments on or before **March 19, 1991,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Gary S. Smithwick
Smithwick & Belendiuk, P.C.
2033 M Street, N.W.
Suite 207
Washington, D.C. 20036
(Attorney for petitioner)

8. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202 (b), 73.504 and 73.606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

9. For further information concerning this proceeding, contact Nancy J. Walls, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Andrew J. Rhodes
Acting Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTES

[1] In addition to Station WGCO(AM), Stations WLOP(AM), WIFO(FM) and noncommercial WLPT(FM) are licensed to Jesup.

[2] The coordinates for Channel 252C1 at Midway are North Latitude 31-36-45 and West Longitude 81-21-37.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-646

In the Matter of

Amendment of Section 73.202(b), RM-7524
Table of Allotments,
FM Broadcast Stations.
(Yreka, California)

NOTICE OF PROPOSED RULE MAKING

Adopted: December 26, 1990; Released: January 10, 1991

By the Acting Chief, Allocations Branch:

1. Before the Commission for consideration is the petition for rule making filed on behalf of Dalmation Enterprises, Inc. ("petitioner"), licensee of Station KYRE(FM), Channel 249C2, Yreka, California, proposing the substitution of Channel 280C1 for Channel 249C2 at Yreka and modification of its license to specify the non-adjacent, higher powered channel. Petitioner failed to state its commitment to apply for Channel 280C1 if it is allotted to Yreka, and should correct the deficiency in response to this *Notice*. *See* paragraph 2 of the attached Appendix.

2. An engineering analysis has determined that Channel 280C1 can be allotted to Yreka in conformity with the minimum distance separation requirements of Section 73.207(b) of the Commission's Rules at the petitioner's present transmitter site.[1] As requested, we also propose to modify petitioner's license for Station KYRE(FM) to specify operation on Channel 280C1. Section 1.420(g)(2) of the Commission's Rules permits the modification of a station's license to a non-adjacent, higher powered channel if an additional equivalent class of channel is available for use by other parties which submit competing expressions of interest. In this regard, petitioner states that Channel 293C1 can be allotted to Yreka in the event other parties express an interest in the use of the Class C1 channel. Channel 293C1 can be allotted to Yreka without the imposition of a site restriction.[2]

3. We believe the public interest would be served by proposing the substitution of Channel 280C1 for Channel 249C2 at Yreka, California, since it could provide an expanded coverage FM service to the community. Accordingly, we seek comments on the proposal to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to the community listed below, as follows:

	Channel No.	
City	Present	Proposed
Yreka, California	249C2	280C1

4. The Commision's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **March 4, 1991,** and reply comments on or before **March 19, 1991,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner's counsel, as follows:

David Tillotson, Esq.
Arent, Fox, Kintner, Plotkin & Kahn
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202 (b), 73.504 and 73.606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Nancy Joyner, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Andrew J. Rhodes
Acting Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

> (a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)
>
> (b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.
>
> (c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTES

[1] Coordinates at the licensed site of Station KYRE(FM) at Yreka are 41-36-34 and 122-37-29.

[2] Coordinates for Channel 293C1 at Yreka are 41-43-48 and 122-38-12.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-647

In the Matter of

Amendment of Section 73.202(b), RM-7180
Table of Allotments,
FM Broadcast Stations.
(Ladysmith and Hallie,
Wisconsin)

NOTICE OF PROPOSED RULE MAKING

dopted: December 26, 1990; Released: January 10, 1991

By the Acting Chief, Allocations Branch:

1. Before the Commission for consideration is a petition r rule making filed by Stewards of Sound, Inc. ("peti- ioner"), licensee of Station WWIB(FM), Channel 279C, .adysmith, Wisconsin, requesting the reallotment of its hannel to Hallie, Wisconsin, and modification of its li- ense accordingly.

2. Petitioner seeks to invoke the provisions of Section .420(i) of the Commission's Rules. Petitioner advises that he requested reallotment to Hallie is mutually exclusive vith the existing allotment of Channel 279C at .adysmith. Petitioner states that operating from its present ite with existing facilities, Station WWIB(FM) places a 70 Bu signal over the entire community of Hallie. Peti- oner adds that Ladysmith (population 3,826)[1] has two M stations and one AM station.[2] Thus, petitioner's pro- osal would bring a first FM broadcast service to Hallie population 4,275), and would not deprive Ladysmith of ocal service.

3. Based on the information before us, we are unable to etermine whether petitioner's proposal would result in a referential arrangement of allotments. We note that Iallie is partially within the Eau Claire Urbanized Area s defined by the United States Census.[3] We question vhether Hallie is deserving of a first local FM service reference, or whether Hallie should be credited with all f the aural services licensed to the Eau Claire Urbanized rea. Petitioner is requested to submit information suffi- ient to show that Hallie is deserving of such a pref- rence. *See Amendment of the Commission's Rules egarding Modification of FM and TV Authorizations to pecify a New Community of License* (*Memorandum Opin- on and Order*), 5 FCC Rcd 7094 (1990).

4. We believe the public interest could be served by roposing to reallot Channel 279C from Ladysmith to Iallie, Wisconsin, if Hallie is deserving of a first local FM ervice preference. Therefore, we shall propose to modify tation WWIB(FM), as requested, to specify Hallie as its ommunity of license. A staff engineering analysis reveals hat Channel 279C can be allotted to Hallie in conformity vith the Commission's rules and regulations at petition- r's specified site.[4] In accordance with the provisions of Section 1.420(i) of the Commission's Rules, we shall not accept competing expressions of interest or require that the petitioner demonstrate the availability of an additional channel at Hallie.

5. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules with respect to the communities listed below, as follows:

	Channel No.	
City	Present	Proposed
Hallie, Wisconsin	-----	279C
Ladysmith, Wisconsin	224A, 279C	224A

6. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

7. Interested parties may file comments on or before **March 4, 1991,** and reply comments on or before **March 19, 1991,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Peter Tannenwald
Arent, Fox, Kintner,
Plotkin & Kahn
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036-5339
(Counsel for the petitioner)

8. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202 (b), 73.504 and 73.606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

9. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been

served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Andrew J. Rhodes
Acting Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

> (a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)
>
> (b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.
>
> (c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Cor
ments shall be served on the petitioner by the perso
filing the comments. Reply comments shall be served c
the person(s) who filed comments to which the reply
directed. Such comments and reply comments shall l
accompanied by a certificate of service. *(See* Sectic
1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisio
of Section 1.420 of the Commission's Rules and Regul
tions, an original and four copies of all comments, rep
comments, pleadings, briefs, or other documents shall l
furnished the Commission.

6. *Public Inspection of Filings.* All filings made in th
proceeding will be available for examination by intereste
parties during regular business hours in the Commission
Public Reference Room at its headquarters, 1919 M Stre
N.W., Washington, D.C.

FOOTNOTES

[1] Population figures are taken from the 1980 U.S. Census.

[2] Station WLDY(AM) and WLDY-FM are licensed
Ladysmith in addition to Station WWIB(FM).

[3] According to the 1980 U.S. Census, 2,017 of Hallie's 4,2
residents are included within the Eau Claire Urbanized Area.

[4] The coordinates for Channel 279C at Hallie are 45-06-35 ar
91-09-43.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-648

In the Matter of

Amendment of Section 73.202(b), RM-7560
Table of Allotments,
FM Broadcast Stations.
(Weiser, Idaho)

NOTICE OF PROPOSED RULE MAKING

Adopted: December 24, 1990; Released: January 10, 1991

By the Acting Chief, Allocations Branch:

1. Before the Commission for consideration is a petition for rule making filed on behalf of Treasure Valley Broadcasting ("petitioner"), licensee of Station KWEI(FM), Weiser, Idaho, seeking the substitution of Channel 300C2 for Channel 257A at Weiser, and modification of its license to specify operation on Channel 300C2. Petitioner states its intention to apply for the channel, if allotted.

2. We believe it would be in the public interest to consider petitioner's proposal because it could provide Weiser with a wide coverage area FM service. A Commission engineering analysis indicates that the proposal to allot Channel 300C2 to Weiser is mutually exclusive with a pending proposal to allot Channel 300C2 to Eagle, Idaho. *See Notice of Proposed Rule Making* in MM Docket 90-526, adopted October 22, 1990. Therefore, in an effort to accommodate petitioner's proposal, we sought an alternate channel and have determined that Channel 298C2 could be allotted to Weiser in compliance with the Commission's minimum distance separation requirements.[1] As requested, we shall propose to modify the license of Station KWEI(FM) to specify operation on Channel 298C2. In accordance with Section 1.420(g) of the Commission's Rules, however, should another party express an interest in the allotment, the modification cannot be implemented unless an equivalent class channel is available for allotment.

3. In view of the fact that Weiser could receive a wide coverage area FM channel the Commission believes it would be in the public interest to seek comments on the proposal to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to the following community:

	Channel No.	
City	Present	Proposed
Weiser, Idaho	257A	298C2

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **March 4, 1991,** and reply comments on or before **March 19, 1991,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Randal Williamson
Treasure Valley Broadcasting
P.O. Box 791
Weiser, Idaho 83672
(Petitioner)

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202 (b), 73.504 and 73.606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Nancy J. Walls, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Andrew J. Rhodes
Acting Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND

the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

> (a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)
>
> (b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.
>
> (c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTE

[1] The coordinates for this proposed allotment are North Latitude 44-15-04 and West Longitude 116-58-06.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

AMERICAN TELEPHONE & TELEGRAPH (AT&T) W-P-C 6622
I-T-C-90-163

Application under Section 214 of the
Communications Act for authority to
acquire certain lines of Western Union
Corporation (WU)

MEMORANDUM OPINION AND ORDER

Adopted: December 21, 1990; Released: December 28, 1990

By the Chief, Common Carrier Bureau:

1. Before the Bureau is an application filed by AT&T under Section 214 of the Communications Act of 1934, 47 U.S.C. § 214 (Application), for authority to acquire by lease the lines currently used by WU to provide Teletypewriter Exchange Services (TWX) and Telex services.[1] The application is opposed by TRT and Graphnet, Inc.[2] For the reasons discussed, below we grant the requested authorization subject to condition and otherwise deny the oppositions.

I. APPLICATION.

2. AT&T seeks authority to acquire certain assets of WU's Business Services Group, including the assets used to provide TWX and Telex services, pursuant to an Agreement of Purchase and Sale (Agreement).[3] AT&T originally stated that the closing under the Agreement was scheduled to occur on September 30, 1990.[4] AT&T states that the lines it proposed to acquire from WU are those currently used by WU to provide domestic and international TWX and Telex services as well as a range of other services.[5] AT&T states that these lines are leased by WU from interexchange and local exchange carriers throughout the U.S.[6] WU currently operates the interexchange lines under a lease from Telecom U.S.A. (Telecom). AT&T intends to enter into a replacement agreement with the successor to Telecom, the terms of which AT&T will advise the Commission once they are negotiated.[7]

3. AT&T states that it does not now provide Telex and TWX services but that it does provide other services to all geographic locations covered by WU's lines. AT&T intends to continue to provide the Telex and TWX services presently provided by WU.[8] AT&T states that to the extent some acquired facilities can be integrated with other AT&T facilities, some of the acquired property will be removed from service. It states that there will be no increase in the property devoted to the public service arising out of the proposed acquisition.[9] It represents that accounting for the acquisition will be performed in accordance with the Uniform System of Accounts for Class A Telephone Companies, Part 32 of the Commission's Rules.[10]

4. AT&T argues that the proposed acquisition will not adversely affect competition.[11] It states that two thirds of the revenues from the Telex and TWX business which AT&T proposes to acquire from WU are from international non-IMTS services, in which the Commission has declared AT&T non-dominant.[12] It asserts that no adverse competitive consequences will result from a transaction in which a non-dominant carrier acquires facilities from another such carrier.[13] AT&T adds that it will be subject to vigorous domestic competition from other global messaging offerings, including other providers' Telex services, fax and electronic mail.[14]

5. AT&T states that the proposed transaction is in the public interest because it will provide WU with cash needed to finance a proposed recapitalization.[15] It adds that acquisition will permit WU to exit a business that it has found increasingly difficult to support financially while, at the same time, enabling AT&T to serve customers in the highly competitive and expanding global messaging industry.[16]

II. COMMENTS AND DISCUSSION.

6. *Market Dominance*. The application is opposed by TRT. It states that with the consummation of the proposed purchase, AT&T would obtain by far the largest share of the market for electronic messaging services and would then hold predominant market shares in all significant United States interexchange services submarkets, except for, perhaps, international private line services.[17] TRT states that AT&T has been held by the Commission to be dominant in the domestic interexchange services market and in the market for international message telephone services (IMTS).[18] It adds that WU, through internal expansion and through its acquisition of one of the largest international record carriers (IRCs), ITT World Communications, Inc., has succeeded in obtaining a major share of the telex business. TRT notes that WU still retains the largest base of telex and telex equivalent subscribers in the U.S.; TRT is concerned that other telex carriers would be unable to provide a universal telex service to their subscribers without reasonable access to the subscribers on WU's networks.[19]

7. TRT argues that the principal issue presented by AT&T's application is whether it is in the public interest to authorize AT&T, the overwhelmingly predominant United States carrier, with more than a two-thirds share of the overall interexchange services market, to buy increased market share and market power by purchasing the business of a leading service provider in a submarket in which AT&T is presently a significant competitor but not predominant.[20] TRT states that AT&T fails to address this issue in its application and circumvents it by merely arguing that AT&T has been found to be non-dominant in one telecommunications service submarket, i.e., non-IMTS international services. TRT distinguishes the case of *Telecom USA, Inc.* where the acquisition of one non-dominant carrier, Telecom, by another non-dominant carrier, MCI, was found not to result in anti-competitive consequences. On the other hand, AT&T, it argues, is much larger in resources and market share than all of its competitors combined,[21] and that in *Telecom USA, Inc.* MCI argued that its acquisition of Telecom would enable it to compete on more equal terms with AT&T.[22] TRT

states that it is not in the public interest to permit AT&T to obtain its goal of predominance in this submarket by the purchase of the business of the market leader.[23]

8. Graphnet states it is a competitor with WU in the provision of international and domestic electronic messaging services.[24] Graphnet states that it is most concerned that the Commission not deviate from its normal policy of subjecting acquisitions of the sort at issue here to a searching and methodical analysis of the transaction's potential to result in a diminution of competition or restraint of trade.[25] Graphnet urges that there is very real cause for concern that the acquisition by AT&T of WU's core electronic messaging capacity will diminish competition. It asserts that in acquiring WU's telex capacities and customers, AT&T will instantly assume approximately 60% of the telex market, a market share larger by approximately 50% than that of the second place company, MCI, which is an even more distant second to AT&T in the voice market share. It adds that the market-leading position of WU's EasyLink electronic mail service, when combined with that of (now) sixth place AT&T Mail, will yield a combined total market share of 37% of that rapidly growing market. According to Graphnet, no firm now ranking between Easylink and AT&T Mail has more than 14% of the total market revenue.[26] Graphnet states that in the electronic messaging industry, a well-respected industry newsletter calculates AT&T's percentage share after the WU purchase as "an amazing 43% of the messaging industry . . . ."[27] Graphnet points out that, to a "microscopically small competitor such as Graphnet, creating a market entity of that magnitude is a threatening prospect which the Commission ought not to endorse without the most careful scrutiny."[28]

9. AT&T counters that Graphnet fails to provide any support or citation for its claimed market share percentages which, it states, are incorrect.[29] AT&T states that there is no merit to claims that this transaction will substantially lessen competition in any market.[30] It argues that pursuant to the Hart-Scott-Rodino Antitrust Improvements Act, 15 U.S.C § 18(a), the Department of Justice has already reviewed AT&T's transaction with WU, and has not objected to the proposed acquisition.[31] According to AT&T, the relevant market for purposes of the instant transaction is "electronic messaging services," and that market includes not only telex and electronic mail services, but also public and premises-based facsimile and voice messaging services, value added networks, and electronic data interchange.[32] It states that the domestic electronic messaging market is large and is also unconcentrated.[33] AT&T estimates that the total revenues for these electronic messaging services were more than $4.3 billion in 1989.[34] AT&T submits that no firm had a market share of greater than 11 percent of these services and the combined shares of AT&T and Western Union were only 7.8 percent.

10. TRT disagrees with AT&T's definition of the relevant market.[35] It states that AT&T relies on an apparent estimate of a market, not for electronic messaging services, but for electronic messaging products.[36] TRT argues that the two largest participants in this market are Japanese equipment manufacturers, Sharp and Murata, which clearly do not compete with AT&T or WU in the provisions of electronic messaging services.[37]

11. Section 7 of the Clayton Act forbids the acquisition of the assets of a company by another company if the acquisition may substantially lessen competition or tend to create a monopoly.[38] The Commission must consider this issue as an element of its public interest finding.[39] An assessment of possible anticompetitive consequences begins with a determination of the relevant market.[40] The relevant market generally is defined by considerations of substitutability both in terms of supply and demand. Two distinct product markets are involved here, domestic interstate interexchange service,[41] and non-international message telephone service.[42] We shall examine each market separately.

12. First, as to the domestic interstate interexchange market, the proposed acquisition will not substantially lessen competition or tend to create a monopoly. Although AT&T still is dominant in that market, its market share of total revenues has declined over the last decade while that of its competitors has increased. In terms of total toll revenues for interexchange telecommunications, in 1989 AT&T had a 67.4 percent share of the market.[43] WU's share of this market is less than half of one percent.[44] AT&T's purchase of WU's limited market share cannot be said to substantially lessen competition in that market.

13. Second, as to the non-IMTS market, we do not believe the proposed acquisition raises anticompetitive concerns, especially given the conditions we are attaching to this authorization.[45] AT&T has approximately a 9.1 percent share of the non-IMTS market. WU has a 22.1 percent share of the non-IMTS market market.[46] Both AT&T and WU are considered non-dominant in the non-IMTS market.[47] AT&T's proposed acquisition will not substantially lessen competition because even after the acquisition AT&T's share will be only 31.2 percent of that market. We also find that this increase in AT&T share is not sufficient to change AT&T's non-dominant status in the non-IMTS market.[48]

14. The record also demonstrates that the Department of Justice reviewed this transaction pursuant to the Hart-Scott-Rodino Antitrust Improvements Act, 15 U.S.C §18 (a), and it did not object to the proposed acquisition or otherwise question its lawfulness. We find that TRT's statement that AT&T relies on an apparent estimate of a market, not for electronic messaging services, but for electronic messaging products, to be irrelevant to our market analysis. Similarly, Graphnet's assessment of the market fails to identify the relevant market and its conclusions are unsupported by any data.

15. In addition, any analysis of whether the grant of the application causes market distortions inimical to the public interest must take into account the current financial difficulties of WU. The record indicates that WU is facing a cash flow emergency which may jeopardize service to current TWX and telex customers. The proposed acquisition should alleviate that risk. The record does not indicate that any other competitor is interested or able to purchase these facilities from WU.

16. No evidence in the record suggests that the proposed acquisition would result in a substantial lessening of competition or tend to create a monopoly. Graphnet and TRT have failed to support their claims of marketplace inequities with any quantifiable data in a manner which outweighs WU's clear and immediate need to sell facilities it can no longer maintain. Therefore, AT&T's application to acquire by lease the lines currently used by WU to provide TWX and Telex services comports with the applicable provisions of the Clayton Act, and the grant of the application will serve the public interest by permitting

telecommunications resources to move to a higher valued use and by avoiding an immediate risk of termination of service to the public.

17. *International Accounting Rates*. Graphnet also argues that AT&T has induced several foreign telecommunication authorities to extend to it favorable IMTS accounting rates that were not made available to AT&T's competitors.[49] It states that AT&T has done the same for its packet services.[50] Graphnet urges that, if AT&T acquires WU's telex and TWX facilities, there is no reason to believe AT&T will not do the same with these services.[51] Graphnet adds that the Commission's proposed new approach to the regulation of accounting rates has a series of safeguards to protect competition that would not immediately constrain AT&T if it is permitted to assume WU's international business.[52] Graphnet submits that any grant of AT&T's application must be conditioned upon a requirement that AT&T be obliged, at least during the pendency of the foreign accounting rate rule making, to adhere to the requirements set out in *Regulation of International Accounting Rates*.

18. AT&T replies that there is no basis to impose this condition.[53] AT&T states that existing procedures already require the filing of waiver applications for different record service accounting rates by individual carriers.[54] It notes that all of the prior accounting rate changes negotiated by AT&T which Graphnet cites in its opposition were subject to such Commission review and were permitted by the Commission to take effect.[55]

19. The condition that Graphnet requests be imposed on AT&T in this proceeding is one element of a proposal to implement a notification option for simple reductions in the accounting rate with a single foreign telecommunications administration rather than requiring carriers to request a waiver of the international settlements policy (ISP) which is being considered in CC Docket No. 90-337, *Regulation of International Accounting Rates*.[56] Whether that condition should be adopted as a part of the notification option is an issue which is appropriately considered in that Rule Making proceeding. Graphnet has not adequately demonstrated why the current procedures for enforcing the ISP are inadequate to deal with AT&T's provision of the services it will initiate as a result of grant of the instant application until such time as a Report and Order in CC Docket No. 90-337 can be issued. Therefore, we deny Graphnet's request that we impose the proposed condition on AT&T at this time.

20. *Telex Interconnection Arrangements*. TRT further argues that AT&T's acquisition of WU's telex, TWX and interconnected Easylink services could jeopardize the continuation of the telex interconnection arrangements established in accordance with the Record Carrier Competition Act of 1981 (RCCA).[57] TRT explains that although the provisions explicitly governing the initial establishment of record carrier interconnection contained in the RCCA have now "sunsetted", there are remaining non-sunsetted provisions which continue to protect the right of each record carrier to equitable interconnection.[58] TRT states that although these requirements are currently binding upon WU, it does not appear that these provisions would be applicable to AT&T as the owner and operator of WU services.[59] TRT notes that the result would be the elimination of any explicit legal requirement for the telex provider with the largest number of subscribers to interconnect its networks upon equitable terms with the networks of the other telex providers. TRT, therefore urges the Commission to impose the following conditions, as a minimum, upon any grant of AT&T application:

> 1. AT&T is required to continue in effect the present interconnection arrangements with the other record carriers, except as it and the other record carriers shall mutually agree to modify or discontinue such interconnection arrangements.
>
> 2. AT&T's charges to other record carriers for the termination of telex or enhanced telex traffic on its domestic telex and TWX networks shall be no higher than the charges for such network termination that AT&T collects from its own international telex carrier (within the meaning of Section 222(c)(1)(B) of the Communications Act) or from its most favored telex customer, enhanced service customer or foreign correspondent.[60]

21. AT&T counters that the RCCA is inapplicable to AT&T because that statute by its explicit terms "does not include any common carrier which derives a majority of its revenues during any calendar year from the provision of services other than record communications service."[61] It adds that in all events, AT&T has already filed tariffs for interconnection of its telex services with other record carriers which are identical in all material respects to WU's existing tariffs.[62] AT&T further states that WU has entered into an agreement with TRT and other record carriers specifying safeguards for interconnection arrangements to which AT&T will become subject as part of its acquisition of WU's telex business.[63] AT&T notes that the Commission has previously concluded that the interconnection agreement provides sufficient protection for other record carriers' interests to obviate imposing additional conditions on a Section 214 application involving WU's facilities.[64]

22. TRT responds that AT&T now opposes the application of the same RCCA requirements to its provision of record services that are applicable to TRT/FTC and other carriers.[65] TRT submits that although AT&T intends voluntarily to continue interconnection arrangements in place and to abide generally by the requirements of the RCCA, corporate strategies and corporate managements change over time and both the Commission and the smaller record carrier competitors should have more than the continued good will of AT&T to rely upon to be assured of fair record carrier interconnection arrangements in the future.

23. We find that it is in the public interest to require AT&T to continue WU's current interconnection obligations. AT&T gives assurances that it already considers itself bound by these agreements as the successor to WU.[66] Thus, it appears that imposing such a condition would not result in a burden upon AT&T. Interconnection arrangements have been found to be an integral element in maintaining competition in this marketplace, and we do not intend by this authorization to weaken those findings.[67] Thus, we condition this authorization on AT&T's assuming WU's current interconnection agreements until the expiration of each such agreement,[68] at which time AT&T shall continue to be subject to the same RCCA interconnection requirements applicable to the networks of its telex and TWX competitors. Should

marketplace considerations require reexamination of this condition in the future, AT&T may petition for such reexamination.

24. In view of the foregoing, the Bureau concludes that grant of the application as conditioned serves the public interest by enabling AT&T to continue service for WU's current customers while maintaining a competitive marketplace.

25. Accordingly, IT IS CERTIFIED, that acquisition and operation of the facilities described in the application of American Telephone and Telegraph Co., File Nos. W-P-C 6622 and I-T-C-90-163 IS REQUIRED by the public convenience and necessity.

26. IT IS ORDERED, that this authorization is subject to AT&T's assuming WU's obligations under interconnection agreements in effect until the expiration of each such agreement, at which time AT&T shall continue to be subject to the same interconnection requirements applicable to the networks of its telex and TWX competitors.

27. IT IS FURTHER ORDERED, that failure to notify the Commission in writing within thirty days of the release date of this memorandum opinion and order that the authorization as conditioned is unacceptable will constitute acceptance thereof. In the event of such notification, this authorization is void pending further order.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Firestone,
Chief, Common Carrier Bureau

FOOTNOTES

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[1] AT&T filed an application for Special Temporary Authority pursuant to §63.04 of the Commission's rules, concurrently with the Section 214 Application. Because we grant the Section 214 authorization, the request for special temporary authority is moot and is hereby dismissed.

[2] A Petition to Deny or to Impose Conditions was filed by TRT/FTC Communications, Inc. (TRT). Graphnet, Inc. (Graphnet) filed comments. AT&T filed a Response to these pleadings. TRT filed a Reply to AT&T's Response.

[3] Under separate cover, AT&T has transmitted to the Commission a voluminous computer printout detailing the lines to be acquired. AT&T requests that the Commission accord this printout confidential treatment under Sections 0.457 and 0.459 of the Commission's rules. It appears that these materials contain commercial information which would not customarily be made available to the public by AT&T. AT&T's request for confidential treatment is granted.

[4] *See* AT&T letter to the Commission dated September 27, 1990. The closing date has been deferred, according to AT&T.

[5] Application at 2. AT&T states it will also acquire certain access node processors and packet switches at many points in the United States and in London, England, as identified in schedules to the Agreement.

[6] Application at 3.

[7] *Id.*

[8] *Id.*

[9] *Id.* at 3-4.

[10] *Id.* at 4.

[11] *Id.*

[12] Application at 4 citing, *International Competitive Carrier Policies*, 102 FCC 2d 812 (1985), *recon. denied*, 60 Rad. Reg. 2d 1435 (1986).

[13] Application at 5 citing, *Telecom USA, Inc.*, File No. ENF-90-08, Memorandum Opinion and Order, DA 90-1018, released August 1, 1990, para. 11.

[14] Application at 5.

[15] *Id.* at 6. AT&T attaches to its request for Special Temporay Authority dated August 15, 1990, an affidavit by the Senior Vice President of WU stating that WU is facing a near-term and long-term liquidity crisis which cannot be supported by operating cash flow. He states that due to the substantial uncertainty and speculation circulating with respect to the financial condition and prospects of the corporation, it is critical to the interests of the corporation to consummate the AT&T sale as soon as possible. Affidavit of John C. Walters, Vice President WU, at 2.

[16] Application at 5. AT&T states that global messaging is the capability to exchange information between a multitude of sources -- such as teleprinters, computer terminals, facsimile (fax) machines, or telephones -- in a multitude of forms -- such as text, data or voice -- anywhere in the world. Telex and TWX represent two forms of such messaging capabilities. *Id.* at 6.

[17] TRT Petition to Deny or to Impose Conditions (TRT Petition) at 2-3.

[18] TRT Petition at 3.

[19] *Id.* at 4.

[20] *Id.* at 5.

[21] *Id.* at 6.

[22] *Id.*

[23] *Id.* at 7.

[24] Graphnet Comment at 1.

[25] *Id.* citing, 47 U.S.C. § 602, 15 U.S.C. § 18.

[26] *Id.* at 3-4. Graphnet states that in order of their rank these are SprintMail, Dialcom, CompuServe and MCI Mail.

[27] *Id.* at 4 citing, *Electronic Mail & Microsystems* (July 16, 1990).

[28] *Id.* Graphnet further argues that WU facilities employed by AT&T in the provision of enhanced services should be placed in a separate subsidiary. This argument was addressed and rejected in *In the Matter of AT & T Petition for Limited Interim Waiver of the Requirements of Third Computer Inquiry*, 5 FCC Rcd _________, released October 22, 1990 (Common Carrier Bureau).

[29] AT&T Response to Oppositions (AT&T Response) at 1.

[30] *Id.* at 2.

[31] *Id.* at 3.

[32] AT&T Reply at 4.

[33] *Id.* at 6.

[34] Exhibit A to AT&T's response is the affidavit of its Marketing Director which describes the data sources and methodology underlying AT&T's market estimate. As part of the estimate, the affidavit provides proprietary information on AT&T and WU's revenues for individual segments of the messaging market. AT&T requests that the Commission accord confidential treatment to the affidavit under Sections 0.457 and 0.459 of the Commission's rules. That request is granted. A non-confidential version of the affidavit has been publicly filed by AT&T with its Response.

[35] TRT Reply to AT&T Response (TRT Reply) at 2.

[36] *Id.*

[37] *Id.*

[38] *See* 15 U.S.C. § 18.

[39] *See GTE Corporation and Southern Pacific Co.*, 94 FCC 2d 235, 249 (1983).

[40] *See Brown Shoe Co. v. U.S.*, 370 U.S. 294 (1962).

[41] All interstate domestic interexchange telecommunications have been defined as a single product market. *See Policy and Rules Concerning Rates for Competitive Carrier Services and Facilities Authorization Therefor*, 95 FCC 2d 554, 573-575 (1983).

[42] In *International Competitive Carrier Policies*, 102 FCC 2d 812 (1985), *recon. denied*, 60 Rad. Reg. 2d 1435 (1986), the Commission found that international telecommunications services are made up of two distinct product markets, IMTS (international message telephone service) and non-IMTS. Non-IMTS includes telex, telegram, TWX, private line, high speed data, video conferencing and Intelsat Business Service (IBS). *See* 102 FCC 2d at 823-828.

[43] *See In re Applications of Telecom USA and MCI*, 5 FCC Rcd. 4857 (Common Carrier Bureau 1990). This compares to a share of approximately 90 percent in 1984. *See also Long Distance Market Shares*: *Second Quarter, 1990*, released September 24, 1990 by the Industry Analysis Division, Common Carrier Bureau at Table 4.

[44] Total transmission revenues for 1989 amounted to approximately 66 billion dollars. *See Long Distance Market Shares*: *Second Quarter 1990*, released September 24, 1990 by the Industry Analysis Division, at Table 4. WU's total transmission revenues for 1989 were 350 million -- a .53 percent share of the market. *See Preliminary Statistics of Communications Common Carriers*, released July 6, 1990 by the Industry Analysis Division, at Table 3.2.

[45] *See infra* para. 23.

[46] *See Trends in the International Telecommunications Industry*, Mimeo 10347, released October 31, 1990 by the Industry Analysis Division, at Table 5. The percentages used herin were calculated using data for telephone private line revenues from Table 6 and international record carrier combined revenues from Table 7 of the report.

[47] *See International Competitive Carrier Policies*, 102 FCC 2d, at 833-838.

[48] Because AT&T is non-dominant in the provision of non-IMTS services and indicates that it already has been authorized to acquire circuits to provide non-IMTS services to all of the countries served by the circuits it proposes to acquire from WU, we need not authorize AT&T to acquire these circuits. *See International Competitive Carrier Policies*, 102 FCC 2d at 845. However, AT&T must report its acquisition of these circuits in accordance with the provisions of Section 63.10 of the Commission's Rules.

[49] Graphnet Comments at 4 citing, *AT&T*, 2 FCC Rcd 6409, *aff'd on recon.*, 2 FCC Rcd 7537 (1987).

[50] Graphnet Comments at 4-5.

[51] *Id.*

[52] Graphnet Comments at 5 citing, *International Accounting Rates*, 5 FCC Rcd 4948, 4949 (1990): "[i]f a foreign telecommunications administration implements a lower accounting rate with one U.S. carrier, it must be prepared to offer the same rate to all U.S. carriers serving that country . . . U.S. carriers would be required to 'accept' only their proportionate share of return traffic from a given country."

[53] AT&T Response at 3.

[54] *Id.* at 10, citing, *Implementation and Scope of the International Settlements Policy for Parallel International Communications Routes*, 2 FCC Rcd 1118 (1987).

[55] *Id.*

[56] *See International Accounting Rates*, 5 FCC Rcd at 4849.

[57] TRT Petition at 7. *See also* RCCA, 47 U.S.C. § 222.

[58] *Id.* at 8 citing, 47 USC §222(c)(1)(B). The RCCA provides that in any case in which such separate domestic record carrier furnishes interconnection to such separate international record carrier, any interconnection which such separate domestic record carrier furnishes to other international record carriers shall be (I) equal in type and quality; and (II) made availabe at the same rates and upon the same terms and conditions. 47 USC § 222(c)1(B)(ii). The RCCA also requires that any interconnection which such separate international record carrier furnishes to to other domestic record carriers shall be (1) equal in type and quality; and (II) made available at the same rates and upon the same terms and conditions. 47 USC § 222(c)(1)(B)(iii).

[59] *Id.* at 8.

[60] TRT Petition at 9.

[61] AT&T Response at 9 citing, 47 U.S.C. § 222(a)(2). Under the RCCA, the term "domestic telegraph carrier" means any common carrier by wire or radio, the major portion of whose traffic and revenues is derived from domestic telegraph operations. *Id.*

[62] AT&T Response at 9.

[63] *Id.* at 9-10.

[64] *Id.* at 10. *See also Western Union Corporation,* 2 FCC Rcd 6063, 6065 (1987). No party may withdraw from the agreement without giving six months prior notice. AT&T states that the Commission has recognized that this interval provides other signatories adequate time to pursue alternative arrangements or, if appropriate, to seek relief from the Commission. *Id.*

[65] TRT Reply at 3.

[66] *See supra* para. 21.

[67] AT&T cites to *WU*, 2 FCC Rcd 6063 (1987), for the proposition that the Commission has previously concluded that the interconnection agreement provides sufficient protection to obviate imposing a condition on a Section 214 application. *See supra* note 64. However, in deciding not to impose a condition in that case, the Bureau relied on the fact that statutory safeguards in 222(c)(1)(B) and 201(a) of the Act guarantee interconnection for the provision of international services and provide procedures for the IRCs to assert their rights. *See* 2 FCC Rcd 6065 at para. 24. Here, AT&T argues it is not subject to Section 222 of the Act.

[68] The Bureau notes that all parties to such interconnection agreements retain the ability to agree mutually to modify or discontinue the agreements.

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 90-313

In the Matter of

Policies and Rules
Concerning Operator
Service Providers

RM-6767

FURTHER NOTICE OF PROPOSED RULE MAKING

Adopted: December 13, 1990; Released: December 21, 1990

By the Commission:

I. INTRODUCTION

1. On October 17, 1990, the President signed into law the Telephone Operator Consumer Services Improvement Act of 1990.[1] The purpose of the Act is "to protect consumers who make interstate operator services calls from pay telephones, hotels, and other public locations against unreasonably high rates and anticompetitive practices."[2] Under the Act, this Commission must, *inter alia,* conduct a "general" rule making proceeding to prescribe regulations that will implement statutory provisions and establish certain standards and policies, and a monitoring/reporting proceeding that will ultimately result in three reports to Congress.[3] We therefore adopt this Further Notice of Proposed Rule Making in order to: (1) "initiate" the general rule making and monitoring/reporting proceedings required by the Operator Services Act;[4] (2) propose the required rules; (3) invite any additional comments that are necessary beyond those submitted in response to our initial Notice of Proposed Rule Making in CC Docket No. 90-313;[5] (4) solicit such further information as is necessary to ensure that the objectives of the Act are satisfied;[6] and (5) declare that, under the Act, the access and payphone compensation issues must be considered in a separate proceeding.[7] The rules proposed herein shall supplant those proposed in the initial *NPRM.*

II. BACKGROUND

2. We noted in our initial *NPRM* that, *inter alia,* the divestiture of AT&T had led to the entry of competitors into the interstate operator services industry that had previously been dominated by the Bell System.[8] The newer operator service providers (OSPs) are sometimes known as alternative operator service (AOS) companies. AOS companies generally lease lines from telephone carriers and combine these transport elements with their own operator services. Then, like the more traditional OSPs, they enter into contracts to provide operator services to "call aggregators," entities that make telephones available to the public or transient users of their premises.[9] A caller using an aggregator's telephone will automatically be connected to this "presubscribed" OSP unless an access code[10] is dialed.

3. This expansion of the operator services industry led not only to a degree of competition among OSPs, but also to "widespread consumer dissatisfaction over the rates and practices of many operator service providers."[11] One sign of this dissatisfaction was a complaint filed by two consumer advocacy groups against five AOS companies.[12] In the *TRAC Order,* the Common Carrier Bureau (Bureau) granted the complaint in part and ordered the defendant companies to, *inter alia*: (1) provide written information about their services to be posted on or near presubscribed telephones; (2) identify themselves audibly at the beginning of calls, a process known as "call branding"; (3) discontinue the blocking of access to other OSPs; and (4) cease "call splashing" to the extent technically possible.[13]

4. Shortly after the *TRAC Order* was released, the National Association of Regulatory Utility Commissioners ("NARUC") filed a petition for rule making, asking us to address a number of issues regarding the practices, policies, and appropriate regulatory treatment of OSPs.[14] In May 1989, the Bureau issued a Public Notice inviting comments on the NARUC Petition, and a number of responses were filed.

5. On June 14, 1990, this Commission adopted the initial *NPRM* in CC Docket No. 90-313. In the *NPRM,* we granted the NARUC Petition to the extent that it sought a broader Commission inquiry into the practices of the operator services industry.[15] More significantly, we proposed specific rules aimed at solving problems in the industry that had persisted despite previous Commission action.[16] Besides inviting comments on the rules themselves, we asked interested parties to express their views on a number of related issues that were not the subject of proposed rules. [17] Parties filed their initial comments by September 7, 1990.

6. Concurrently with the Commission's examination of operator service issues, Congress was considering specific legislative proposals that were intended to curb certain practices in the operator services industry and to preserve a (caller's right to just and reasonable rates. During the first week of October 1990, Congress passed the Operator Services Act, which the President signed into law shortly thereafter. Following passage of the Act, the Bureau issued an order that extended the date for filing reply comments in CC Docket No. 90-313 and that asked parties who intended to file reply comments to discuss the effects of the Act on that proceeding.[18] In addition, the Bureau released a public notice dealing with the Act's informational tariff filing requirements.[19] The notice described who must file such tariffs and the information that the tariffs must contain.[20] It also established filing procedures and set out the format with which the tariffs must conform.

III. DISCUSSION

7. After considering both the text of the Operator Services Act and the reply comments filed in CC Docket No. 90-313, [21] we conclude that it is necessary to adopt a *Further NPRM* in this docket. We think such action is required for several reasons.

A. The General Rule Making Proceeding

8. First, Section 226(d)[22] of the Act directs the Commission to "initiate" a general rule making proceeding to prescribe the regulations described by the Act.[23] This *Further NPRM* will serve to formally "initiate" the general proceeding. In addition, our original proposed rules are not, in all respects, identical to the requirements of the Act. Hence, in order to ensure that the Act is satisfied by this rule making: proceeding, we are adopting this *Further NPRM* to propose new, comprehensive rules that are modeled directly on the text of the Act.[24] These new rules will supersede those proposed in the initial *NPRM*. For the most part, however, the rationale for each new proposed rule will be similar to the rationale set out for the analogous rule in the initial *NPRM*, and we will not repeat that discussion here.

9. We therefore seek comment on the new proposed rules contained in Appendix B and ask that interested parties pay special attention in their comments to provisions that differ significantly from the rules proposed in the initial *NPRM*. We wish to emphasize, however, that parties need not repeat the views contained in their previously submitted comments. We intend to give full consideration to all relevant comments, including those filed during the initial stages of this proceeding.

10. Several of the new proposed rules depart somewhat from the treatment given the same topics in the initial *NPRM*. For example, the new rules would require double branding [25] and the posting of the address of the Bureau's Enforcement Division on or near aggregator telephones,[26] while the earlier proposed rules required only single branding and did not require the latter posting. The new rules also prohibit OSPs from charging for most unanswered calls[27] and aggregators from placing a higher surcharge on access code calls than on calls using the presubscribed OSP,[28] topics on which we did not originally propose rules. Further, the new rules would only prohibit, as the Act does, the blocking of 800 and 950 access,[29] while the original proposed rules would have prohibited 10XXX blocking as well.[30] At the same time, the new rules, like the Act, require only new aggregator equipment to have the 10XXX access capability;[31] we originally proposed that both new and existing equipment be required to have this capability. We have also proposed a definition section,[32] which we did not do in the initial *NPRM*, and a somewhat different splashing rule[33] based on the Act.

11. In addition, the Operator Services Act specifically requires us to adopt regulations that establish: (1) minimum standards for OSPs to use in the routing and handling of emergency calls;[34] and (2) a policy for requiring OSPs to make public information about recent changes in operator services and choices available to consumers in that market.[35] Neither of these subjects was discussed at length in the initial *NPRM*.

12. We noted in the *NPRM* that NARUC had recommended in its rule making petition that we consider adopting nationwide standards for the handling of emergency calls by OSPs.[36] The purpose of such standards would be to ensure that emergency calls are efficiently routed to the appropriate local public safety organization. In response to NARUC's recommendation, we simply requested comment on the topic rather than proposing a rule, explaining that we have traditionally deferred to the states in this area because of the local nature of such calls. Given the requirements of the Operator Services Act, however, we now propose and seek comment on a specific rule, Section 64.706, that sets out a minimum standard for the routing and handling of emergency calls by OSPs. While we have suggested in the proposed rule that only calls made via an "emergency" dialing sequence (e.g., "0," "911") be covered by the rule, we seek comment on whether it is possible for an OSP to receive emergency calls that are initiated in some other way. We also tentatively conclude that when an OSP connects a call to the "appropriate emergency service of the call's originating location," the call must be routed not only to the proper type of service, such as a fire department, but also to the service that serves the caller's location. For example, it would not be appropriate to route a call to an urban fire department when a caller is actually in a suburban locale.

13. We also seek comment on our proposed rule concerning public dissemination of information by OSPs, Section 64.707. As a matter of policy, we find that it is essential for participants in the operator services industry to communicate with the interested public. Regular publication of the described materials will help to ensure that "consumers have the opportunity to make informed choices"[37] when placing interstate calls. Under this proposed rule, we would expect an OSP to make available, upon request, written information that describes not only its own services and recent changes in those services, but also the services and trends in the industry as a whole. In addition, the information must include descriptions of any recent changes in the choices available to consumers in the operator services market and the methods by which they may exercise those choices. Unlike the reporting they would provide as to their own services, however, we do not intend that OSPs be required to publish lengthy details about their competitors' rates and services. Instead, we contemplate the publication of generic descriptions of any recent innovations in services and consumer choices. We specifically seek comment on how detailed this information must be to satisfy Section 226(d)(4)(B) of the Act, which is the statutory basis of our proposed rule.

B. CC Docket No. 90-313 - Phase II

14. Next, this *Further NPRM* will serve to initiate the proceeding required by Section 226(h)(3) of the Act, which directs the Commission to "initiate" a proceeding to determine whether the regulatory objectives specified in Section (d)(1) are being achieved. Those provisions of the Act seek, first, to ensure that consumers are protected from unfair and deceptive practices relating to their use of operator services to place interstate calls and, second, to ensure that consumers have the opportunity to make informed choices in making such calls. Toward that end, the Act directs the Commission to (1) monitor operator service rates (Section 226(h)(3)(A)(i)); (2) determine the extent to which offerings made by providers of operator services improve operator services in various respects (Section 226(h)(3)(A)(ii)); (3) report on operator service rates, incidence of complaints, and service offerings (both in the aggregate and with respect to particular OSPs) (Section 226(h)(3)(A)(iii)); (4) consider the effect of commissions and various other costs of doing business on the rates operator service providers charge consumers (Section 226(h)(3)(A)(iv)); and (5) monitor compliance with the Act, including the periodic placement of telephone calls from aggregator locations (Section 226(h)(3)(A)(v)).

Section 226(h)(3)(B) directs the Commission to report on the progress of this proceeding 5, 11, and 23 months after its initiation.

15. The Operator Services Act does not direct that the proceeding required by Section 226(h)(3) be separate from other proceedings that Congress has instructed us to initiate. Indeed, because the purpose of the proceeding required by Section 226(h)(3) is to determine whether the regulatory objectives specified in Section 226(d) are being achieved, we conclude that administrative efficiency dictates that we conduct the two proceedings jointly in the same docket, with issues raised by Section 226(h)(3) being designated "Phase II." Therefore, we seek comment in this docket on the proposed reporting requirements outlined below and on other issues raised by Section 226(h)(3).[38]

16. In order to monitor and report on certain aspects of the operator services industry as required by Section 226(h)(3)(A) and (B), we conclude that we will need information beyond that provided by the informational tariffs that OSPs will file under Section 226(h)(1). Hence, we now propose that OSPs be required to file additional information with the Common Carrier Bureau. This information, which is described below, would have to be filed not later than 6, 9, 15, and 21 months after release of this *Further NPRM.*

17. First, pursuant to Section 226(h)(3)(A)(i) and (iii), we propose that OSPs subject to the terms of the Act be required to submit compilations of their rates at each of the intervals noted above. We tentatively conclude that each report should state the percentage change in each rate element since January 1, 1991, or since the date of the last report, whichever is more recent.[39]

18. Next, pursuant to Section 226(h)(3)(A)(iii), we propose to require each OSP to file, at the intervals noted above, a statement of the number of complaints each OSP has received each month since January 1, 1991 or since the date of its last report, whichever is more recent. This statement should include both complaints received directly from consumers and complaints filed with this Commission or other governmental bodies and should indicate the incidence of complaints, *i.e.*, the number of complaints received divided by the number of calls attempted by consumers during each month covered by the report. We recognize that in many instances it may not be clear whether consumers are complaining about interstate or intrastate calls. Accordingly, we propose that the reports cover all complaints. The reports should, when possible, indicate the actual numbers of interstate and intrastate complaints and the percentages of total complaints that those numbers represent. If and only if such a distinction cannot be made, the reports should include the total number of complaints and an estimate of the percentage of complaints that relate to interstate calling. The reports should also classify and quantify the complaints using the following categories: (1) rate charged; (2) blocking of access to carriers other than the presubscribed one; (3) call splashing; (4) call quality; (5) failure to comply with other statutory requirements or FCC rules; and (6) other complaints. We seek comment on these categories.

19. Section 226(h)(3)(A)(iv) requires the Commission to consider the effect that commissions, surcharges, billing and validation costs, and other costs of doing business will have on the overall rates charged to consumers. Therefore, we also propose to require OSPs to file certain cost data in order to provide a record of the effect of various costs on the overall rates that consumers pay for operator services, as required by this section. Specifically, we propose to require OSPs to state their total capital investment, total expenses, and total revenue for the period from January 1, 1991 to the date of each report. Reports of expenses should separately state the amounts of commissions and surcharges that OSPs pay as well as their costs for billing and validation, total salaries and other benefits to\officers and employees, and all other expenses.

20. In addition to comments on the proposed reporting requirements outlined above, we solicit comment on the matters raised by Section 226(h)(3)(A)(ii) and Section 226(h)(3)(A)(v). Specifically, commenters should address the extent to which service offerings made by operator service providers are improvements, in terms of service quality, price, innovation, and other factors, over those available before the entry of new providers of operator services into the market. Commenters are also invited to discuss how we can best monitor compliance with the provisions of Section 226 of the Act, as required by Section 226(h)(3)(A)(v), for purposes of submitting the reports to Congress required by Section 226(h)(3)(B). Commenters should specifically discuss methods by which the Commission may comply with the requirement of Section 226(h)(3)(A)(v) of "periodic placement of calls from aggregator locations."[40]

C. Access and Compensation Issues

21. In our initial *NPRM,* we proposed a rule prohibiting the blocking of 10XXX access, and most parties filed detailed comments on that issue. Some parties also commented on the need for us to prescribe compensation for owners of competitive public pay telephones for calls not routed through the presubscribed OSP. While a record on these issues exists in the present proceeding, the Operator Services Act clearly directs us to conduct a "[s]eparate" rule making on access and compensation issues.[41] We therefore conclude that the access and payphone compensation issues should not be addressed in this proceeding and that the record established to date on these issues will be made a part of the later separate proceeding.

IV. PAPERWORK REDUCTION ACT

22. The proposal contained herein has been analyzed with respect to the Paperwork Reduction Act of 1980 and found to impose a new or modified information collection requirement on the public. Implementation of any new or modified requirement will be subject to approval by the Office of Management and Budget as prescribed by the Act.

V. FURTHER INITIAL REGULATORY FLEXIBILITY ANALYSIS

23.**Reason for action.** The Commission is issuing this Further Notice of Proposed Rule Making to provide an opportunity for public comment and to provide a record for a Commission decision on the issues stated above.

24. **Objectives.** The objective of this Further Notice of Proposed Rule Making is to initiate a proceeding to prescribe regulations that protect consumers from unfair and deceptive practices related to their use of operator services to place interstate telephone calls and that ensure that consumers have the opportunity to make informed choices in making such calls.

25. **Legal basis.** Sections 1, 4(i), 4(j), 201-205, 218, 226, and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. § 151, 154(i), 154(j), 201-205, 218, 226, 303(r).

26. **Description, potential impact, and number of small entities affected.** The proposed rules will require that entities in the operator services industry provide information that is necessary for consumers to make knowledgeable choices among services. The rules will also help to eliminate certain practices and charges that reduce consumer choice and competitiveness within the industry. Small entities may feel some economic impact due to the proposed information posting and reporting requirements.

27. **Reporting, recordkeeping, and other compliance requirements.** The proposed rules require reporting in the form of the disclosure by operator service providers and call aggregators to their customers of certain information regarding their identities, their services, and the options customers have in using those services. In addition, the *Further NPRM* seeks comment on whether the Commission should impose certain reporting requirements to provide information for use in the proceeding necessitated by Section 226(h)(3) of the Operator Services Act, 47 U.S.C. 226(h)(3).

28. **Federal rules which overlap, duplicate, or conflict with the Commission's proposal.** None.

29. **Any significant alternatives minimizing impact on small entities and consistent with stated objectives.** We shall consider any alternatives suggested in comments that are consistent with the requirements of the Operator Services Act.

30. **Comments are solicited.** We request written comments on this Further Initial Regulatory Flexibility Analysis. These comments must be filed in accordance with the same filing deadlines set for comments on the other issues in this Further Notice of Proposed Rule Making, but they must have a separate and distinct heading designating them as responses to this Regulatory Flexibility Analysis. The Secretary shall send a copy of the Further Notice to the Chief Counsel for Advocacy of the Small Business Administration in accordance with Section 603(a) of the Regulatory Flexibility Act. *See* 5 U.S.C. 601, *et seq.*

VI. EX PARTE REQUIREMENTS

31. For purposes of this non-restricted notice and comment rule making proceeding, members of the public are advised that *ex parte* presentations are permitted except during the Sunshine Agenda period. *See generally* Section 1.1206(a) of the Commission's Rules, 47 C.F.R. 1.1206(a). The Sunshine Agenda period is the period of time that commences with the release of a public notice that a matter has been placed on the Sunshine Agenda and terminates when the Commission (1) releases the text of a decision or order in the matter; (2) issues a public notice stating that the matter has been deleted from the Sunshine Agenda; or (3) issues a public notice stating that the matter has been returned to the staff for further consideration, whichever occurs first. Section 1.1202(f) of the Commission's Rules, 47 C.F.R. 1.1202(f). During the Sunshine Agenda period, no presentations, *ex parte* or otherwise, are permitted unless specifically requested by the Commission or staff for the clarification or adduction of evidence or the resolution of issues in the proceeding. Section 1.1203 of the Commission's Rules, 47 C.F.R. 1.1203.

32. In general, an *ex parte* presentation is any presentation directed to the merits or outcome of the proceeding made to decision-making personnel that (1), if written, is not served on the parties to the proceeding, or (2), if oral, is made without advance notice to the parties to the proceeding and without opportunity for them to be present. Section 1.1202(b) of the Commission's Rules, 47 C.F.R. 1.1202(b). Any person who makes or submits a written *ex parte* presentation shall provide on the same day it is submitted two copies of same under separate cover to the Commission's Secretary for inclusion in the public record. The presentation (as well as any transmittal letter) must clearly indicate on its face the docket number of the particular proceeding(s) to which it relates and the fact that two copies of it have been submitted to the Secretary, and must be labeled or captioned as an *ex parte* presentation.

33. Any person who in making an oral *ex parte* presentation presents data or arguments not already reflected in that person's written comments, memoranda, or other previous filings in that proceeding shall provide on the day of the oral presentation an original and one copy of a written memorandum to the Secretary, with a copy to the Commissioner or staff member involved, that summarizes the data and arguments. The memorandum, as well as any transmittal letter, must clearly indicate on its face the docket number of the particular proceeding and the fact that an original and one copy of it have been submitted to the Secretary, and must be labeled or captioned as an *ex parte* presentation. Section 1.1206 of the Commission's Rules, 47 C.F.R. 1.1206.

34. All relevant and timely comments and reply comments will be considered by this Commission. In reaching our decision, this Commission may take into account information and ideas not contained in the comments, provided that such information or a writing containing the nature and source of such information is placed in the public file, and provided that the fact of this Commission's reliance on such information is noted in the Order.

VII. CONCLUSION AND ORDERING CLAUSES

35. In summary, the rules proposed in this *Further NPRM* are intended, as required by the Operator Services Act, to protect consumers from unfair and deceptive practices related to their use of operator services to place interstate calls, and to ensure that consumers have the opportunity to make informed choices in placing such calls. As we noted in our initial *NPRM*, we expect the proposed rules to free consumers from charges they did not agree to and from practices that prevent them from using the operator service provider they prefer. These rules will also help foster a marketplace environment in which operator service providers compete based on the merits of their services, rather than on the payments they provide to aggregators who deliver to them a captive clientele. In submitting comments on these proposed rules, interested parties should note that we are particularly interested in evidence regarding the technical and operational complexities of implementing the proposed rules. We are also interested in the economic impact of implementation in terms of costs to or burdens on consumers, carriers, and call aggregators. In Phase II of this

docket, we seek separate comment on our proposed reporting requirements and on other issues raised by Section 226(h)(3) of the Operator Services Act.

36. Accordingly, IT IS ORDERED, pursuant to Sections 1, 4(i), 4(j), 201-205, 218, 226, and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. § 151, 154(i), 154(j), 201-205, 218, 226, 303(r), that a FURTHER NOTICE OF PROPOSED RULE MAKING IS ISSUED, proposing the amendment of 47 C.F.R. Parts 64 and 68 as set forth in Appendix B.

37. IT IS FURTHER ORDERED, pursuant to Sections 1.415 and 1.419 of the Commission's Rules, 47 C.F.R. § 1.415, 1.419, that all interested parties may file comments on the matters discussed in this *Further NPRM* and on the proposed rules contained in Appendix B by January 22, 1991, and reply comments by February 6, 1991. Comments on issues designated for CC Docket No. 90-313 - Phase II are also due on these dates. Phase II comments must be filed separately from comments on other issues in this docket and must include the designation "CC Docket No. 90-313 - Phase II" in the caption of the comments. All relevant and timely comments will be considered by the Commission before final action is taken in this proceeding. To file formally in this proceeding, participants must file an original and four copies of all comments, reply comments, and supporting comments. If participants wish each Commissioner to have a personal copy of their comments, an original plus nine copies must be filed. Comments and reply comments should be sent to the Office of the Secretary, Federal Communications Commission, Washington, D.C. 20554. Comments and reply comments will be available for public inspection during regular business hours in the Dockets Reference Room (Room 239) of the Federal Communications Commission, 1919 M Street, N.W., Washington, D.C. 20554.

38. IT IS FURTHER ORDERED that the Chief of the Common Carrier Bureau is delegated authority to require the submission of additional information, make further inquiries, and modify the dates and procedures if necessary to provide for a fuller record and a more efficient proceeding.

39. IT IS FURTHER ORDERED that the Secretary shall cause a copy of this *Further NPRM*, including the Further Initial Regulatory Flexibility Analysis, to be sent to the Chief Counsel for Advocacy of the Small Business Administration in accordance with Section 603(a) of the Regulatory Flexibility Act, 5 U.S.C. 603(a) (1981). The Secretary shall also cause a summary of this *Further NPRM* to appear in the Federal Register.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX A
THE TELEPHONE OPERATOR CONSUMER SERVICES IMPROVEMENT ACT OF 1990, as amended

Pub. L. No. 101-435, 104 Stat. 986 (1990)

SECTION 1. SHORT TITLE.

This Act may be cited as the "Telephone Operator Consumer Services Improvement Act of 1990".

SEC. 2. FINDINGS.

The Congress finds that--

(1) the divestiture of AT&T and decisions allowing open entry for competitors in the telephone marketplace produced a variety of new services and many new providers of existing telephone services;

(2) the growth of competition in the telecommunications market makes it essential to ensure that safeguards are in place to assure fairness for consumers and service providers alike;

(3) a variety of providers of operator services now compete to win contracts to provide operator services to hotels, hospitals, airports, and other aggregators of telephone business from consumers;

(4) the mere existence of a variety of service providers in the operator services marketplace is significant in making that market competitive only when consumers are able to make informed choices from among those service providers;

(5) however, often consumers have no choices in selecting a provider of operator services, and often attempts by consumers to reach their preferred long distance carrier by using a telephone billing card, credit card, or prearranged access code number are blocked;

(6) a number of State regulatory authorities have taken action to protect consumers using intrastate operator services;

(7) from January 1988 through February 1990, the Federal Communications Commission received over 4,000 complaints from consumers about operator services;

(8) those consumers have complained that they are denied access to the interexchange carrier of their choice,jthat they are deceived about the identity of the company providing operator services for their calls and the rates being charged, that they lack information on what they can do to complain about unfair treatment by an operator service provider, and that they are, accordingly, being deprived of the free choice essential to the operation of a competitive market;

(9) the Commission has testified that its actions have been insufficient to correct the problems in the operator services industry to date; and

(10) a combination of industry self-regulation and government regulation is required to ensure that competitive operator services are provided in a fair and reasonable manner.

SEC. 3. AMENDMENT.

Title II of the Communications Act of 1934 is amended by inserting immediately after section 225 (47 U.S.C. 225) the following new section:

SEC. 226. TELEPHONE OPERATOR SERVICES.

(a) *Definitions.* --As used in this section--

(1) The term 'access code' means a sequence of numbers that, when dialed, connect the caller to the provider of operator services associated with that sequence.

(2) The term 'aggregator' means any person that, in the ordinary course of its operations, makes telephones available to the public or to transient users of its premises, for interstate telephone calls using a provider of operator services.

(3) The term 'call splashing' means the transfer of a telephone call from one provider of operator services to another such provider in such a manner that the subsequent provider is unable or unwilling to determine the location of the origination of the call and, because of such inability or unwillingness, is prevented from billing the call on the basis of such location.

(4) The term 'consumer' means a person initiating any interstate telephone call using operator services.

(5) The term 'equal access' has the meaning given that term in Appendix B of the Modification of Final Judgment entered August 24, 1982, in United States v. Western Electric, Civil Action No. 82-0192 (United States District Court, District of Columbia), as amended by the Court in its orders issued prior to the enactment of this section.

(6) The term 'equal access code' means an access code that allows the public to obtain an equal access connection to the carrier associated with that code.

(7) The term 'operator services' means any interstate telecommunications service initiated from an aggregator location that includes, as a component, any automatic or live assistance to a consumer to arrange for billing or completion, or both, of an interstate telephone call through a method other than--

(A) automatic completion with billing to the telephone from which the call originated; or

(B) completion through an access code used by the consumer, with billing to an account previously established with the carrier by the consumer.

(8) The term 'presubscribed provider of operator services' means the interstate provider of operator services to which the consumer is connected when the consumer places a call using a provider of operator services without dialing an access code.

(9) The term 'provider of operator services' means any common carrier that provides operator services or any other person determined by the Commission to be providing operator services.

(b) *Requirements for Providers of Operator Services.* --

(1) In general.--Beginning not later than 90 days after the date of enactment of this section, each provider of operator services shall, at a minimum--

(A) identify itself, audibly and distinctly, to the consumer at the beginning of each telephone call and before the consumer incurs any charge for the call;

(B) permit the consumer to terminate the telephone call at no charge before the call is connected;

(C) disclose immediately to the consumer, upon request and at no charge to the consumer--

(i) a quote of its rates or charges for the call;

(ii) the methods by which such rates or charges will be collected; and

(iii) the methods by which complaints concerning such rates, charges, or collection practices will be resolved;

(D) ensure, by contract or tariff, that each aggregator for which such provider is the presubscribed provider of operator services is in compliance with the requirements of subsection (c) and, if applicable, subsection (e)(1);

(E) withhold payment (on a location-by-location basis) of any compensation, including commissions, to aggregators if such provider reasonably believes that the aggregator (i) is blocking access by means of "950" or "800" numbers to interstate common carriers in violation of subsection (c)(1)(B) or (ii) is blocking access to equal access codes in violation of rules the Commission may prescribe under subsection (e)(1);

(F) not bill for unanswered telephone calls in areas where equal access is available;

(G) not knowingly bill for unanswered telephone calls where equal access is not available;

(H) not engage in call splashing, unless the consumer requests to be transferred to another provider of operator services, the consumer is informed prior to incurring any charges that the rates for the call may not reflect the rates from the actual originating location of the call, and the consumer then consents to be transferred; and

(I) except as provided in subparagraph (H), not bill for a call that does not reflect the location of the origination of the call.

(2) Additional requirements for first 3 years.--In addition to meeting the requirements of paragraph (1), during the 3-year period beginning on the date that is 90 days after the date of enactment of this section, each presubscribed provider of operator services shall identify itself audibly and distinctly to the consumer, not only as required in paragraph (1)(A), but also for a second time before connecting the call and before the consumer incurs any charge.

(c) *Requirements for Aggregators.* --

(1) In general.--Each aggregator, beginning not later than 90 days after the date of enactment of this section, shall--

(A) post on or near the telephone instrument, in plain view of consumers-- telephone number of the provider of operator services;

(ii) a written disclosure that the rates for all operator-assisted calls are available on request, and that consumers have a right to obtain access to the interstate common carrier of their choice and may contact their preferred interstate common carriers for information on accessing that carrier's service using that telephone; and

(iii) the name and address of the enforcement division of the Common Carrier Bureau of the Commission, to which the consumer may direct complaints regarding operator services;

(B) ensure that each of its telephones presubscribed to a provider of operator services allows the consumer to use "800" and "950" access code numbers to obtain access to the provider of operator services desired by the consumer; and

(C) ensure that no charge by the aggregator to the consumer for using an "800" or "950" access code number, or any other access code number, is greater than the amount the aggregator charges for calls placed using the presubscribed provider of operator services.

(2) Effect of state law or regulation.--The requirements of paragraph (1)(A) shall not apply to an aggregator in any case in which State law or State regulation requires the aggregator to take actions that are substantially the same as those required in paragraph (1)(A).

(d) *General Rulemaking Required.* --

(1) Rulemaking proceeding.--The Commission shall conduct a rulemaking proceeding pursuant to this title to prescribe regulations to--

(A) protect consumers from unfair and deceptive practices relating to their use of operator services to place interstate telephone calls; and

(B) ensure that consumers have the opportunity to make informed choices in making such calls.

(2) Deadlines.--The Commission shall initiate the proceeding required under paragraph (1) within 60 days after the date of enactment of this section and shall prescribe regulations pursuant to the proceeding not later than 210 days after such date of enactment. Such regulations shall take effect not later than 45 days after the date the regulations are prescribed.

(3) Contents of regulations.--The regulations prescribed under this section shall--

(A) contain provisions to implement each of the requirements of this Section, other than the requirements established by the rulemaking under subsection (e) on access and compensation; and

(B) contain such other provisions as the Commission determines necessary to carry out this section and the purposes and policies of this section.

(4) Additional requirements to be implemented by regulations.--The regulations prescribed under this section shall, at a minimum--

(A) establish minimum standards for providers of operator services to use in the routing and handling of emergency telephone calls; and

(B) establish a policy for requiring providers of operator services to make public information about recent changes in operator services and choices available to consumers in that market.

(e) Separate Rulemaking on Access and Compensation.--

(1) Access.--The Commission, within 9 months after the date of enactment of this section, shall require--

(A) that each aggregator ensure within a reasonable time that each of its telephones presubscribed to a provider of operator services allows the consumer to obtain access to the provider of operator services desired by the consumer through the use of an equal access code; or

(B) that all providers of operator services, within a reasonable time, make available to their customers a "950" or "800" access code number for use in making operator services calls from anywhere in the United States; or

(C) that the requirements described under both subparagraphs (A) and (B) apply.

(2) Compensation.--The Commission shall consider the need to prescribe compensation (other than advance payment by consumers) for owners of competitive public pay telephones for calls routed to providers of operator services that are other than the presubscribed provider of operator services for such telephones. Within 9 months after the date of enactment of this section, the Commission shall reach a final decision on whether to prescribe such compensation.

(f) Technological Capability of Equipment.--Any equipment and software manufactured or imported more than 18 months after the date of enactment of this section and installed by any aggregator shall be technologically capable of providing consumers with access to interstate providers of operator services through the use of equal access codes.

(g) Fraud.--In any proceeding to carry out the provisions of this section, the Commission shall require such actions or measures as are necessary to ensure that aggregators are not exposed to undue risk of fraud.

(h) Determinations of Rate Compliance.--

(1) Filing of informational tariff.--

(A) In general.--Each provider of operator services shall file, within 90 days after the date of enactment of this section, and shall maintain, update regularly, and keep open for public inspection, an informational tariff specifying rates, terms, and conditions, and including commissions, surcharges, any fees which are collected from consumers, and reasonable estimates of the amount of traffic priced at each rate, with respect to calls for which operator services are provided. Any changes in such rates, terms, or conditions shall be filed no later than the first day on which the changed rates, terms, or conditions are in effect.

(B) Waiver authority.--The Commission may, after 4 years following the date of enactment of this section, waive the requirements of this paragraph only if--

(i) the findings and conclusions of the Commission in the final report issued under paragraph (3)(B)(iii) state that the regulatory objectives specified in subsection (d)(1) (A) and (B) have been achieved; and

(ii) the Commission determines that such waiver will not adversely affect the continued achievement of such regulatory objectives.

(2) Review of informational tariffs.--If the rates and charges filed by any provider of operator services under paragraph (1) appear upon review by the Commission to be unjust or unreasonable, the Commission may require such provider of operator services to do either or both of the following:

(A) demonstrate that its rates and charges are just and reasonable, and

(B) announce that its rates are available on request at the beginning of each call.

(3) Proceeding required.--

(A) In general.--Within 60 days after the date of enactment of this section, the Commission shall initiate a proceeding to determine whether the regulatory objectives specified in subsection (d)(1) (A) and (B) are being achieved. The proceeding shall-

(i) monitor operator service rates;

(ii) determine the extent to which offerings made by providers of operator services are improvements, in terms of service quality, price, innovation, and other factors, over those available before the entry of new providers of operator services into the market;

(iii) report on (in the aggregate and by individual provider) operator service rates, incidence of service complaints, and service offerings;

(iv) consider the effect that commissions and surcharges, billing and validation costs, and other costs of doing business have on the overall rates charged to consumers; and

(v) monitor compliance with the provisions of this section, including the periodic placement of telephone calls from aggregator locations.

(B) Reports.--(i) The Commission shall, during the pendency of such proceeding and not later than 5 months after its commencement, provide the Congress with an interim report on the Commission's activities and progress to date.

(ii) Not later than 11 months after the commencement of such proceeding, the Commission shall report to the Congress on its interim findings as a result of the proceeding.

(iii) Not later than 23 months after the commencement of such proceeding, the Commission shall submit a final report to the Congress on its findings and conclusions.

(4) Implementing regulations.--

(A) In general.--Unless the Commission makes the determination described in subparagraph (B), the Commission shall, within 180 days after submission of the report required under paragraph (3)(B)(iii), complete a rulemaking proceeding pursuant to this title to establish regulations for implementing the requirements of this title (and paragraphs (1) and (2) of this subsection) that rates and charges for operator services be just and reasonable. Such regulations shall include limitations on the amount of commissions or any other compensation given to aggregators by providers of operator service.

(B) Limitation.--The requirement of subparagraph (A) shall not apply if, on the basis of the proceeding under paragraph (3)(A), the Commission makes (and includes in the report required by paragraph (3)(B)(iii)) a factual determination that market forces are securing rates and charges that are just and reasonable, as evidenced by rate levels, costs, complaints, service quality, and other relevant factors.

(i) Statutory Construction.--Nothing in this section shall be construed to alter the obligations, powers, or duties of common carriers or the Commission under the other sections of this Act.

APPENDIX B
PROPOSED RULES

It is proposed that Part 64 of Title 47 of the Code of Federal Regulations be amended as follows:

1. The authority citation for Part 64 is amended to read as follows:

Authority: Sec. 4, 48 Stat. 1066, as amended, 47 U.S.C. § 154, unless otherwise noted. Interpret or apply secs. 201, 218, 226, 48 Stat. 1070, as amended, 1077, 47 U.S.C. § 201, 218, 226, unless otherwise noted.

2. A new Section 64.703 is added to read as follows:

§ 64.703 Consumer information.

(a) Each provider of operator services shall:

(1) identify itself, audibly and distinctly, to the consumer at the beginning of each telephone call and before the consumer incurs any charge for the call;

(2) permit the consumer to terminate the telephone call at no charge before the call is connected; and

(3) disclose immediately to the consumer, upon request and at no charge to the consumer,

(A) a quotation of its rates or charges for the call;

(B) the methods by which such rates or charges will be collected; and

(C) the methods by which complaints concerning such rates, charges, or collection practices will be resolved.

(b) Each aggregator shall post on or near the telephone instrument, in plain view of consumers:

(1) the name, address, and toll-free telephone number of the provider of operator services;

(2) a written disclosure that the rates for all operator-assisted calls are available on request, and that consumers have a right to obtain access to the interstate common carrier of their choice and may contact their preferred interstate common carriers for information on accessing that carrier's service using that telephone; and

(3) the name and address of the Enforcement Division of the Common Carrier Bureau of the Commission (FCC, Enforcement Division, CCB, Room 6202, Washington, D.C. 20554), to which the consumer may direct complaints regarding operator services.

(c) *Additional requirements for first 3 years.* In addition to meeting the requirements of paragraph (a), each presubscribed provider of operator services shall, during the 3-year period beginning on the effective date of this section, identify itself audibly and distinctly to the consumer, not only as required in paragraph (a)(1), but also for a second time before connecting the call and before the consumer incurs any charge.

(d) *Effect of state law or regulation.* The requirements of paragraph (b) shall not apply to an aggregator in any case in which State law or State regulation requires the aggregator to take actions that are substantially the same as those required in paragraph (b).

(e) Each provider of operator services shall ensure, by contract or tariff, that each aggregator for which such provider is the presubscribed provider of operator services is in compliance with the requirements of paragraph (b).

3. A new Section 64.704 is added to read as follows:

§ 64.704 Call blocking prohibited.

(a) Each aggregator shall ensure that each of its telephones presubscribed to a provider of operator services allows the consumer to use "800" and "950" access code numbers to obtain access to the provider of operator services desired by the consumer.

(b) Each provider of operator services shall:

(1) ensure, by contract or tariff, that each aggregator for which such provider is the presubscribed provider of operator services is in compliance with the requirements of paragraph (a); and

(2) withhold payment (on a location-by-location basis) of any compensation, including commissions, to aggregators if such provider reasonably believes that the aggregator is blocking access to interstate common carriers in violation of paragraph (a).

4. A new Section 64.705 is added to read as follows:

§ 64.705 Restrictions on charges related to the provision of operator services.

(a) A provider of operator services shall:

(1) not bill for unanswered telephone calls in areas where equal access is available;

(2) not knowingly bill for unanswered telephone calls where equal access is not available;

(3) not engage in call splashing, unless the consumer requests to be transferred to another provider of operator services, the consumer is informed prior to incurring any charges that the rates for the call may not reflect the rates from the actual originating location of the call, and the consumer then consents to be transferred;

(4) except as provided in paragraph (3), not bill for a call that does not reflect the location of the origination of the call; and

(5) ensure, by contract or tariff, that each aggregator for which such provider is the presubscribed provider of operator services is in compliance with the requirements of paragraph (b).

(b) An aggregator shall ensure that no charge by the aggregator to the consumer for using an "800" or "950" access code number, or any other access code number, is greater than the amount the aggregator charges for calls placed using the presubscribed provider of operator services.

5. A new Section 64.706 is added to read as follows:

§ 64.706 Minimum standards for the routing and handling of emergency telephone calls. Upon receipt of any emergency telephone call initiated through use of a dialing sequence associated with such calls (e.g., "0," "911") in the call's originating location, a provider of operator services shall immediately connect the call to the appropriate emergency service of the call's originating location.

6. A new Section 64.707 is added to read as follows:

§ 64.707 Public dissemination of information by providers of operator services. Providers of operator services shall regularly publish and make available at no cost to inquiring consumers written materials that describe any recent changes in operator services and in the choices available to consumers in that market.

7. A new Section 64.708 is added to read as follows:

§ 64.708 Definitions. As used in sections 64.703 through 64.707 and 68.318, 47 C.F.R. § 64.703-64.707, 68.318:

> (a) the term "access code" means a sequence of numbers that, when dialed, connect the caller to the provider of operator services associated with that sequence;
>
> (b) the term "aggregator" means any person that, in the ordinary course of its operations, makes telephones available to the public or to transient users of its premises, for interstate telephone calls using a provider of operator services;
>
> (c) the term "call splashing" means the transfer of a telephone call from one provider of operator services to another such provider in such a manner that the subsequent provider is unable or unwilling to determine the location of the origination of the call and, because of such inability or unwillingness, is prevented from billing the call on the basis of such location;
>
> (d) the term "consumer" means a person initiating any interstate telephone call using operator services;
>
> (e) the term "equal access" has the meaning given that term in Appendix B of the Modification of Final Judgment entered by the United States District Court on August 24, 1982, in *United States v. Western Electric*, Civil Action No. 82-0192 (D.D.C. 1982), as amended by the Court in its orders issued prior to the effective date of this section;
>
> (f) the term "equal access code" means an access code that allows the public to obtain an equal access connection to the carrier associated with that code;
>
> (g) the term "operator services" means any interstate telecommunications service initiated from an aggregator location that includes, as a component, any automatic or live assistance to a consumer to arrange for billing or completion, or both, of an interstate telephone call through a method other than:

(1) automatic completion with billing to the telephone from which the call originated; or

(2) completion through an access code used by the consumer, with billing to an account previously established with the carrier by the consumer;

> (h) the term "presubscribed provider of operator services" means the interstate provider of operator services to which the consumer is connected when the consumer places a call using a provider of operator services without dialing an access code;
>
> (i) the term "provider of operator services" means any common carrier that provides operator services or any other person determined by the Commission to be providing operator services.

It is proposed that Part 68 of Title 47 of the Code of Federal Regulations be amended as follows:

1. The authority citation for Part 68 is amended to read as follows:

Authority: Secs. 4, 201, 202, 203, 204, 205, 208, 215, 218, 226, 313, 314, 403, 404, 410, 602, 48 Stat., as amended, 1066, 1070, 1071, 1072, 1073, 1076, 1077, 1087, 1094, 1098, 1102, 47 U.S.C. § 154, 201, 202, 203, 204, 205, 208, 215, 218, 226, 313, 314, 403, 404, 410, 602, unless otherwise noted.

2. Section 68.318 is amended by adding paragraph (d) to read as follows:

§ 68.318 Additional limitations.

*****

(d) *Requirement that registered equipment allow access to common carriers.* Any equipment or software manufactured or imported on or after April 17, 1992, and installed by any aggregator shall be technologically capable of providing consumers with access to interstate providers of operator services through the use of equal access codes. The terms used in this paragraph shall have the meanings defined in Section 64.708, 47 C.F.R. 64.708.

FOOTNOTES

[1] Pub. L. No. 101-435, 104 Stat. 986 (1990) (to be codified at 47 U.S.C. § 226) ("Operator Services Act"). The text of the Act is attached as Appendix A.

[2] S. Rep. No. 101-439, 101st Cong., 2d Sess. 1 (1990); *see also* H.R. Rep. No. 101-213, 101st Cong., 1st Sess. 2 (1989) ("The purpose of [the Act] is to protect telephone consumers against

unfair prices and practices of some operator service providers (OSPs), yet allow the legitimate companies in the industry the opportunity to compete in the market.").

[3] 47 U.S.C. § 226(d), (h)(3)

[4] *Id.* § 226(d)(2), (h)(3)(A).

[5] Policies and Rules Concerning Operator Service Providers, Notice of Proposed Rule Making, 5 FCC Rcd 4630 (1990) (hereinafter *NPRM*).

[6] *See* 47 U.S.C. § 226(h)(3)(A).

[7] *See id.* § 226(e).

[8] *NPRM,* 5 FCC Rcd at 4630. A full discussion of the development of the operator services industry and the proceedings related to operator service issues is contained in the *NPRM. See id.* at 4630-31.

[9] *See* 47 U.S.C. § 226(a)(2).

[10] An access code is a sequence of numbers that, when dialed, connects the caller to the OSP associated with that sequence. *See id.* § 226(a)(1).

[11] *NPRM,* 5 FCC Rcd at 4630.

[12] Telecommunications Research & Action Center v. Central Corp., 4 FCC Rcd 2157 (Com. Car. Bur. 1989) (hereinafter *TRAC Order*), *application for review pending.*

[13] *Id.* at 2159; *see also id.* at 2160 nn.5-6 (definitions of "call blocking" and "call splashing").

[14] *See* Petition of the National Association of Regulatory Utility Commissioners, RM-6767 (filed April 17, 1989) (hereinafter "NARUC Petition").

[15] *NPRM,* 5 FCC Rcd at 4631 (also denying the petition in part).

[16] *Id.* at 4631-35, 4637-38.

[17] *Id.* at 4632-35 (these issues included double branding, charging for unanswered or uncompleted calls, and standards for the handling of emergency calls).

[18] Policies and Rules Concerning Operator Service Providers, CC Docket No. 90-313, Order, DA 90-1383 (released Oct. 5, 1990) (deadline for filing reply comments extended to Oct. 23, 1990).

[19] Public Notice, DA 90-1773 (released Dec. 4, 1990).

[20] *See* 47 U.S.C. § 226(a)(7), (9), (h)(1)(A).

[21] Many commenting parties have expressed a preference for additional Commission action beyond our initial *NPRM.* For example, some parties have suggested that a fuller record on certain issues must be developed. *See, e.g.,* Reply Comments of BellSouth Tel. Cos. (further rule making necessary for establishment of emergency call standards). Other parties have indicated that clarification is necessary for certain statutory requirements. *See, e.g.,* Reply Comments of The American Public Communications Council (branding, information posting).

[22] 47 U.S.C. 226(d).

[23] The Act requires that, by May 15, 1991, the Commission adopt the general regulations prescribed under Section 226(d)(2). These regulations must take effect by June 29, 1991. *Id.*

[24] Appendix B contains the text of the new proposed rules.

[25] Appendix B, 64.703(c). "Branding" occurs when an operator service provider audibly identifies itself to a caller before the call is connected. 47 U.S.C. 226(b)(1)(A); *NPRM,* 5 FCC Rcd at 4630. We have tentatively defined "double branding" as such an identification both at the beginning of a call and again just before the call is connected. *NPRM,* 5 FCC Rcd at 4632.

[26] Appendix B, § 64.703(b)(3).

[27] *Id.* § 64.705(a)(1)-(2).

[28] *Id.* § 64.705(b).

[29] *Id.* § 64.704.

[30] The Act requires 800 and 950 blocking to be addressed in this proceeding and the 10XXX blocking issue to be addressed in a separate proceeding. 47 U.S.C. § 226(d)(3)(A), (e); *see also* para. 21, *infra.*

[31] Appendix B, § 68.318(d).

[32] *Id.* § 64.708.

[33] *Id.* § 64.705(a)(3)-(4).

[34] 47 U.S.C. § 226(d)(4)(A).

[35] *Id.* § 226(d)(4)(B).

[36] *NPRM,* 5 FCC Rcd at 4634-35.

[37] U.S.C. § 226(d)(1)(B).

[38] Comments on the matters contained in Section 226(h)(3) of the Act must be filed separately from those on other issues in this proceeding and must be designated, in the caption, "CC Docket No. 90-313 -- Phase II."

[39] Section 226(h)(3)(A)(iii) also directs us to report on service offerings. We expect to glean the information necessary for such reports from the tariffs that must be filed under Section 226(h)(1). Comments on improvements in service, which we have solicited *infra,* may also contain helpful information in this regard.

[40] *See NPRM,* 5 FCC Rcd at 4639 n.28.

[41] 47 U.S.C. § 226(e); *see also id.* 226(d)(3)(A) (the regulations prescribed in the "general" rule making shall implement the provisions of the Act "other than the requirements established by the rule making under subsection (e) on access and compensation"). Section 226(e) states that the Commission must make two determinations in the separate rule making. First, we must decide whether (a) aggregators must unblock 10XXX access; (b) OSPs must establish 800 or 950 access; or (c) both (a) and (b). Second, we must decide whether to prescribe compensation for owners of competitive public payphones for calls not routed through their presubscribed OSPs. The Act requires the Commission to make determinations regarding the access and compensation issues within 9 months of the statute's enactment, i.e., by July 17, 1991.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-382

In re Applications of

WWOR-TV, INC. File No. BRCT-871221KE

For Renewal of License of Station
WWOR(TV), Secaucus, New Jersey

and

GARDEN STATE BROADCASTING LIMITED PARTNERSHIP File No. BPCT-871223KG

For Construction Permit
Secaucus, New Jersey

Appearances

James R. Denvir, Esq., Randall L. Sarosdy, Esq., Elizabeth Haile Hayes, Esq., Michael R. Gardner, Esq., and *Charles R. Milkis, Esq.*, on behalf of WWOR-TV, Inc.; *Lewis I. Cohen, Esq., Morton L. Berfield, Esq.* and *Roy W. Boyce, Esq.* on behalf of Garden State Broadcasting Limited Partnership; and *Charles E. Dziedzic, Esq., Y. Paulette Laden, Esq.*, and *Gary P. Schonman, Esq.* on behalf of the Chief, Mass Media Bureau, Federal Communications Commission.

PARTIAL INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE RICHARD L. SIPPEL

Issued: January 4, 1991; Released: January 11, 1991

PRELIMINARY STATEMENT

1. This case was commenced under *Hearing Designation Order* DA 88-1077, published at 53 Fed. Reg. 28911 (August 1, 1988) for the renewal of the broadcast license of Station WWOR-TV (Channel 9) held by WWOR-TV, Inc. ("WWOR-TV"), and the competing application of Garden State Broadcasting Limited Partnership ("Garden State") for a construction permit for a television station on Channel 9 in Secaucus, New Jersey.[1]

2. This case is in a decisional posture at this time because of a proposed settlement that was submitted to the Presiding Judge on September 27, 1990. The proposed settlement was filed two days after WWOR-TV's parent company, MCA, Inc. ("MCA"), issued a news release announcing discussions regarding a negotiated acquisition of MCA. (WWOR Exh. 21-A.) In a Declaration that accompanied the settlement papers, Ms. Wells certified that the application of Garden State was not filed for the purpose of reaching or carrying out the settlement agreement. (WWOR Exh. 21-B.) The settlement was opposed by the Mass Media Bureau ("Bureau") and was denied because the agreement contemplated a monetary payoff to Garden State in the amount of $2 million while there remained an unresolved added issue against Garden State that could preclude approval of a settlement. The added issue was set:

> [t]o determine the facts and circumstances of the motive and the *bona fides* of the filing of Garden State Broadcasting Limited Partnership's application, whether those facts and circumstances show that the application of Garden State Broadcasting Limited Partnership was filed for the purpose of reaching or carrying out a settlement agreement which would result in the dismissal of its application, thereby abusing the Commission's process, whether Garden State Broadcasting Limited Partnership has misrepresented or lacked candor in certifying that it did not file its application for an improper motive and lack of good faith, and the impact thereof on the basic qualifications of Garden State Broadcasting Limited Partnership to be a Commission licensee.

Memorandum Opinion and Order, FCC 88M-3567, released October 25, 1988.

3. That issue was added at the request of WWOR-TV, concurred in by the Bureau, and the Presiding Judge's ruling adding the issue was affirmed by the Review Board. *See WWOR - TV, Inc.*, 3 F.C.C. Rcd 7175 (Review Bd 1988). There had been no motion filed to resolve the issue by summary decision. *See* 47 C.F.R. §1.251. Therefore, a hearing was required in view of the statutory prohibition against approving a settlement involving an application that was filed for the purpose of securing a settlement. The proposed settlement was denied with the right to renew its consideration if the disqualifying added issue is resolved in favor of Garden State. *See Memorandum Opinion and Order*, FCC 90M-3220, released October 12, 1990. The Presiding Judge also ruled that he would consider whether the evidence would support summary grant of WWOR- TV's renewal application and whether Garden State's application should be dismissed with prejudice without approval of the proposed settlement. *Id.*

4. A provision of the proposed Settlement was also rejected that contained a covenant which would prohibit Jean Wells and Garden State from filing before April 21, 1998, any "petition, motion, complaint or other pleading that relates to the broadcast license of station WWOR-TV." *Id.* The Bureau has asserted that the covenant was too restrictive and the Commission has held it to be contrary to the public interest to preclude the future filing of applications that might improve service to the public. *James S. Rivers, Inc.*, 26 F.C.C. 4 (Comm'n 1959).

5. In accordance with scheduling proposed by counsel, hearings were set for October 19, 1990, and October 24-26, 1990 (FCC 90M-3257). The Commission adopted its ruling on documents claimed by Jean Wells to be privileged (FCC 90-345) and the Presiding Judge set a schedule for delivery of documents to counsel for WWOR-TV and counsel for the Bureau (FCC 90M-3258). A related protective order was issued by the Presiding Judge on October 18, 1990 (FCC 90M-3292). A joint motion to suspend cross examination of public witnesses was issued on October 17, 1990 (FCC 90M-3307), a mo-

tion to defer the examination of Jean Wells was granted for cause that same day (FCC 90M-3320), rulings on witness sequestration were confirmed on October 19, 1990 (FCC 90M-3340), and the Presiding Judge denied a petition for leave to intervene on October 26, 1990 (FCC 90M-3406).

6. Hearings were conducted in Washington, D.C. on October 19, 24, 25, and 29, 1990. The burden of proceeding with the introduction of evidence continued to be assigned to WWOR-TV, although it requested to be relieved of that burden (Tr. 1008-16), and the burden of proof was assigned to Garden State. The testimony of the following persons was taken, with full rights of cross-examination afforded the parties:

Robert D. Hadl	Vice President and General Counsel, MCA, Inc. and Vice President, WWOR-TV, Inc.
Morton L. Berfield	Partner, Cohen and Berfield, P.C.
Lewis I. Cohen	Partner, Cohen and Berfield, P.C.
Jean Wells	General Partner, Mainstream Television Limited Partnership and Garden State Broadcasting Limited Partnership.

WWOR-TV introduced 72 exhibits, Garden State introduced 21 exhibits, and the Bureau introduced six exhibits. The parties were ordered to file Proposed Findings of Fact and Conclusions of Law by December 13, 1990, and any Proposed Reply Findings and Conclusions were required to be filed by December 21, 1990 (FCC 90M-3456). All parties filed their Proposed Findings and Conclusions on December 13, 1990, and Garden State filed its proposed Reply Findings and Conclusions on December 20, 1990.

7. This partial decision will address only the added issue and the proposed settlement in accordance with the Commission's standards at 47 C.F.R. §1.267(b). This is an administrative proceeding tried under §5 of the Administrative Procedure Act [5 U.S.C. §§551 *et seq.*] and the preponderance of the evidence standard applies. *Steadman* v. *SEC*, 450 U.S. 91 (1981). Testimony is cited where practicable by the name of the witness followed by the transcript page number. References to proposed findings and conclusions are introduced by "PFC."

FINDINGS OF FACT

The Parties' Present Positions on Settlement

8. WWOR-TV has found the challenge to its renewal application to be a material distraction to station management because full resources could not be devoted to broadcast operations.[2] Therefore, MCA determined that it would be desirable to settle the litigation on terms it deemed reasonable so that it would not need to direct its resources and senior personnel to an upcoming hearing that would be costly and lengthy. (WWOR Exh. 21.)[3]

9. Ms. Jean Wells, the general partner of Garden State, has started a new business with substantial demands on her time. The new business would suffer if Ms. Wells participates further in the litigation of this case and therefore it is in her best interest to settle. (Garden State Exh. 1.)

The Mainstream Venture

10. On March 31, 1986, Mainstream Television Limited Partnership ("Mainstream") tendered an application for a construction permit for a new TV station on Channel 9 in Secaucus, New Jersey. (Garden State PFC at 3.) Mainstream also filed simultaneously a petition requesting that the then licensee, RKO General, Inc. ("RKO"), be required to file an early renewal application and that Mainstream's application be accepted and processed simultaneously with RKO's renewal application. (WWOR Exh. 27.) At that time, Ms. Wells was the sole general manager of Mainstream with a 3.75% equity interest.

11. Mainstream's genesis was the RKO qualifications proceeding involving 13 broadcast licenses in which Mr. Berfield participated as counsel. As that proceeding progressed, Mr. Berfield formed an opinion as litigating counsel for a challenging group that RKO would have serious problems in obtaining renewals and that with the proper filings, an early renewal proceeding might be set by the Commission. (Berfield, Tr. 1204-05.) Mr. Berfield relayed this conclusion to his law partner, Mr. Cohen, in late 1985 or early 1986. Then Mr. Cohen took the lead, and said that he knew someone who might be interested in an RKO challenge. He contacted Mr. Richard Rynd ("Rynd").

12. Mr. Rynd organized the limited partners (Cohen, Tr. 1327); but he told Mr. Cohen that he knew of no one who would be a good general manager. (Cohen, Tr. 1328.) Mr. Cohen contacted a client unrelated to Mainstream or Garden State, Mr. Robert Lee Dunham, and Mr. Dunham put Mr. Cohen in touch with Ms. Wells. (Cohen, Tr. 1328-30.)

13. Mr. Rynd was said to be a business risk-taker:

> He had said to me that he was interested in broadcast projects where there was a high risk/reward ratio, and he was willing to take risks for great rewards.

(Cohen, Tr. 1325.) Mr. Cohen recommended going forward with a challenge to the license for then Station WOR but it was Mr. Rynd who selected the partnership vehicle and the limited partners from among his friends and relatives:

> It was soon apparent to me that Mr. Rynd, when he expressed interest in the project, said that he would bring into this friends and relatives, so when I am using the word "Mr. Rynd," I am talking about Rynd et al., to wit, the people who were his friends and relatives.

(Cohen, Tr. 1326.) Mr. Cohen obtained Ms. Jean Wells' resume', sent it to Mr. Rynd on January 24, 1986, and met with Ms. Wells to "interview" her on February 4, 1986. (WWOR Exh. 22.) Prior to their meeting, Ms. Wells prepared her resume' which she sent to Mr. Cohen and which he forwarded to Mr. Rynd and three other limited partners, Melvin A. Steinberg, William K. Orlove, and Stanley J. Orlove. (Wells, Tr. 1692; WWOR Exh. 22.)

14. Mr. Cohen could not remember whether he met with Mr. Rynd to discuss Ms. Wells before Mr. Cohen went to New York to interview her. (Cohen, Tr 1331.) But the testimonial evidence is clear. Mr. Rynd wanted Mr. Cohen to clear Ms. Wells before she was approached for the position of general partner. Mr. Cohen testified:

> He asked me to go to New York and talk to her to see whether I thought she would be a good general partner, because he said to me, I had, in his view, an understanding of what kind of requirements from an FCC point-of-view would be desirable in a general partner. So he asked me to preliminarily, if you will, talk to her prior to the time he and the limited partners would decide to talk to her.

(Cohen, Tr. 1332.) Ms. Wells was the only candidate for general partner who was interviewed by Mr. Cohen and there is no evidence that any other candidate was considered for the position. (Cohen, Tr. 1331.)

15. Ms. Wells is an Afro-American female. She resides in Teaneck, New Jersey. (Wells, Tr. 1670.) She now is one-third owner and president of Wells, Burns & Watkins, a firm in Brooklyn, New York, organized in October 1989, and conducting business in advertising, promotions and special events. (Wells, Tr. 1678-79, 1682-83.) In May 1989, Ms. Wells left her position at Inner City Broadcasting Corp., a licensee of several broadcast stations, where she had worked in several positions. She had served as general sales manager of one of the company's radio broadcast stations in New York City, Station WLIB(AM). (Wells, Tr. 1678-80, 1688, 1807-08.)

16. At his meeting with Ms. Wells, Mr. Cohen told her that he was representing a group of investors that wanted to challenge WOR-TV's license. He told her something about the legal issues involved but he was mainly concerned about learning from Ms. Wells her broadcast experience and her knowledge of the community that might be helpful in the challenge. (Cohen, Tr. 1333 and Wells, Tr. 1692-93.) At that time, Ms. Wells had never prepared a budget for a TV station, was unfamiliar with Commission procedure, had never participated in a Commission proceeding, had no news experience, had never managed a staff of more than seven or eight, and had no knowledge of the number of persons employed at WOR-TV. (Wells, Tr. 1811-12.)

17. Ms. Wells did have experience in radio broadcasting but did not have any experience in television broadcasting. (Cohen, at 1333-34; Wells, Tr. 1811-13.) Mr. Cohen told Ms. Wells that if she were selected as Mainstream's general partner, she would receive a percentage of the partnership interest in exchange for her services. (Cohen, Tr. at 1339; Wells, Tr. 1700.) Following the meeting, Mr. Cohen recommended to Mr. Rynd that Ms. Wells be the general partner for Mainstream. (Cohen, Tr. 1335.) Ms. Wells later contacted Mr. Cohen and expressed her interest in the position. (Cohen, Tr. 1334-35; Wells, Tr. 1699.) Shortly thereafter, Mr. Rynd, Ms. Wells and Mr. Cohen met in New York City. (Cohen, Tr. 1337-38; Wells, Tr. 1708-10.) During that meeting Mr. Rynd suggested giving Ms. Wells a 3.75% interest in the limited partnership in exchange for her services. (Cohen, Tr. at 1339-40.) If Mainstream were successful in its application for Channel 9, Ms. Wells was to become general manager of the station with compensation at a rate to be determined at such time as she assumed this position. (Cohen, Tr. 1351-52; Wells, Tr. 1810; WWOR Exh. 25.)

18. There was a subsequent meeting between Cohen, Wells and Rynd in New York City at which Mr. Rynd advised that the limited partners would accept Ms. Wells as Mainstream's general partner with a 3.75% equity interest. (Cohen, Tr. 1336-38, 1340.) Although no salary was negotiated or agreed to for Ms. Wells' services, Mr. Cohen designed a "formula" that would be a proxy for a survey of prevailing salaries. (Cohen, Tr. 1352-53.)

19. Mr. Cohen reserved the Mainstream name with New Jersey's Secretary of State and Mr. Rynd obtained a financial commitment for construction costs. (Cohen, Tr. 1341, 1359.) While Mainstream was being organized, Mr. Cohen and Ms. Wells were not aware that RKO intended to transfer its license for Channel 9 to MCA. (Cohen, Tr. 1366, 1370-71; Wells, Tr. 1843.) It was after Mainstream's formation, but before Mainstream's application was filed, that Mr. Cohen and Ms. Wells learned about the proposed sale and assignment of Channel 9 from RKO to MCA. (Cohen, Tr. 1366; Wells, Tr. 1843.)

20. A Mainstream retainer letter agreement was prepared by Mr. Cohen and executed on or about March 12, 1986. (WWOR Exh. 26.) The Cohen & Berfield firm's fees were negotiated with Mr. Rynd and Mainstream was not to be billed on an hourly basis. (Cohen, Tr. 1356-58.) Under the agreement, Cohen & Berfield P.C. would be awarded a 10% bonus upon dissolution of the partnership, net of capital contributions and partnership debt, that would be in addition to fees for services.[4]

21. The bonus provision was drafted by Mr. Cohen with a settlement contingency in mind, and the retainer was not questioned by Ms. Wells or the limited partners. (Cohen, Tr. 1353-56.) But there is no substantial evidence that proves that Cohen, Wells and Rynd had agreed on a plan or scheme to file Mainstream's application in order to effect settlement. After Mr. Cohen received the signed retainer agreement, he and his law firm proceeded to prepare an FCC application Form 301, a petition to invoke early renewal of the WOR-TV licensee, and documents associated with a budget and a bank letter. (Cohen, Tr. 1359.)

22. Mr. Cohen took the lead on budget preparation because Ms. Wells had no experience in preparing TV budgets. (Cohen, Tr. 1361; Wells, Tr. 1714-15.) He suggested Ray M. Stanfield ("Stanfield") of Granada Hills, California and she accepted the recommendation. Mr. Cohen and Ms. Wells traveled to Granada Hills to meet with Mr. Stanfield. (Cohen, Tr. 1363.) A budget covering construction and operation costs was prepared by Stanfield, Cohen and Wells, but none of these persons was able to produce a document. (Cohen, Tr. 1389.)

23. With permission from Ms. Wells, Mr. Cohen took the lead in lining up Dr. Roger Johnson ("Johnson") as an expert witness[5] in April 1986. (Cohen, Tr. 1379.) Mr. Cohen met with Dr. Johnson on April 17, 1986, and although Ms. Wells did not attend the meeting, she was in contact with Dr. Johnson by telephone. (Cohen, Tr. 1383; Wells, Tr. 1713-14.) However, it never became necessary to use Dr. Johnson's services for Mainstream beyond these initial contacts.

24. On June 4, 1986, RKO filed its application for consent to the assignment of license for WOR-TV to a wholly owned subsidiary of MCA and on July 14, 1986, Mainstream filed a petition to deny the assignment application.

25. On December 9, 1986, the Commission issued a decision granting the assignment of RKO's license to MCA, denying a petition filed by Mainstream to deny the assignment, and refusing to accept Mainstream's application. *RKO General, Inc.* (*WOR - TV*), 1 F.C.C. Rcd 1081 (1986).[6] Mainstream filed an appeal with the United States Court of Appeals for the District of Columbia Circuit and a Motion To Stay the *WOR - TV* decision. (Cohen, Tr. 1390.) The motion for stay was denied by the Court. (*Id.*) Mr. Cohen had concluded that while he believed in the merits of Mainstream's appeal, its success was speculative and he testified that he shared his opinion in that regard with Ms. Wells. (Cohen, Tr. 1392-93.)

26. The next event in evidence is testimony of a contact that was initiated by counsel for RKO about settlement. The contact occurred in January or February 1987. (Berfield, Tr. 1221-22.) At a lunch meeting between Mr. Berfield and RKO's counsel, RKO offered $1 million to settle by dismissal of Mainstream's court appeal. Mr. Berfield immediately transmitted the offer to his partner, Mr. Cohen. (Berfield, Tr. 1223.) Mr. Cohen contacted Ms. Wells about the settlement offer and told her that "this is something that she ought to think very hard about." (Cohen, Tr. 1394-95; Wells, Tr. 1727.) Mr. Cohen communicated substantially the same message and advice to two of the limited partners, Mr. Rynd and Mr. Steinberg.[7] (Cohen, Tr. 1395.)

27. Messrs. Cohen, Berfield, Rynd and Steinberg and Ms. Wells met in Mr. Cohen's office to discuss settlement. (Cohen, Tr. 1397-99; Wells, Tr. 1726-28.) The group agreed that Mainstream would settle for a payment of $11.5 million. That amount represented Ms. Wells' assessment of adequate monetary compensation for her lost opportunity to challenge Channel 9's licensee. (Cohen, Tr. 1401; Wells, 1727, 1730-32.) There was no specific methodology used by Ms. Wells to assess her value of the lost opportunity. One factor considered was her share of an $11.5 million settlement calculated to be $400,000. (Wells, Tr. 1730-32, 1825.) The assertion that there is a "lost opportunity" value of $11.5 million or of $400,000 for the opportunity to challenge Channel 9's licensee is rejected for lack of any credible evidence.

28. On March 2, 1987, the same three Mainstream principles and Mr. Cohen met with RKO's counsel and RKO's Chairman to pursue settlement discussions. (Cohen, Tr. 1401-02; Wells, 1727-29; WWOR Exh. 32.) Ms. Wells negotiated with RKO's Chairman, an offer of $5.37 million was made by RKO, and Ms. Wells discussed the offer with Mr. Rynd and Mr. Steinberg, who agreed to accept that amount. (Cohen, Tr. 1401, 1409; Wells, Tr. 1728-29.)

29. The Mainstream settlement was contingent on settlement of other appeals of RKO's transfer to MCA. All appeals of the FCC's decision to authorize the transfer were settled by March 25, 1987. (WWOR Exh. 33.) On April 1, 1987, Mainstream received payment of $5.37 million. (WWOR Exhs. 34, 38.) Mr. Berfield calculated distribution amounts and prepared the checks for Ms. Wells to sign. (Berfield, Tr. 1237; Cohen, 1412; WWOR Exhs. 41, 42.) Ms. Wells received a share in the amount of $178,694 (WWOR Exh. 63) and the Cohen & Berfield law firm was paid the sum of $528,500, an amount calculated at 10% of the settlement, the bonus percentage under the retainer. (Cohen, Tr. 1421; WWOR Exh. 42.) Mr. Cohen arranged for an accountant to prepare partnership tax returns, Ms. Wells' Form K-1, and to provide documentation to limited partners for their individual income tax returns. (Cohen, Tr. 1417, 1543.) Mr. Sidney Fetner, who would play a major role in the Garden State application and who was Mr. Rynd's cousin, received a *pro rate* share in the amount of $1.3 million on an investment of $21,428. (Cohen, Tr. 1345; WWOR Exh. 42.)

30. MCA began operating on Channel 9 on April 3. 1987. (Cohen, Tr. 1432; Wells, 1832.) It was on or about August 11, 1987, that Mr. Berfield made the final Mainstream distribution. (Berfield, Tr. 1240; WWOR Exh. 48.)

The Garden State Venture

31. Mr. Fetner had no experience in broadcasting aside from his investment in Mainstream. Mr. Fetner rejected the idea of purchasing a broadcast property through a brokered purchase. But at the conclusion of the Mainstream settlement, he reminded Mr. Cohen that he had considerable financial resources and that he was interested in speculating with money where there was the potential for a substantial reward.

> Mr. Cohen: [H]is buying a television station, to him, wasn't what he was looking for. He said he owned lots of businesses.
>
> Q: What was he looking for?
>
> A: He liked the challenge and the chase.

(Cohen, Tr. 1425.) He wanted Mr. Cohen to advise him of any such opportunities in broadcasting. (*Id.*) He had this and similar conversations with Mr. Cohen around the time of the Mainstream settlement on or about March 2, 1987. (Cohen, Tr. 1426.)

32. Sometime between April 15, 1987, and July 16, 1987, in a telephone conversation between Ms. Wells and Mr. Cohen, she expressed personal criticism of the news and entertainment programming of WWOR-TV as being, in her view, the same programming that RKO had provided which she believed was not responsive to the needs of Northern New Jersey. (Cohen, Tr. 1429, 1735- 38; Garden State's PFC at 5.) Mr. Cohen testified that Ms. Wells knew that Channel 9 was soon to file a renewal application. But Ms. Wells testified that she became aware of the imminent license renewal from Mr. Cohen in a subsequent telephone call in the Summer of 1987. (Cohen, Tr. 1531; Wells, Tr. 1836.) Mr. Cohen also testified that in April 1987, he had filed an application for Ms. Wells in another broadcast venture in Poughkeepsie, New York. (Cohen, Tr. 1431.) That would be an occasion to speak with Ms. Wells about the programming of WWOR-TV. Mr. Cohen also testified that after the Mainstream settlement, Ms. Wells told him that she was aware that MCA (WWOR-TV) had to file a renewal application and that a new entity such as Garden State would have an absolute right to be compared, which was not the situation earlier when RKO held the license. (Cohen, Tr. 1531.) If she knew about renewal she most likely had learned of it earlier from Mr. Cohen or from Mr. Berfield. Certainly, the occasion to speak was presented in light of the Poughkeepsie application, and sometime be-

fore Ms. Wells initiated a conversation about renewal she most likely had learned of it from Mr. Cohen, her communications counsel. While the testimony of the persons who were involved in those conversations is inconclusive for determining the month in which they took place, it was before July 16, 1987, the date when all of the limited partners were accounted for. (WWOR Exh. 45.)

33. At Mr. Cohen's request, Ms. Wells agreed that Mr. Cohen could pass this information about Ms. Wells' criticisms of Channel 9 programming to one of Mr. Cohen's clients. (Cohen, Tr. 1431, 1437; Wells, Tr. 1737-40.) In keeping with the desires of Mr. Fetner, Mr. Cohen relayed the information to Mr. Fetner, the limited partner of Mainstream. (Cohen, Tr. 1434; WWOR Exh. 25.) Mr. Fetner stated that he wanted a meeting and Mr. Cohen arranged one in New York City among Mr. Fetner, Mrs. Fetner, Ms. Wells and Mr. Cohen. (Cohen, Tr. 1434, 1440-41; Wells, Tr. 1740.)

34. The date of the meeting was not established by the evidence.[8] The purpose for the meeting was to determine whether Ms. Wells and Mr. Fetner would be compatible business partners in a venture to challenge Channel 9's renewal. (Cohen, Tr. 1444-45.) But Mr. Cohen testified that there was no discussion during the dinner meeting about filing a renewal challenge against MCA for the purpose of reaching a settlement. (Cohen, Tr. 1446.) Similarly, Mr. Cohen testified that there was no discussion during the dinner meeting about the settlement proceeds that Ms. Wells, Mr. Fetner and the other Mainstream partners had received earlier that year in their settlement with the previous licensee of Channel 9. (Cohen, Tr. 1447.) That may well have been the case. But since Mr. Cohen, Mr. Fetner and Ms. Wells had recently settled a renewal challenge for $5.7 million it did not need to be communicated in *haec verba* that an offer for a financially profitable settlement could be made by MCA, assuming that a non-frivolous challenge were made. In addition, it also would be reasonable to assume that the subject of a potential lawsuit by MCA based on a theory of breach of the Mainstream agreement would be a topic of discussion. Yet that was never mentioned in the testimony.[9]

35. Mr. Fetner offered Ms. Wells a 4% interest in a limited partnership to challenge the licensee, WWOR-TV. (Cohen, Tr. 1448-49; Wells Tr. 1740-43.) Mr. Fetner volunteered to put up or arrange for the capital and he offered Ms. Wells a 4% equity interest in exchange for her services as general partner. (Cohen, Tr. 1449; Wells, Tr. 1741, 1743.) Ms. Wells took the offer under advisement and within a few days she accepted Mr. Fetner's proposition. (Wells, Tr. 1746).

36. By July 16, 1987, all of the limited partners for the Garden State venture had been identified. (WWOR Exh. 45.) Mr. Fetner selected all of the limited partners, who were his family and friends, and Ms. Wells selected the name of the partnership. (Cohen, Tr. 1452-54; Wells Tr. 1743.) Thus, a documented decision to form Garden State as a limited partnership and to proceed with the challenge to WWOR-TV's license had been made as of July 23, 1987. (Cohen, Tr. 1485; WWOR Exh. 46.) Also on that date, Mr. Fetner paid the Cohen & Berfield law firm a retainer in the amount of $25,000. (Cohen, Tr. 1455-58, WWOR Exh. 46.) The required limited partnership agreement and certificate were filed with the State of Delaware on October 19, 1987. (WWOR Exh. 58.) Mr. Fetner died in April 1988. (Cohen, Tr. 1560-61.)

The Garden State Retainer Agreement

37. Mr. Cohen was the principal author of the Garden State retainer agreement and he discussed it outside of his firm only with Mr. Fetner. (Cohen, Tr. 1499.) On August 2, 1987, the retainer agreement and the limited partnership agreement were sent to the limited partners for signature. (Cohen, Tr. 1495; WWOR Exh. 51.) The retainer agreement provides for a 10% bonus for Cohen & Berfield in the event the partnership dissolves or settles the litigation. (Cohen, Tr. 1497; WWOR Exh. 52.) Unlike the Mainstream arrangement, the retainer agreement also provides for a bonus, unspecified as to amount or percentage, that would be based on the value of the station in the event that Garden State were successful in obtaining the permit. (Cohen, Tr. 1501-02; WWOR Exh. 52.) The capital contributions also varied: Mainstream called for total capital contributions of $249,000 (WWOR Exh. 26) while Garden State called for contributions of $500,000. (WWOR Exh. 52.)

38. As to the differences in the retainer agreements, Mr. Berfield said that the unspecified bonus, should Garden State win, was an unknown amount that could not be quantified because the station's value was then unknown. (Berfield, Tr. 1261.) Mr. Cohen relied on his perception of Mr. Fetner's sense of fairness to see to a suitable reward if Garden State was declared the winner. (Cohen, Tr. 1503.) The authorized capital of $500,000 was based on Mr. Cohen's estimate of the duration of the litigation. (Cohen, Tr. 1500-02.) Ms. Wells did not know why the capital contribution of Garden State differed from that of Mainstream. (Wells, Tr. 1745.)

39. Before any partner could sell or transfer any portion of a capital interest it was necessary to obtain the written consent of the general partner and the general partner's attorney. (WWOR Exh. 58 at 10.) Mr. Cohen was unable to state a reason for requiring the consent of the general partner's attorney. He considered himself and his firm to represent the limited partnership - the entity - and not its general partner, Jean Wells. (Cohen, Tr. 1517.) But Ms. Wells did in fact look to Cohen & Berfield for legal advice on matters that related to her position as general partner of Garden State. (Cohen, Tr. 1517-18.) And Ms. Wells confirmed that she consulted Mr. Cohen on most matters involving Garden State and that she could recall no situation where she went against his advice. (Wells, Tr. 1853-54.) The evidence establishes the fact that Mr. Cohen represented the Garden State limited partnership entity and Ms. Wells in her capacity of its general partner. But there is no evidence of a conflict ever arising in those representations.

Prosecution Of Garden State's Application

40. Sometime before October 1, 1987, Ms. Wells and Mr. Cohen returned to California to work with Mr. Stanfield on a budget for Garden State. (Wells, Tr. 1752-54.) Mr. Stanfield prepared a budget. (Cohen, Tr. 1557; WWOR Exh. 88.) Under Mr. Cohen's advice, Ms. Wells set up a partnership checking account and obtained the requisite IRS number. Mr. Cohen's law firm handled the initial capital call paperwork because Ms. Wells was not logistically set up to handle it. But it appears that she handled subsequent calls. (Cohen, Tr. 1532-33.)

41. On December 21, 1987, MCA filed its application for renewal of the license for WWOR-TV and two days later, on December 23, 1987, Garden State filed its com-

peting application. (WWOR Exh. 62.) For tactical reasons, Garden State filed quickly in order to restrict the record on which WWOR-TV could urge a renewal expectancy. (Cohen, Tr. 1535-37.) Ms. Wells admitted knowing when the application was filed that comparative renewal cases could result in lucrative settlements as evidenced by her participation in Mainstream. But she testified that such circumstance played no role in her decision to file the Garden State application. (Wells, Tr. 1837-38.) While there is no item of substantial evidence in the record to rebut that position and there is no evidentiary basis to reject her testimony, the inference is made by the undersigned fact finder that Ms. Wells had in mind the possibility that even if Garden State did not receive a construction contract, there might be an alternative financial benefit obtained through settlement. But the totality of the evidence shows that the application was filed on December 23, 1987, for the purpose of obtaining a construction permit and that evidence fails to establish that Garden State filed for the purpose of securing a settlement.

42. Ms. Wells performed identifiable services for Garden State. She prepared a draft annual report and she hired a person to assist her in locating public witnesses. (Cohen, Tr. 1554; WWOR Exhs. 65 and 66; Wells, Tr. 1850.) She also monitored Dr. Johnson's progress in the preparation of his expected testimony on programming. (Garden State Exhs. 6 and 7.) Two meetings between Ms. Wells, Dr. Johnson and Mr. Cohen were held in July 1988, and Dr. Johnson submitted his 96 page draft report in November - December 1988. (Garden State Exh. 7 at 2 - 3.)

43. Garden State paid Dr. Johnson the sum of $19,066 for his efforts on a draft report that was intended to show that WWOR-TV programming was not responsive to the needs of Northern New Jersey. In addition, through Ms. Wells' efforts, Garden State hired Journal Graphics, Inc. to transcribe tapes of WWOR-TV's programming that had been made by Dr. Johnson, and to perform a computerized "buzzword" analysis of the programming. Garden State paid Journal Graphics the sum of $10,716 for its services. Thus, Garden State's total expenditures for expert and technical assistance in preparation for trial amounted to approximately $30,000. (Garden State's PFC at 7-8 and Garden State Exh. 7.)

Settlement Negotiations

44. In January 1990, at the instance of the Judge in the New Jersey federal court action, Mr. Hadl instructed WWOR-TV's litigation counsel to arrange a meeting with Mr. Cohen to discuss settlement. (Cohn, Tr. 1571; Hadl, Tr. 1088, 1094.) Shortly thereafter, Mr. Cohen, Mr. Berfield, Mr. Hadl, Mr. Gardner, and Mr. Denvir[10] met in the Washington, D.C. offices of WWOR-TV's counsel to discuss settlement. (Hadl, Tr. 1313; Denvir, WWOR Exh. 92.) Each side expressed an opinion on the merits of their respective cases but no dollar amount was mentioned. (Hadl, Tr. 1100-01; Berfield, Tr. 1313-14; Cohen, Tr. 1574; Denvir, WWOR Exh. 92.) Nothing came of the meeting. Mr. Cohen made a report on the meeting to Ms. Wells, Mr. Harold Fetner (Sidney Fetner's son) and Mr. James Castigan, limited partners for Garden State. (Cohen, Tr. 1575.)

45. In April 1990, Mr. Denvir contacted Mr. Cohen and arranged to meet. (Berfield, Tr. 1314; Cohen, Tr. 1575-76; Denvir, WWOR Exh. 92.) While disclosing to Mr. Cohen that he had no authority to bind WWOR-TV to settlement terms, Mr. Denvir unilaterally conveyed to Mr. Cohen the willingness of WWOR- TV to settle for expenses, estimated at that time to be about $450,000. (Cohen, Tr. 1576-77; Denvir, WWOR Exh. 92.) Mr. Cohen reported the offer to Ms. Wells and she refused to settle for expenses. (Cohen, Tr. 1578.) Nothing resulted from Mr. Denvir's efforts which he reported to Mr. Hadl. (Hadl, Tr. 1109-10; Denvir, WWOR Exh. 92.)

46. In May 1990, Mr. Denvir again met with Mr. Cohen to discuss settlement and there it was stated to Mr. Denvir by Mr. Cohen that Garden State would insist on receiving more than $1 million to settle. (Cohen. Tr. 1578; Denvir, WWOR Exh. 92.) But Mr. Denvir had no authority at that point in time to make an offer. (Hadl, Tr. 1131; Cohen, Tr. 1580; Denvir, WWOR Exh. 92.)

47. In mid-September 1990, through his senior executive position with MCA, Mr. Hadl was aware that an international company was engaged in negotiations to acquire MCA. Mr. Hadl testified that those negotiations heightened MCA's interest in reaching a settlement with Garden State. (Hadl, Tr. 1112-15.) MCA initially offered $1 million and after conferring with Ms. Wells, Mr. Cohen countered for $5 million. Mr. Hadl offered $2 million as MCA's last offer which Ms. Wells accepted when Mr. Cohen informed her of the amount. (Hadl, Tr. 1158-59; Cohen, Tr. 1584-85.)

CONCLUSIONS OF LAW

48. There are proposed findings submitted by the Bureau with respect to "other ventures" of Cohen & Berfield which are not relevant to the resolution of the added issue.[11] There also were findings proposed by Garden State on its perceptions of the state of the Judge's bias and prejudice, which charges are deemed to be irrelevant to consider here without there being a third request made for the Judge's disqualification under §1.245 of the Commission's rules.[12]

49. The facts found above fail to show that Ms. Wells filed the Garden State application in order to obtain a settlement. Although settlement was a future possibility that was contemplated by Garden State and its counsel when Mr. Cohen's retainer agreement *cum* bonus was signed, the provision in a retainer agreement for a settlement bonus does not *ipso facto* establish that Garden State's application was filed for the purposes of reaching or carrying out settlement. In fact, there was also a provision in the retainer agreement to compensate the law firm with a bonus if Garden State were to win the license after full litigation. Also, there was provision for twice the capital investment in Garden State compared with Mainstream which evidences a determination on the part of Garden State limited partners to cover substantial litigation expenses. Therefore, it is concluded that Garden State was disposed to litigate the case to its conclusion when it retained Cohen & Berfield, P.C and filed its application.

50. The evidence further shows that Garden State was vigorously litigating this case up until the fruitful phase of settlement negotiations in September 1990. *See e.g.* Transcripts of Hearings held August 23 and September 13-14, 1990, wherein public written testimony was received and rejected. In addition, Garden State had expended approximately $30,000 in costs for an expert and litigation assis-

tance. Section 311(d)(3)(B) of the Communications Act of 1934, as amended (the "Act") provides for approving only settlements where:

> - - - no party to the agreement filed its application for the purpose of reaching or carrying out such agreement.

Pertinent legislation history reflects Congressional concern with the filing of a "frivolous application for a station license in order to harass an incumbent." *H. R. No. 97 - 208*, July 29, 1981, P&F Radio Reg. at 10:605, 10:608. The evidence showing the nature and the extent of Garden State's participation in the pre-hearing and hearing phases of this case[13] establishes that its application was not frivolous or intended to harass.

51. The Bureau argues in conclusion that the record contained evidence that Garden State's application "may have been filed for the purpose of carrying out a settlement." *See* Bureau PFC at 30. The Bureau's primary concern seems to be with the absence of proof which could best be shown by Garden State as to when Ms. Wells began reviewing WWOR-TV's programming and reported her adverse conclusions to Mr. Cohen. WWOR-TV began broadcasting on April 3, 1987, the date of acquisition. Ms. Wells was involved with Mr. Cohen in an unrelated broadcast application in that same month. Yet no one who was a party to a dinner meeting in New York has any specific recollection or written record that pins down the date of the meeting between Mr. Cohen, Ms. Wells and Mr. Fetner on the challenge to WWOR-TV's renewal. These circumstances leave open the question of when Ms. Wells had the opportunity to review programming before Mr. Cohen relayed her concerns to Mr. Fetner, the person who apparently was interested after his success with Mainstream to return to the "chase." Nonetheless, even with the admitted speculation motive on Mr. Fetner's part as the reason for his participation in the comparative renewal process, the evidence does not establish that Mr. Fetner's "chase" did not encompass winning the license as the sole reason for filing Garden State's application on December 23, 1987. Nor would it be reasonable or rational to assume that settlement was a viable option to Mr. Fetner, Ms. Wells, Mr. Cohen or Garden State until there was an exchange of evidence, deposition discovery, and an offer to settle was made by the renewal applicant.

52. Nor does the evidence support a conclusion that there has been an abuse of the Commission's process. The Commission has defined the term "abuse of process" as:

> the use of a Commission process, procedure, or rule to achieve a result which that process, procedure or rule was not designed or intended to achieve or, alternatively, use of such process, procedure or rule in a manner which subverts the underlying intended purpose of that process, or rule.

First Report and Order in BC Docket No. 81-742, 4 F.C.C. Rcd 4780, 4793 n. 1 (1989). Since settlements are provided for by the Act [§311(d)] and Commission rule [§73.3525], there is nothing intrinsically illegal in presenting a *bona fide* settlement as a potentially alternative option to lengthy litigation at some time in the course of the proceeding. It is only required that when the applicant files an application on Form 301, the applicant must then have an intention to receive a construction license from the Commission, a frame of mind which is reasonable to assume with the act of filing, unless the document is frivolous on its face or there is convincing extrinsic evidence to the contrary. *See Memorandum Opinion and Order in BC Docket No. 81 - 742*, 5 F.C.C. Rcd 3902, 3903 (1990) ("abuse [of process] is not an easy matter to prove"). Proof of a frivolous filing and proof of the element of intent to abuse the filing process are distinctly lacking here.

53. Mr. Cohen and Ms. Wells have testified that the subject of settlement was never discussed before the application was filed, positions that the Bureau argues were "contrived." *See* Bureau PFC at 32. But as found above, there is no direct evidence that rebuts the Cohen/Wells denials and their joint experiences with Mainstream had illustrated to them that settlements, as accepted by the Commission at that time, were always a potential development as the case proceeded into discovery and litigation stages. And, of course, there is the occasional serendipitous event that sometimes occurs, such as here, with the emergence of a suitor for the station's parent company which could not have been predicted when Garden State filed its Form 301. Thus, without evidence of a rational expectation of receiving a settlement offer at or soon after the filing of an application, the wrongful intent of filing for the purpose of settlement is not established on the record made in this case.

54. To the extent that there are circumstances here that the Bureau finds "troubling,"[14] the Commission has addressed such concerns for the future by limiting settlement payments, noting:

> We believe this approach furthers a number of important policies. By prohibiting all payments in excess of legitimate and prudent expenses made anytime during a comparative hearing, we are eliminating most of the potential profit to applicants in filing competing applications.

First Report and Order, *supra*, 4 F.C.C. 2d at 4783. Thus, the Commission has focused on and has addressed the policy concerns of these settlements. Clearly, the acceptance of this particular settlement involving payment of a substantial sum of money under circumstances perceived as "troubling" to the Bureau will not serve as a precedent for any future settlement. Even the Bureau concedes that "the record here, taken as a whole, does not support a conclusion that Garden State filed its application for an improper purpose." *See* Bureau PFC at 33.[15] WWOR-TV, not surprisingly, urges findings that are favorable to Garden State and the proposed settlement. *See* WWOR-TV PFC at 20-23. Thus, no opposing party has cited a precedent or presented an argument that would support a finding on the evidence that is adverse to permitting Garden State to participate in a money settlement in return for its dismissal.

55. It is further noted that Garden State disputes the existence of even circumstantial evidence to support an allegation that Garden State filed its application for purposes of settlement. *See* Garden State Reply PFC. Garden State asserts that the Bureau has made a "quibble" over the inability of witnesses to recall the date of a meeting among Mr. Cohen, Ms. Wells and Mr. Fetner that took place four years ago. (*Id.*) But the Presiding Judge does

not see that evidentiary weakness to be a mere "quibble." It is a material circumstance that is troubling in not being resolved with the precision of clear and convincing evidence that has been weighed and considered by the undersigned. But any adverse inference is off-set by the direct evidence noted above of Garden State retaining Dr. Johnson and vigorously litigating this case into the hearing phase on public witnesses. The wrongful intent can only be determined from the totality of the evidence and not from the lapses in memories of Mr. Cohen and Ms. Wells.

56. Garden State also argues in its Reply that there is no evidence to support the Bureau's argument that the testimony of Mr. Cohen and Ms. Wells "appears contrived" with respect to there being no mention of settlement. *See* Garden State Reply PFC at 2-3. It is noted that the phrase used by the Bureau, "appears contrived" addresses only appearances. There will be no adverse inference drawn based on a circumstantial appearance except as it impacts on the totality of a particular witness' credibility. The Presiding Judge has considered that testimonial episode and has concluded that with the prior experience that Mr. Cohen, Ms. Wells and Mr. Fetner gained through the Mainstream settlement, there was no need for Mr. Cohen, Mr. Fetner or Ms. Wells to mention settlement in their first discussion. Thus, the testimonial credibility of Mr. Cohen or Ms. Wells, while not having been established by them, has not been tainted. Garden State argues further that there is no assurance gained from the fact of the Mainstream settlement with RKO that MCA would do likewise in this case. *See* Garden State Reply PFC at 3. That assertion is true. But the rational inference to be drawn is that the three persons were sensitized through the Mainstream experience[16] to the then speculative possibility of receiving a settlement offer as litigation progressed, a reasonable inference to be drawn in view of the temporal proximity of the Mainstream settlement with a payment of $5.6 million just three months prior to the formation of Garden State by July 1987.

57. The remainder of Garden State's Reply arguments are directed toward other ventures that involved Mr. Cohen and persons who were limited partner investors in Mainstream or Garden State. *See* Garden State Reply PFC at Paras. 4 to 13. Those matters have been determined to be irrelevant for purposes of this decision and need not be addressed further. *See* fn. 11, *supra*. Nor are there any adverse findings or conclusions made here to the legality or ethical propriety of fee arrangements of Cohen & Berfield, P.C.

SUMMARY CONCLUSIONS

58. Garden State has met its burden of proof on the added issue. Furthermore, aside from the meeting of the burden of proof, the evidence of record, considered as a whole, does not establish that Garden State's application lacked *bona fides* when it was filed, or that Garden State's application was filed for the purpose of reaching or carrying out a settlement agreement which would result in the dismissal of its application, or that Garden State abused a Commission process through its application or otherwise, or that Garden State misrepresented or lacked candor in certifying that it did not file its application for an improper motive or lack of good faith. Therefore, Garden State is qualified under §311(d) of the Act to participate in a money payoff in return for a dismissal with prejudice of its application for a construction permit for a new commercial TV station to operate on Channel 9 at Secaucus, New Jersey.

59. The evidence shows that approximately three months after Mainstream received a settlement of $5.37 million, Mr. Cohen and Mr. Fetner promoted a venture to challenge WWOR-TV's renewal application. Mr. Cohen, Mr. Fetner and Ms. Wells were of the opinion that the programming of WWOR-TV that had commenced on April 3, 1987, was not meeting the needs of Northern New Jersey and that therefore a meritorious challenge could be made to the station's renewal application. Ms. Wells agreed to serve again as general partner for a group of investors who were friends and relatives of Mr. Fetner. The challenge was vigorously litigated by Garden State without any consideration to settlement until WWOR-TV's vice-president and general counsel made an offer to Mr. Cohen in January 1990. The parties then continued to consider settlement from time to time through probes initiated by WWOR-TV's trial counsel in April and May 1990. In September 1990, when MCA was approached by a serious take-over suitor, WWOR-TV principals made a concerted effort to settle with Garden State for $2 million and that effort succeeded with the settlement agreement that was filed on September 27, 1990.

60. For its part, WWOR-TV is qualified to continue to operate its TV station on Channel 9 at Secaucus, New Jersey as proposed in its renewal application, and there is no longer a challenging application or the need to determine which proposal would, on a comparative basis, best serve the public interest. *See Hearing Designation Order*, MM Docket No. 88-382, DA 88-1077, released July 22, 1988, published at 53 Fed. Reg. 28911 (August 1, 1988). In reaching this conclusion, the Presiding Judge has taken into account the matters pertaining to the transfer of control and allegations of foreign control that were fully considered by the Commission in its *Memorandum Opinion and Order*, FCC 90-424, *In re Application of WWOR - TV, Inc. for Transfer of Control of Station WWOR - TV, Channel 9 Secaucus, New Jersey*, FCC 90-424, released December 26, 1990 (denying oppositions of Garden State Broadcasting Limited Partnership, Whitely Communications and Mr. Michael Krauss to a short form [FCC Form 316] spin-off of control from parent company MCA, Inc. to the shareholders of MCA, Inc. in connection with a tender offer for all its shares from a subsidiary of Matsushita Electrical Industrial Company, Ltd., a firm organized under the laws of Japan). There the Commission authorized the use of a short form to effect a spin-off of shares of WWOR-TV, Inc. to the shareholders of MCA's common stock before control passes to Matsushita, noting in the ruling that its "effect, if any, on the comparative hearing or settlement agreement is for [the presiding Administrative Law Judge] to decide in the first instance." The Presiding Judge notes that there is no adverse implication from MCA's use of the short form to transfer control of Channel 9 to an entity controlled by United States citizens or from Garden State's opposition to the short form transfer. The Commission has found in a factually detailed and reasoned ruling that the proposed transfer of control by spin-off to common shareholders of MCA, at least 83% of which are United States citizens, would not involve a substantial change in ownership or control and there would be no possible violation of §310(b) of the Act prohibiting foreign ownership of 25% or more of a United States broadcast facility. *Id.* at 3-5

and 5-13. Those rulings do not effect the findings, conclusions and settlement considered, made and accepted herein. Accordingly, WWOR-TV's renewal application is now set to be granted.

SETTLEMENT

61. The acceptance of the proposed settlement would conserve Commission resources by avoiding further litigation of this case which would be substantial in terms of time and commitment. Acceptance of the settlement also would result in the termination of ongoing litigation in the United States District Court of New Jersey. The termination of all such litigation will permit the key personnel of WWOR-TV to turn full time and attention to providing broadcasting for Northern New Jersey at the earliest possible time. Except for the restrictive covenant discussed below, the settlement proposal will be accepted at this time in light of the request for "expedited approval."

62. The proposed restrictive covenant precluding Garden State from making "filings" for eight years provides as follows:

> Garden State and Wells further agree that they will not file or participate directly or indirectly in any proceeding (whether or not docketed) involving an application, petition, motion, complaint or other pleading that relates to the broadcast license of station WWOR-TV and is filed with the FCC or any court prior to April 21, 1998, nor during that time period will Garden State or Wells attempt or seek leave to file any competing application not ordinarily permitted by FCC rules.

(WWOR Exh. 216.) This provision appears in Paragraph No. 1 at P.2 of the document entitled "Settlement Agreement. The accompanying Joint Request asks for its "expedited approval." As indicated above, this restrictive covenant is exceedingly broad, was objected to by the Bureau, and was rejected by the Presiding Judge (FCC 90M-3220). There has been no mention made in the Proposed Findings and Conclusions of any attempt by the parties to revisit this covenant to attempt to make it more reasonable. *Compare Memorandum Opinion and Order*, FCC 88M-2622, (WBBM-TV, Admin. L.J.) released August 12, 1988 (presiding judge denied broad covenant not to compete). Moreover, the spirit, if not the letter, of the proposed covenant was already violated by Garden State's opposition to the short form transfer of control (FCC 90-424). *See* discussion *supra* at Para. 60, of the Commission rulings in *In re Application of WWOR - TV, Inc. for Transfer of Control of Station WWOR - TV, Channel 9 Secaucus, New Jersey*, FCC 90-424, released December 26, 1990. The seeking of expedited approval and the actions of the parties after the proposed covenant was rejected are circumstances indicating an abandonment of the covenant as a condition to settlement.

63. The proposed covenant extends for eight years and appears to cover every conceivable filing that might effect Channel 9. In *Dayton Telecasting, Inc.*, 96 F.C.C. 2d 214, 215-16 (Review Bd 1983) a five year covenant not to compete was rejected. *Compare Raul Santiago Roman*, 38 F.C.C. 290, 295-96 (Review Bd 1965) (five year covenant approved where evidence showed a need for temporary protection to preserve value of assigned station and territorial limits were imposed). In this case, there is no showing that WWOR-TV, or its spin-off successor, will need such protection to preserve the station's value. In fact, there has been no showing that the covenant is ancillary to the sale of any business, that the covenant is intended to prevent Garden State and Ms. Wells from derogating the value of Channel 9, and that an eight year period is needed to effect those interests or to preserve the station's value. *See Raul Santiago Roman*, *supra* at 294, and cases cited therein.

64. There are additional equitable considerations that show public interest reasons to not restrict Garden State from participating in the community dialogue process effecting Channel 9's broadcasting. The restrictive covenant, if implemented, would contravene the Commission's policy that encourages public participation in the allocation, licensing and renewal processes. *See Amendments of Commission's Rules Concerning Abuses of the Commission Processes*, FCC 87-265, released September 3, 1987. And the court of appeals has noted that listening and viewing audience are among the best vindicators of the public interest. *Office of Communication of the United Church of Christ* v. *F. C. C.*, 359 F.2d 994, 1005 (D.C. Cir. 1966). Garden State, and particularly Jean Wells, have closely followed Channel 9's broadcasting. Ms. Wells also has acquired familiarity with the licensee's duty to meet local needs. Yet, without a showing of any overriding business reason or a showing of any past "strike" filings, the parties seek a Commission endorsed restrictive covenant that would arbitrarily silence Jean Wells for eight years, notwithstanding the above stated policies. Certainly, Garden State and Jean Wells are aware that the law prohibits the filing of spurious pleadings for the purpose of securing a settlement or to otherwise abuse the Commission's processes. 47 U.S.C. §311, 47 C.F.R. §73.3525. *See also Amendment of Commission's Rules Concerning Abuses of the Commission's Processes*, *supra* at 4 (strike petition), 11 (threats to file petitions), and 16-17 (allocation rule making). Thus, there are no convincing reasons shown for approving the settlement agreement's restrictive covenant. Also, with the limitations that are now imposed on settlements to only the legitimate and prudent expenses, coupled with Ms. Wells' turning her full time and attention to a new business venture and Mr. Fetner's demise, it is most unlikely that Ms. Wells or Garden State would launch another venture to obtain control of Channel 9.

ORDER

Accordingly, because the preponderance of the evidence fails to prove that Garden State Broadcasting Limited Partnership filed its application in this case for the purpose of reaching or carrying out a settlement agreement or that the applicant abused a Commission process, IT IS FOUND that Garden State Broadcasting Limited Partnership IS QUALIFIED to participate in a monetary settlement in this case in return for the dismissal with prejudice of its application.

IT IS FURTHER FOUND that the Form 301, as amended, that was filed by Garden State Broadcasting Limited Partnership was a *bona fide* application, that the Commission's processes were not abused by Garden State Broadcasting Limited Partnership, and that Garden State Broadcasting Limited Partnership has not misrepresented or lacked candor in certifying to the Commission that it did not file its application for an improper motive or with any lack of good faith.

IT IS FURTHER ORDERED that the Joint Request For Approval Of Settlement Agreement filed on September 27, 1990, by WWOR-TV, Inc., Garden State Broadcasting Limited Partnership and Jean Wells IS ACCEPTED AND APPROVED, except for the exclusionary covenant in the third sentence of Paragraph 1 that prohibits Garden State and Jean Wells from filing pleadings relating to the broadcast license of WWOR-TV prior to April 21, 1998, which SHALL NOT BE ENFORCED and IS STRICKEN from the Settlement Agreement.

IT IS FURTHER ORDERED that this Partial Initial Decision applies to WWOR-TV, Inc., its assigns (*e.g.* "Newco, Inc.") and to all succeeding entities which are or become entitled by a Commission authorized assignment or transfer of control (*e.g.* "Pinelands, Inc.") to broadcast on Channel 9 at Secaucus, New Jersey.

IT IS FURTHER ORDERED that the application of Garden State Broadcasting Limited Partership (File No. BPCT-871223KG) IS DISMISSED WITH PREJUDICE, the application for renewal of license of Station WWOR-TV, Secaucus, New Jersey (File No. BRCT-871221KE) IS GRANTED, and the Hearings set to commence on January 28, 1991, ARE CANCELLED.[17]

FEDERAL COMMUNICATIONS COMMISSION

Richard L. Sippel
Administrative Law Judge

FOOTNOTES

[1] A second competing applicant, Whitely Communications (File No. BPCT- 880321KM), was dismissed for non-compliance with procedural rules and orders. *See Memorandum Opinion and Order*, FCC 89M-2206, released September 6, 1989, *aff'd*, 4 F.C.C. Rcd 8127 (Review Bd 1989), *rev. denied*, 5 F.C.C. Rcd (Comm'n 1990).

[2] MCA has spent in excess of $1 million in legal fees in this renewal proceeding. (Hadl, Tr. 1092.) MCA estimates it would spend an additional $1 million on this case if it does not settle. (Hadl, Tr. 1093.) Continued litigation also would take top management away from more productive station business matters. (Hadl, Tr. 1091-92.)

[3] WWOR-TV also notes the ongoing civil litigation in the United States District Court for New Jersey involving claims by MCA, Inc. against Garden State and counterclaims asserted by Garden State against MCA, Inc. It is contemplated that the District Court case would be settled simultaneously with this proceeding.

[4] The fee portion of the agreement was stepped: legal work incident to filing, including waiver of Commission cut-off rule and anticipated court litigation for $75,000; legal work after application is accepted through a final decision for $174,000. It is in consideration of a guaranteed cap of $249,000 for extensive legal work (out-of-pocket expenses were included in the cap) that the retainer agreement provided for a 10% bonus. (*See* WWOR Exh. 26.)

[5] Dr. Johnson is a Professor of Psychology at Ramapo College of New Jersey. He wrote to Mr. Cohen that he "anticipated a flurry of legal activity" when he learned of the proposed sale of WOR-TV to MCA, Inc. As a result, Dr. Johnson advised Mr. Cohen in a letter dated April 18, 1986, that he had begun to videotape WOR-TV programming in order to be ready to conduct analyses.

[6] In rejecting Mainstream's contentions that MCA had failed to demonstrate that it would operate Channel 9 as a New Jersey rather than a New York station, the Commission noted that when it filed for renewal, MCA would run on the record established in the intervening period. 1 F.C.C. Rcd at 1089.

[7] Mr. Cohen was aware that the limited partnership agreement provided that where assets were to be disposed of, 51% of the equity owners would need to approve the transaction. (Cohen, Tr. 1395.)

[8] Mr. Cohen testified that he was unable to recall when the meeting took place. (Tr. 1441). Although Mr. Cohen maintained a diary of meetings and events that he attended in 1987, he claimed that his review of the diary prior to the hearing and in anticipation of questions on the topic failed to reveal any reference to his New York meeting with Ms. Wells and Mr. Fetner. (Tr. 1436-1437.) He also could not name the restaurant where the meeting took place. (Tr. 1441). Mrs. Fetner was not produced as a witness and Mr. Fetner is deceased.

[9] On June 7, 1988, MCA filed a lawsuit against Garden State and Jean Wells for breach of contract of the Mainstream agreement with RKO that had been assigned to MCA. The action was commenced in the United States District Court for the District of New Jersey (Civil Action No. 88-2508) wherein the court denied cross-motions for summary judgment.

[10] Mr. James R. Denvir has been actively engaged in representing WWOR-TV at the lengthy pre-hearing stages of this case. Because of his unavailability due to a conflicting court commitment, Mr. Denvir was permitted to testify by declaration to his involvement in settlement. A declaration executed on October 29, 1990, was received in evidence. (WWOR Exh. 92; Tr. 1862.)

[11] The Presiding Judge permitted evidence to be introduced on cross-participation of limited partners in groups represented by the Cohen & Berfield law firm that challenged other renewal applicants. *See Clay Frank Huntington*, 61 F.C.C. 2d 123, 124 (Review Bd 1976) (evidence of pattern accepted on issue of intent to deceive). Here the Bureau questioned Mr. Cohen on renewal challenges in which only one bonus was paid. Two additional cases had bonus arrangements but no payments. One case settled for expenses only. Such evidence is too tangential to establish a pattern of settling cases through a single law firm in order to obtain bonuses. Nor is there any direct evidence that shows that any of those applications were filed for the purpose of obtaining a settlement.

[12] *See WWOR - TV, Inc.*, 5 F.C.C. Rcd 2845 (Comm'n 1990) (Comm'n rejects Garden State's motion to disqualify Presiding Judge on grounds of bias and prejudice alleged to be shown by his adding this issue against Garden State). *Compare* also *WWOR - TV, Inc.*, 4 F.C.C. Rcd 6155 (Comm'n 1989) (former applicant Whitely Communication's motion to disqualify Presiding Judge on similar grounds denied by Commission). Garden State even complains of an appearance of impropriety in the Judge's questioning of WWOR-TV's witness. First, it is noted that no error or impropriety was asserted by WWOR-TV or by the Bureau. Second, there is a responsible trend in the law that acknowledges the value of a Judge's active participation through questioning witnesses on factual matters that effect the substantive merits of an issue. *See* e.g., *Reform Proposals To Compara-*

tive Hearing Process, FCC 90-410, released December 21, 1990 at 17 (comment submitted suggesting that cross-examination by applicants' counsel should be eliminated and all witnesses should be questioned only by the presiding judge). This Judge will continue to primarily rely on the skills of trial counsel to elicit relevant facts from witnesses while actively participating in the questioning process only where it is deemed necessary to make the record for a decision. Such judicial participation in questioning is particularly appropriate where, as here, the procedural posture of settlement undercuts the incentive of competing parties to vigorously litigate as compared with the situation when a case is advancing in a full-blown trial on all issues and parties have an incentive to best or disqualify the competition.

[13] *See e. g.*, Motion for Stay of discovery rulings filed November 1, 1988, denied by *Memorandum Opinion and Order* released November 14, 1988 (FCC 88M- 3846); Supplement to Motion to Stay filed November 8, 1988 and *Order* refusing to reconsider ruling released November 25, 1988 (FCC 88M-4046); Motion Opposing the Taking of Depositions and for Protective Order filed on November 14, 1988, denied in part by *Memorandum Opinion and Order* released November 30, 1988 (FCC 88M-4072); Appeal to Review Board and Motion for Stay filed November 21, 1988, denied as an unauthorized interlocutory appeal by *Memorandum Opinion and Order* released December 22, 1988 (FCC 88R-66); Motion to Quash filed on February 13, 1989 by Jean Wells, denied for the most part by *Memorandum Opinion and Order* released February 24, 1989 (FCC 89M-639); Motion Opposing the Taking of Depositions filed on August 10, 1989, denied by *Memorandum Opinion and Order* released August 25, 1989 (FCC 89M-2163); Motion for Temporary Stay filed on August 28, 1989 in connection with request for withdrawal of Presiding Judge filed August 31, 1989; stay denied by *Order* released September 6, 1989 (FCC 89M-2207). By *Memorandum Opinion and Order* released September 12, 1990, a Motion for Stay re Production of Privileged Documents filed on August 31, 1989 was denied; a Motion to Quash filed by Messrs. Cohen and Berfield on September 14, 1989 was denied by *Memorandum Opinion and Order* released October 3, 1989 (FCC 89M-2394); a Memorandum Regarding Privilege Claims was filed on August 25, 1989, and the claims denied in part by *Memorandum Opinion and Order* released May 15, 1990 (FCC 90M-1198). *See also, e.g.,* Appeal filed August 21, 1990 by Jean Wells, denied in part by Review Board *Memorandum Opinion and Order* released July 6, 1990, (FCC 90R-54); Petition for Stay filed with the Commission by Jean Wells on June 26, 1990, declared moot by Commission's ruling requiring production of documents of Mainstream claimed to be privileged, Comm'n *Memorandum Opinion and Order,* FCC 90-345, released October 18, 1990.

[14] *See* Bureau PFC at 33.

[15] The Bureau and WWOR-TV support accepting a settlement in this case. There is no party that objects to permitting a settlement to be concluded that involves a monetary payment to Garden State.

[16] Garden State makes a narrow argument on relevancy, pointing out that Mainstream's situation was procedurally different from the Garden State application. But settlement to Ms. Wells, a layperson, and to Mr. Fetner, who wanted the "chase," was a state of general awareness of a potential for settlement, not a narrowly focused probability that would take into account procedural differences and the probability of a lawsuit which are considerations that would call for a formal legal opinion.

[17] This *Partial Initial Decision* disposes of this case in its entirety. It shall become effective 50 days after its public release if exceptions are not filed within 30 days thereafter, unless the Commission elects to review the case on its own motion. 47 C.F.R. §1.276(d).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-48

In the Matter of

Amendment of Section 73.202(b),	RM-5772
Table of Allotments,	RM-5941
FM Broadcast Stations.	RM-6533
(Arlington, McKinney, Celina,	RM-6534
Terrell, Daingerfield, College	RM-6535
Station, Caldwell, and Howe,	RM-6536
Texas; and Durant, Oklahoma)	

MEMORANDUM OPINION AND ORDER

Adopted: December 26, 1990; Released: January 11, 1991

By the Chief, Policy and Rules Division:

1. The Commission has before it a "Motion to Sever" filed by Evergreen Media Corporation of Dallas ("Evergreen"), licensee of Station KHYI, Channel 235C1, Arlington, Texas. The Motion to Sever is directed to the Report *and Order* in this proceeding, 5 FCC Rcd 2660 (1990), which, *inter alia*, substituted Channel 235C for Channel 235C1 at Arlington, Texas, and modified the Station KHYI license to specify operation on Channel 235C.[1] Roy E. Henderson filed an Opposition, and Evergreen filed a Reply. For the reasons discussed below, we grant the Motion to Sever.

2. On May 24, 1990, Roy E. Henderson ("Henderson"), permittee of Station KHEN, Channel 236A, Caldwell, Texas, filed an Application for Review directed to the *Report and Order* in this proceeding. The Application for Review was filed because the *Report and Order* did not consider a Henderson petition for rule making looking toward a Channel 236C2 upgrade at Caldwell. Under Section 1.420(f) of the Commission's Rules, the upgrade at Arlington was stayed by the filing of the Application for Review.

3. A Channel 236C2 upgrade at Caldwell was in conflict with the originally proposed Channel 235C2 upgrade at College Station, Texas. *Notice of Proposed Rule Making and Order to Show Cause*, 3 FCC Rcd 964 (1988). However, the *Report and Order* granted Station KTSR an upgrade on Channel 297C3, thereby removing any conflict between a Channel 236C2 upgrade at Caldwell and any allotment either proposed or granted in this proceeding.

4. In support of his Opposition, Henderson argues that we should not resolve MM Docket No. 88-48 in "piecemeal" fashion by severing the upgrade at Arlington from this proceeding. Furthermore, Henderson contends that in view of previous actions by the licensee of Station KTSR opposing his request for a Channel 236C2 upgrade at Caldwell, we "cannot say with certainty that a connection no longer exists" between the allotments granted in the *Report and Order* and the proposed upgrade at Caldwell.

5. These arguments do not justify denying the Motion to Sever. In a separate docket, we are going forward with a *Notice of Proposed Rule Making* looking toward the Channel 236C2 upgrade at Caldwell. In the event that we grant the proposed upgrade, the Application for Review would become moot. While this docket is pending, we see no reason why Evergreen should not go forward with the implementation of its upgrade at Arlington. Granting the Motion to Sever will not delay the overall resolution of MM Docket No. 88-48, and will lead to an early commencement of enhanced service by Station KHYI. We do not believe that this is a "piecemeal" resolution of this matter or in any manner contrary to the public interest. As indicated earlier, there is no longer any technical conflict between the Caldwell upgrade and any allotment in this proceeding. Previous opposition by the licensee of Station KTSR to a Caldwell upgrade does not constitute a conflict or connection.[2] Moreover, the Application for Review is not directed against the upgrade at Arlington, College Station, or any allotment which could impact on the Arlington upgrade. As such, we believe that there is no need to stay the effectiveness of the Channel 235C upgrade at Arlington, Texas. *See Clemson, South Carolina*, 2 FCC Rcd 5970 (1987).

6. Accordingly, IT IS ORDERED, That the aforementioned Motion to Sever IS GRANTED.

7. IT IS FURTHER ORDERED, That the Opposition to Motion to Sever filed by Roy E. Henderson IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Douglas W. Webbink
Chief, Policy and Rules Division
Mass Media Bureau

FOOTNOTES

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[1] The *Report and Order* also upgraded Station KTSR, College Station, Texas, to specify operation on Channel 297C3, allotted Channel 237A to Howe, Texas, as a new service, and substituted Channel 295A for Channel 237A at McKinney, Texas.

[2] In this regard, we also note that there is no conflict between the Channel 297C3 upgrade at College Station and the proposed Channel 236C2 upgrade at Caldwell.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-491

In the Matter of

Amendment of Section 73.202(b), Table of Allotments, FM Broadcast Stations. (*Vacaville* and Middletown,[1] California)	*RM-6371* RM-6650

MEMORANDUM OPINION AND ORDER

Adopted: December 21, 1990; Released: January 11, 1991

By the Chief, Policy and Rules Division:

1. The Commission has before it a Petition for Reconsideration filed by Joe L. and L. Ann Gross ("the Grosses"), who request reconsideration of the *First Report and Order* ("*R&O*") in this proceeding, 4 FCC Rcd 8315 (1989). The *R&O* granted the request of Quick Broadcasting, Inc. ("Quick"), licensee of Station KUIC(FM), Channel 237A (95.3 MHz), Vacaville, California, for a co-channel upgrade to Channel 237B1 and modification of its license accordingly. Quick filed an opposition to the Grosses' petition, and the Grosses filed a reply. Both parties subsequently filed a number of pleadings beyond the normal pleading cycle.

BACKGROUND

2. In response to the *Notice of Proposed Rule Making* in this proceeding, 3 FCC Rcd 6128 (1988), proposing the channel upgrade at Vacaville, the Grosses, who jointly own 60% of the stock of Goldrush Broadcasting, Inc., licensee of nearby Station KDJK(FM), Channel 236B, Oakdale, California, filed a counterproposal that Middletown, California, be allotted Channel 238A. In the *R&O*, we determined that Channel 254A is available as an alternative, equivalent channel, and could be allotted to Middletown without imposing a site restriction, which would be required for the allotment of Channel 238A. We decided that because there were questions as to Middletown's status as a community, no allotment would be made at that time. Therefore, subsequent to the release of the *R&O*, we issued the *Further Notice*, *supra* note 1, that separately proposed the allotment of Channel 254A to Middletown and requested additional demographic data. Those data will assist us in determining whether Middletown is a community for allotment purposes.

3. In opposing the Vacaville upgrade, the Grosses had claimed that the mountainous terrain between Quick's proposed transmitter site and Vacaville would cause severe shadowing, and would preclude the availability of an alternate site from which a signal of at least 70 dBu could be provided over all of Vacaville. Furthermore, because of co-channel and adjacent channel constraints, the Grosses argued, Quick could not comply with Section 73.315(b) of the Commission's Rules, which recommends that a site be selected so that line-of-sight may be achieved over the city to be served and that no major obstructions lie in that path. We determined that the technical feasibility of Quick's proposal rested ultimately on whether a 70 dBu signal could be provided over the entirety of Vacaville. Based on a staff engineering analysis incorporating an examination of the pertinent terrain, we disagreed with the Grosses' assessment. We found that a signal of at least 70 dBu field strength could be provided over the entire community of Vacaville from Quick's preferred site utilizing an antenna with a height of 230 meters (755 feet). We also found that there existed an alternate site from which the required coverage of Vacaville could be provided using an antenna of 30 meters (98 feet) in height. Thus, the *R&O* granted Quick's allotment request for an upgraded Channel 237B1.

THE PLEADINGS

4. In their petition for reconsideration, the Grosses contend that there was insufficient explanation of how the Commission reached its conclusion as drawn from the staff engineering study. The Grosses argue that the *R&O* did not mention the Grosses' engineering showings demonstrating that Quick's proposal was technically deficient, or explain why Quick's engineering statements were preferable to those of the Grosses. They contend that the Commission simply chose to accept Quick's engineering statements as accurate, discounting those of the Grosses. The Grosses further contend that in cases of questionable antenna sites located in extremely mountainous terrain causing severe shadowing, as here, a party such as Quick should have conducted propagation tests to show definitively that sufficient coverage could be provided over Vacaville. The Grosses argue that the Commission not only failed to require such tests, but also failed to conduct its own independent engineering study to ensure that adequate coverage of Vacaville could be provided in spite of shadowing.[2] The Grosses contend that the absence of reasons for the Commission's acceptance of Quick's engineering statements, despite substantial errors pointed out by the Grosses, demonstrates that the Commission has not satisfied its obligation to support its decisions with findings of fact and reasoned explanations.

5. In opposition, Quick states that it finds it inexplicable that the Grosses have filed a petition requesting reconsideration of the *R&O* in light of our issuance of the *Further Notice* responding to their counterproposal for an allotment to Middletown. Quick nevertheless offers an explanation of the Grosses' motivations by pointing out that the Grosses are the principal owners and managers of Station KDJK(FM), which operates nearby on Channel 236B adjacent to Quick's present Channel 237A. Quick contends that the Grosses submitted their counterproposal to block the allotment of Channel 237B1. According to Quick, this is borne out by the Grosses' filing an application to move the transmitter site for their Station KDJK(FM) such that it would be short-spaced to the reference point for Channel 237B1. Additionally, Quick points to inconsistent statements made by the Grosses regarding the availability of two transmitter sites in pleadings relating to that application and in its pleadings in this proceeding. [3]

6. As to the merits of the Grosses' opposition, Quick claims that they "never *once* reached the conclusion that predicted coverage [of Vacaville] below-70 dBu would result" from an upgraded KUIC(FM) (emphasis in original). As to the Grosses' doubt that an independent Commission study had ever been conducted, Quick asserts that the very existence of the study undercuts most of the Grosses' arguments and that the study verifies the feasibility of the Vacaville allotment. Quick does not contest the Grosses' conclusion that shadowing would occur, noting that Section 73.315(b), advising that line-of-sight should be obtained and that a path free of major obstructions should exist, is not mandatory. A number of cases are cited by Quick as inapposite to the principle for which they were cited by the Grosses--that shadowing of a principal community would preclude an allotment.[4]

7. In reply, the Grosses submit an engineering statement, which they claim properly takes into account the mountainous terrain, and, in combination with interstation spacing requirements, restricts the area in which the transmitter site might be selected. The engineering statement seeks to show that a lack of the requisite 70 dBu coverage within significant areas of Vacaville would occur due to terrain obstructions. The Grosses argue that this case is similar to *Creswell, Oregon*, 4 FCC Rcd 7040 (1989) (" *Creswell* "), in that Quick would fail, as did the proponent in *Creswell*, to provide 70 dBu service to the principal community, and to "meet its burden that its site complies with *all* the Commission's engineering requirements" (emphasis in original).

8. The Grosses' engineering statement contains "detailed studies" of the signal propagation in the area of Vacaville, newly applying the propagation method commonly known as Tech Note 101[5], from "sites 1 and 3 as previously designated by KUIC." The studies investigate one radial path from each site, each path resulting in the shadowing of Vacaville that the Grosses consider as typical of that along other radials from that site. Conclusions arrived at in *Creswell*, they claim, are applicable to the propagation characteristics in Vacaville, whose surrounding terrain comprises rounded obstructions. The Grosses note that such obstructions, as the Commission observed in *Creswell*, cause greater signal attenuation than occurs over sharply defined terrain features such as cliffs or ridges (knife-edge propagation). Using formulas from Tech Note 101, the Grosses determined the free-space attenuation along each of the radials. They then deducted that attenuation from the predicted signal level as determined from the Commission's F(50,50) propagation curves. The Grosses found that the resultant received signal level to be less than 70 dBu along each radial from each of the two sites. Only along the radial from site 3 did they provide "detailed procedures and formulas for the calculation of attenuation of Radio Signal [due] to Isolated Rounded Obstacles." Along that radial at two points (of the three points investigated) in the interval 12.0 to 14.2 kilometers from the site, where they claim shadowing occurs, the Grosses predicted field strengths significantly less than 70 dBu. Therefore, they argue that these results along the radial from site 3 make it conclusive that a 70 dBu signal does not encompass all of Vacaville.

9. Quick responded to the Grosses' reply by filing a Motion to Strike the engineering statement contained in that reply. Asserting that the engineering study improperly presents for the first time in this proceeding a rebuttal to the Commission's analysis, Quick argues that the study should be stricken because it is not limited to matters raised in its opposition and improperly attempts to raise new matters to which our rules do not give Quick the opportunity to respond. Quick also contends that prior to the Grosses' filing of the engineering study, they had not stated that Vacaville would receive a signal of less than 70 dBu. Citing Section 1.429(b), which specifies the conditions under which new facts serve as a basis for a grant of a petition for reconsideration, Quick argues that the Grosses allege no changed circumstances, do not claim that they were unaware of or could not have learned of any new facts, nor do they show why consideration of those facts would be in the public interest. Moreover, Quick notes that the Grosses give no justification for their late filing.

10. Quick also submitted a response to the Grosses' engineering study, contending that it is flawed in two major respects. First, Quick argues that the areas claimed by the Grosses to receive less than a 70 dBu signal lie outside the city boundaries of Vacaville. Referencing two of its previously submitted engineering studies, Quick asserts that the Grosses' claim that less-than-70-dBu shadowing occurs at points certain distances from sites 1 and 3 are irrelevant because those points lie outside the boundaries of Vacaville.[6] Second, Quick further argues, even if those points fall within Vacaville, the results obtained still would be inaccurate because incorrect data had been used to compute the attenuation along the paths from each of the sites. Quick also purports to demonstrate that a "full" 70 dBu signal would be provided over all of Vacaville upon the correct application of Tech Note 101.[7] In summary, Quick's position is that the very late submissions by the Grosses do not undercut the Commission's decision, which should be affirmed.

DISCUSSION

11. The Grosses' petition for reconsideration will be denied. After failing to allege throughout this proceeding that the requisite signal would not be placed over Vacaville by Quick's proposal (instead, arguing that impermissibly severe shadowing would occur), the Grosses did so in their reply to Quick's opposition. They now make that allegation by raising a new set of issues and including fundamentally different engineering analyses from anything they had raised in this proceeding prior to filing their reply. Section 1.45, however, limits replies to matters raised in the oppositions. The Grosses' reply is comprised of an engineering statement concerning whether Vacaville is totally encompassed by at minimum a 70 dBu contour, a matter that, implicitly at least, has remained a point of contention during the whole of this proceeding. However, in that statement, the Grosses attempt to introduce an entirely new and detailed propagation analysis that had never before been addressed in these proceedings. In this sense, the Grosses' reply relies upon facts never before considered by the Commission. Section 1.429(b) prohibits grant of a petition for reconsideration when it relies upon such facts unless they relate to changed circumstances or could not have been uncovered with due diligence. Not only does the Grosses' petition clearly fail these tests, but it does not make the alternative showing that there is any public interest justification for our consideration of their late-filed engineer-

ing submission. Therefore, we cannot consider that information. Consequently, we will grant Quick's motion to strike the Grosses' engineering statement.

12. Upon dealing with the merits of the Grosses' petition, we agree with Quick that because the Commission provided the Grosses, in response to their FOIA request, a copy of the Commission's independent engineering study of principal city coverage of the entirety of Vacaville, this severely undercuts their main argument that such analysis may never have been conducted. As indicated in the *R&O*, using two different transmitter sites with antenna heights of 230 meters and 30 meters, respectively, we predicted that the entirety of Vacaville would receive at least a 70 dBu signal using the Commission's F(50,50) propagation curves.[8] Terrain profile graphs (using 30-second topographic data) revealed no shadowing in Vacaville from either of the two sites. The presence or absence of shadowing, however, was not critical to our conclusion that an allotment to Vacaville would comply with our rules. While good engineering practice calls for the avoidance of shadowing by locating the transmit antenna so that it has a line-of-sight path over the principal city with no major obstructions in that path, these provisions are not mandatory. Unlike these and other guidelines, such as locating the transmitter at the highest elevation possible, however, it is mandatory that a minimum field strength of 70 dBu be provided over the city to be served. *See* Section 73.315(a) and (b). Because our analysis demonstrated that all of Vacaville would likely receive a 70 dBu signal, Quick's proposal meets the Commission's primary coverage requirement for FM allotments.

13. Even if we were to consider the Grosses' stricken engineering statement as possible support for their assertion that a denial of their petition for reconsideration would result in granting a sub-standard allotment, the statement fails as support for their contention that the requisite coverage of Vacaville would not be possible. The statement does appear, nonetheless, to comply with our basic procedural requirements for supplemental propagation showings.[9] Although apparently compliant in these respects, the Grosses use faulty methodology to determine the received signal level. They have committed what is a fundamental, methodological error in deriving the predicted signal field strength in Vacaville. As the Grosses appear to recognize, they are obligated in the first instance to use the Commission's propagation methodology, which predicts the received signal by use of the F(50,50) curves that take into account attenuation due to average terrain. However, to account for the attenuation along that path due to the isolated rounded obstacle, the Grosses deduct from that received field strength the added attenuation calculated using Tech Note 101 for an isolated rounded obstacle *relative to free space*. This is incorrect. Because the F(50,50) curves do not predict field strengths at free space, but as attenuated over average terrain, the losses due to the obstruction, relative to free-space, cannot properly be deducted from the field strength predicted in accordance with Commission methodology.[10] For two of the three ranges from the transmitter, on the basis of the Grosses' flawed formulation using the F(50,50) curves and the attenuation using Tech Note 101, they conclude that less than a 70 dBu signal would be received. The Grosses' submission with its methodological deficiencies leads to the faulty conclusion that the required minimum signal would not be delivered to the entirety of Vacaville. Therefore, even had we considered their stricken engineering statement for its intended purpose, it does not support the Grosses' contention that Vacaville would not likely receive a 70 dBu signal.

14. Accordingly, pursuant to authority contained in Sections 4(i), 5(c)(1), 303(g) and (r), and 307(b) of the Communications Act of 1934, as amended, and §§0.61, 204(b), and 0.284 of the Commission's Rules, IT IS ORDERED That the Petition for Reconsideration filed by Joe L. Gross and L. Ann Gross IS DENIED.

15. IT IS FURTHER ORDERED That Motion to Strike filed by Quick Broadcasting, Inc. IS GRANTED.

16. For further information concerning this proceeding, contact J. Bertron Withers, Jr., Mass Media Bureau, (202)632-7792.

FEDERAL COMMUNICATIONS COMMISSION

Douglas W. Webbink
Chief, Policy and Rules Division
Mass Media Bureau

FOOTNOTES

[1] We have separately addressed the allotment request for Middletown in a *Further Notice of Proposed Rule Making*, 4 FCC Rcd 8417 (1989) ("*Further Notice*"). A decision on that request is currently pending.

[2] The Grosses also submitted a Freedom of Information Act ("FOIA") request in order to obtain staff material that served as a basis for our findings. Subsequent to the filing of the Grosses' petition here, we forwarded to counsel for the Grosses the requested material.

[3] As we stated in the *Report and Order* in this proceeding, these issues need not be addressed in view of our determination herein.

[4] Among them are *Memorandum Opinion and Order* in MM Docket No. 84-442 (Aug. 13, 1986) and *Freedom and Morgan Hill, CA*, 2 FCC Rcd 2182 (1987) (allotments granted due to 70 dBu coverage despite shadowing); *Attica, NY* 54 FCC 2d 1137 (1975) (where allotment was denied due to close proximity of desired site to obstruction, and not because no shadow-free service from fully-spaced site could be had); and *Bloomsburg, PA*, 34 FCC 2d 940 (1972), *Greenwood, Seneca, Aiken, and Clemson, SC*, 3 FCC Rcd 4108 (1987), and *New Castle, PA*, 32 FCC 2d 131 (1971), *recon. denied*, 34 FCC 2d 553 (1972) (allotments denied due to available sites being too distant to provide full 70 dBu coverage, not because of lack of shadow-free service).

[5] P.L. Rice, A.G. Longley, K.A. Norton, and A.P. Barsis, "Transmission Loss Predictions for Tropospheric Communications Circuits," *NBS Technical Note 101*, first published in 1965 by the National Bureau of Standards.

[6] Quick claims that its engineering study attached to its "Reply to Untimely Filed Comments" of August 8, 1989, shows that Vacaville's boundaries begin at 13.7 km from Site #3 along the 139.7^0 radial. Thus, Quick argues, the Grosses' claim that below-70 dBu shadowing would occur at 12.0 km and 13.6 km from Site #3 are "irrelevant." Quick also argues that its engineering statement attached to its "Reply to Response" of February 27, 1989, shows that Vacaville's borders begin 11.6 km from Site #1 along the 189.00 radial (the Grosses' analyzed the

188.5^0 radial). Therefore, the Grosses' claim that below-70-dBu shadowing would occur 10.4 km from Site #1 is also irrelevant, insists Quick.

[7] Quick's analysis employs the Grosses' hand-generated elevation points taken from 7½-minute maps and the Commission's F(50,50) propagation curves. Quick predicted the received signal field strengths at various distances to Vacaville, as transmitted from Site #1 along the 188.5^0 radial and from Site #3 along the 139.7^0 radial. The diffraction losses due to the moutainous terrain were computed using formulas of Tech Note 101, and were deducted from the received field strengths. Quick also included a formulation based on the work of K. Bullington, "Radio Propagation at Frequencies above 39 Megacycles," *Proc. IRE*, vol. 35, pp. 1122-1136, October 1947, wherein the diffraction losses are referenced to smooth or plane earth. For this methodology, Quick used a Bullington nomograph, which graphically depicts how the median signal is attenuated due to shadowing, depending on the frequency and the average terrain roughness over the obstructions. The F(50,50) field strength is reduced by the attenuation due to the obstructions using the nomograph and is enhanced by the addition of 2.0 dB to offset the attenuation over the assumed average terrain when using the F(50,50) curves. Therefore, the resultant received field strength is that referenced to smooth earth. Additionally, Quick derived received signal strengths and drew the appropriate profile graphs using elevation points derived from a computer-generated 3-second terrain data base. Using these 3-second data, Fresnel zone losses were computed where appropriate, in addition to the losses due to the obstructions. Quick argues that each of the terrain profile graphs from each site to each of various receive locations outside of or in Vacaville clearly demonstrate that at least a 70 dBu signal would be received. This is so, Quick argues, whether employing data from 7½-minute maps or a 3-second data base (or a computer-generated 30-second data base, as Quick had shown in a prior submission), that the entirety of Vacaville would receive a signal with a predicted field strength of at least 70 dBu. Finally, Quick showed where, in several instances, the Grosses had used incorrect data that resulted in an overestimate of free-space attenuation factors.

[8] In instances where line-of-sight from the transmitter site may be difficult to achieve because of terrain obstructions, as here, we investigate whether the use of a taller antenna tower would permit achievement of both a transmission path to the community free of obstruction and the requisite signal for principal city coverage. Since we concluded that such coverage would be achieved from two qualifying sites, there was no need to require that propagation tests be conducted, as the Grosses urge, to confirm the likely provision of sufficient coverage or that supplemental prediction methods be employed.

[9] *See Reno, Nevada*, 3 FCC Rcd 5631 (1988). The procedures used for the preparation of the study as well as the assumptions and the methodology employed are set out along with the numerous equations used in evaluating the signal attenuation predicted using Tech Note 101. The Grosses also provide sample calculations showing how the methodology was applied to derive the predicted attenuation and, finally, the received signal strength within what are represented to be the boundaries of Vacaville. The attenuation is computed on the assumption that from each site along the single radial investigated the major obstruction can be represented as a rounded obstruction. There is no showing, however, that a rounded model is truly representative of that terrain, although it may be reasonable to assume that the mountains are generally more rounded than knife-edge and to use Tech Note 101 to compute the attenuation due to an "isolated rounded obstacle."

[10] The Grosses do, however, correctly compute the received field strength assuming free-space attenuation along one radial from Site #3, for three ranges from the transmitter. For the additional attenuation due to the rounded obstacle using Tech Note 101, only at 12.0 kilometers from the transmitter do they estimate that the received signal would be less than 70 dBu (69.1 dBu). As we indicate above, however, that resultant signal should reflect not only free-space losses but the attenuation due to the terrain over which the signal traverses. Quick's analysis does this by referencing the F(50,50) curves to smooth earth (by adding 2.0 dB), so that one could factor in correctly the attenuation over the rounded obstacle and could estimate the received signal by use of a Bullington nomogram, which is referenced to smooth earth.

**Before the
Federal Communications Commission
Washington, D.C. 20554**

MM Docket No. 89-385

In the Matter of

Amendment of Section 73.202(b), RM-6892
Table of Allotments,
FM Broadcast Stations.
(Glen Arbor and Scottsville,
Michigan)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: December 26, 1990; Released: January 11, 1991

By the Acting Chief, Allocations Branch:

1. The Commission has before it for consideration the *Notice of Proposed Rule Making*, 4 FCC Rcd 6700 (1989), proposing the substitution of FM Channel 240C2 for Channel 240A at Glen Arbor, Michigan, and the substitution of Channel 235C3 for Channel 240A at Scottsville, Michigan, in response to a petition filed jointly by David C. Schaberg ("Schaberg") and West Shore Broadcasting ("West Shore"). Schaberg also requested modification of his construction permit for Station WTHM, Channel 240A, to specify operation on Channel 240C2, and West Shore requested modification of its license for Station WKZC, Channel 240A, to specify operation on Channel 235C3. Schaberg and West Shore filed comments supporting their respective proposals. ODON Communications Group I, Limited Partnership ("ODON"), filed comments. Schaberg and Sheboygan County Broadcasting Co., Inc. ("Sheboygan Broadcasting"), filed reply comments.

2. ODON proposes a new site for Channel 240C2 at Glen Arbor to avoid a short spacing to the proposed upgrade of Channel 240A to Channel 240C3 at De Pere, Wisconsin, in MM Docket 89-282. *See Notice of Proposed Rule Making and Order to Show Cause*, 4 FCC Rcd 4970 (1989). ODON believes that the site restriction on Channel 240C2 at Glen Arbor, coupled with a "comprehensive resolution" proposed in MM Docket 89-282, will promote accommodation of all proposals in both dockets.

3. Schaberg opposes the additional site restriction on Channel 240C2 at Glen Arbor. Schaberg argues that from ODON's proposed site, he could not provide shadow-free service to Glen Arbor. He believes that he could not obtain FAA or FCC approval for a tower of the height needed to serve the entire community at the new site. To remove the conflict with the proposed DePere allotment, Schaberg proposes the substitution of Channel 238C2, rather than Channel 240C2, for Channel 240A at Glen Arbor. According to Schaberg, Channel 238C2 can be used at the current construction permit site for Channel 240A provided Canadian concurrence is requested as a short spaced allotment.

4. Sheboygan Broadcasting, licensee of Station WWJR(FM), Sheboygan, Wisconsin, and a party to MM Docket 89-282, filed comments stating that the instant proceeding is not related to MM Docket 89-282 and can be resolved without reference to ODON's "comprehensive resolution" in MM Docket 89-282. Sheboygan Broadcasting supports Schaberg's proposal to allot Channel 238C2 to Glen Arbor in lieu of Channel 240C2.

5. We have reviewed all the pleadings before us in this proceeding and find that the public interest would be served by providing expanded FM services in Glen Arbor and Scottsville. A staff engineering analysis confirms that there would be a line of sight problem to Glen Arbor from ODON's suggested site for Channel 240C2. However, Channel 238C2 can be substituted for Channel 240A at Glen Arbor at Schaberg's proposed site,[1] thereby removing any conflict with the DePere proposal in MM Docket 89-282. Channel 235C3 can be substituted for Channel 240A at Scottsville, Michigan, in compliance with the Commission's spacing requirements, at West Shore's proposed site.[2] Since Glen Arbor and Scottsville are located within 320 kilometers (200 miles) of the U.S. - Canadian border, Canadian concurrence has been obtained for these allotments. Concurrence for the allotment of Channel 238C2 at Glen Arbor has been obtained as a specially negotiated short spaced allotment. [3]

6. In accordance with Section 1.420(g) of the Commission's Rules, we will modify the license for Station WKZC, Channel 240A, Scottsville, Michigan, to specify operation on Channel 235C3, since no other expressions of interest in the allotment have been filed. We will also modify the construction permit for Station WTHM, Channel 240A, Glen Arbor, Michigan, to specify operation on Channel 238C2.

7. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **February 25, 1991,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the communities listed below, to read as follows:

Community	Channel No.
Glen Arbor, Michigan	238C2, 251A
Scottsville, Michigan	235C3

8. IT IS FURTHER ORDERED, pursuant to the authority contained in Section 316 of the Communications Act of 1934, as amended, that the construction permit for Station WTHM, Channel 240A, Glen Arbor, Michigan, IS MODIFIED to specify operation on Channel 238C2, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the permittee shall file with the Commission a minor change application for construction permit (Form 301), specifying the new facility.

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620.

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

9. IT IS FURTHER ORDERED, pursuant to the authority contained in Section 316 of the Communications Act of 1934, as amended, that the license of Station WKZC, Channel 240A, Scottsville, Michigan, IS MODIFIED to specify operation on Channel 235C3 in lieu of Channel 240A, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall file with the Commission a minor change application for construction permit (Form 301), specifying the new facility.

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620.

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

10. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

11. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Andrew J. Rhodes
Acting Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

FOOTNOTES

[1] The coordinates for Channel 238C2 at Glen Arbor are 44-53-25 and 85-59-59.

[2] The coordinates for Channel 235C3 at Scottsville are 44-04-40 and 86-25-00.

[3] Since the substitutions at Glen Arbor and Scottsville are made as a result of a petition for rule making filed prior to October 2, 1989, Schaberg and West Shore may avail themselves of the provisions of Section 73.213(c)(1) of the Commission's Rules. *See* 47 CFR § 73.213(c).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-233

In the Matter of

Amendment of Section 73.202(b),	RM-7089
Table of Allotments,	RM-7546
FM Broadcast Stations.	
(Garberville and Yuba City, California)[1]	

REPORT AND ORDER
(Proceeding Terminated)

Adopted: December 24, 1990; Released: January 11, 1991

By the Acting Chief, Allocations Branch:

1. Before the Commission is the *Notice of Proposed Rule Making*, 5 FCC Rcd 2815 (1990), issued in response to a petition filed by Eric R. Hilding (petitioner) proposing the allotment of Channel 280C1 to Garberville, California, as that community's second local FM service. Petitioner filed comments in support of the *Notice*. Ridge L. Harlan ("Harlan"), licensee of Station KXCL(FM), Channel 280A, Yuba City, California, filed a counterproposal requesting the substitution of Channel 280B1 for Channel 280A at Yuba City and modification of his license accordingly.[2] Additionally, Harlan proposes the allotment of Channel 280C3 or Channel 279C1 at Garberville in lieu of Channel 280C1. No other comments were received.

2. The requests to use Channel 280C1 at Garberville and 280B1 at Yuba City are mutually exclusive since the communities are separated by less than the required minimum distance of 233 kilometers (144 miles) between co-channel Class B1 and C1 allotments. We have confirmed that while Channel 280C1 at Garberville would preclude Station KXCL(FM) from upgrading its facilities on Channel 280B1 at Yuba City, Channel 279C1 can be allotted to Garberville to satisfy petitioner's desire to provide a second local FM service to that community. [3] Channel 279C1 can be allotted to Garberville in conformity with the minimum distance separation requirements of the Commission's Rules,[4] without the imposition of a site restriction. Additionally, Channel 280B1 can be allotted to Yuba City at the petitioner's suggested site, located 19.2 kilometers (11.9 miles) west of the community,[5] consistent with the minimum distance spacing requirements specified in Section 73.207(b) of the Commission's Rules.

3. We believe the public interest would be served by the allotment of Channel 279C1 to Garberville, California, and the substitution of Channel 280B1 for Channel 280A at Yuba City, California, thereby providing a second local FM service at Garberville and an expanded coverage FM service at Yuba City. In accordance with the provisions of Section 1.420(g) of the Commission's Rules, we will modify herein the license of Station KXCL(FM) to specify operation on Channel 280C1 in lieu of Channel 280A, as requested.

4. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **February 25, 1991,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED with respect to the communities listed below, as follows:

City	Channel No.
Garberville, California	279C1,284C2
Yuba City, California	280B1

5. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the license of Ridge L. Harlan for Station KXCL(FM) IS MODIFIED effective **February 25, 1991,** to specify operation on Channel 280B1 in lieu of Channel 280A, subject to the following conditions:

> (a) Within 90 days of the effective date of this *Order*, the licensee shall submit to the Commission a minor change application for a construction permit (Form 301), specifying the new facility;
>
> (b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620; and
>
> (c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

6. The window period for filing applications for Channel 279C1 at Garberville, California, will open on **February 26, 1991,** and close on **March 28, 1991.**

7. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

8. For further information concerning the above, contact Nancy Joyner, Mass Media Bureau, (202) 634-6530. Questions related to the window application filing process should be addressed to the Audio Services Division, FM Branch, Mass Media Bureau, (202) 632-0394.

FEDERAL COMMUNICATIONS COMMISSION

Andrew J. Rhodes
Acting Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

FOOTNOTES

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[1] The community of Yuba City, California, has been added to the caption.

[2] Public Notice of the counterproposal was given November 16, 1990, Report No. 1829.

[3] We did not consider Harlan's alternate proposal to allot Channel 280C3 at Garberville since no interest in its use was expressed.

[4] Coordinates used for Channel 279C1 at Garberville are 40-05-54 and 123-47-36. Since this allotment is made as a result of a petition for rule making filed prior to November 2, 1989, applicants may avail themselves of the provisions of Section 73.213(c)(1) of the Commission's Rules. *See* 47 CFR § 73.213(c).

[5] Coordinates used for Channel 280B1 at Yuba City, California, are 39-12-21 and 121-49-11. The spacing requirements for the Yuba City proposal are based on those specified in MM Docket No. 88-375, 4 FCC Rcd 6375 (1989), which, *inter alia*, increased the maximum power for Class A facilities to 6 kW and adjusted the minimum distance separations accordingly.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-604

In the Matter of

Amendment of Section 73.202(b), Table of Allotments, FM Broadcast Stations. (Gordonsville and Orange, Virginia)	RM-7049

REPORT AND ORDER
(Proceeding Terminated)

Adopted: December 26, 1990; Released: January 11, 1991

By the Acting Chief, Allocations Branch:

1. At the request of Radio Virginia Limited Partnership, licensee of Station WJMA-FM (formerly WVJZ-FM) ("petitioner"), the Commission has before it the *Notice of Proposed Rule Making*, 5 FCC Rcd 47 (1990), proposing the reallotment of Channel 255A from Orange to Gordonsville, Virginia, as the community's first local service. Petitioner also requested modification of its license to specify the change of community. Petitioner subsequently filed a request for withdrawal of its petition for rule making.[1]

2. In accordance with Commission policy, we will grant petitioner's request for withdrawal of its rule making proposal.

3. Accordingly, IT IS ORDERED, that the petition for rule making of Radio Virginia Limited Partnership, seeking reallotment of Channel 255A from Orange to Gordonsville, Virginia, and modification of petitioner's license for Station WJMA-FM to specify the change of community, IS DISMISSED.

4. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

5. For further information concerning this proceeding, contact Pamela Blumenthal, Mass Media Bureau, (202) 632-6302.

FEDERAL COMMUNICATIONS COMMISSION

Andrew J. Rhodes
Acting Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

FOOTNOTE

[1] In accordance with Section 1.420(j) of the Commission's Rules, petitioner states that it received no money or other consideration in exchange for withdrawing its expression of interest.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-410

In the Matter of

Amendment of Section 73.202(b), Table of Allotments, FM Broadcast Stations. (Pickford, Michigan)	RM-7354

REPORT AND ORDER
(Proceeding Terminated)

Adopted: December 24, 1990; Released: January 11, 1991

By the Acting Chief, Allocations Branch:

1. At the request of Leon B. Van Dam ("petitioner"), the Commission has before it for consideration the *Notice of Proposed Rule Making*, 5 FCC Rcd 5514 (1990), requesting the allotment of Channel 288A to Pickford, Michigan, as that community's first local FM service. Petitioner filed comments supporting the allotment. No other comments were received.

2. The *Notice* requested that petitioner furnish information to demonstrate that Pickford has the social, economic and cultural indicia to qualify it as a community for allotment purposes. The *Notice* indicated that Pickford is listed in the *Rand McNally Commercial Atlas* as having a population of 500 persons, as well as a post office, zip code and a bank. Petitioner states that Pickford is in one of the fastest growing areas in the State of Michigan and that the 1990 Census preliminary figures show an 18.2% growth in Chippewa County, where Pickford is located. Further, petitioner states that Pickford has its own public school system (kindergarten through 12th grade), churches, civic organizations, and a shopping area, and offers public services and government functions. Petitioner notes that Pickford is served by the Chippewa County International Airport, which is the only major airport in the eastern half of the Upper Peninsula. Petitioner provides a letter from the Eastern Upper Peninsula Regional Planning and Development Commission indicating that this area of Michigan has been neglected in terms of radio news coverage, promotion of local activities and events and that a radio station dedicated to serve Pickford and the surrounding area would be a tremendous asset.

3. We believe that petitioner has provided us with sufficient indicia to conclude that Pickford is a community for allotment purposes. It is an identifiable population grouping with businesses and community organizations which identify themselves with the residents of Pickford. *See Laughlin, Nevada*, 2 FCC Rcd 6267 (1987).

4. Channel 288A can be allotted to Pickford in compliance with the Commission's minimum distance separation requirements without a site restriction.[1] Since Pickford is located within 320 kilometers (200 miles) of the U.S. - Canadian border, Canadian concurrence has been obtained for this allotment.

5. We believe the public interest would be served by the allotment of Channel 288A to Pickford, Michigan, since it could provide the community with its first local FM service. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **February 25, 1991,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, to read as follows:

Community	Channel No.
Pickford, Michigan	288A

6. The window period for filing applications will open on **February 26, 1991,** and close on **March 28, 1991.**

7. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

8. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Andrew J. Rhodes
Acting Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

FOOTNOTE

[1] The coordinates for Channel 288A are 46-09-30 and 84-21-30.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-649

In the Matter of

Amendment of Section 73.606(b), RM-7563
Table of Allotments,
Television Broadcast Stations.
(Roseburg, Oregon)

NOTICE OF PROPOSED RULE MAKING

Adopted: December 24, 1990; Released: January 11, 1991

By the Acting Chief, Allocations Branch:

1. The Commission has before it the petition for rule making filed by KMTR, Inc. ("petitioner"), requesting the allotment of Channel 46 to Roseburg, Oregon, as the community's third local commercial television allotment.

2. Roseburg (population 16,644), seat of Douglas County (population 93,748), is located in west central Oregon, approximately 264 kilometers (164 miles) south of Portland, Oregon.[1] Channels 4 and 36 are allotted to Roseburg. Station KPIC-TV is licensed on Channel 4, and there are two applications pending for Channel 36, filed by petitioner (BPH-900413KH) and Metrocom of Oregon (BPH-881021KG). Petitioner states that it will apply for Channel 46 as a satellite of Station KMTR, Eugene, Oregon, should it be unsuccessful in the comparative hearing for Channel 36. Alternatively, petitioner states that if Channel 46 is allotted on an expedited basis, it may be possible for either it or Metrocom of Oregon to amend their pending Channel 36 application to specify the new channel. Petitioner submits that the Commission has accepted such conditional expressions of interest in the past, citing *Las Vegas and Paradise, Nevada*, 57 R.R. 2d 1433 (1985). Petitioner also states that the allotment of Channel 36 to Roseburg is consistent with *Revision of FM Assignment Policies and Procedures*, 90 F.C.C. 2d 88 (1982), allowing the allotment of an additional channel to avoid a comparative hearing.

3. We believe the public interest would be served by proposing the allotment of Channel 46 to Roseburg, Oregon, since it could provide the community with its third local commercial television service. We find that petitioner's conditional statement of intent to apply for the channel to be acceptable for purposes of seeking comments on the proposal. However, we note that we would permit either applicant for Channel 46 to amend its application to specify the new channel, thereby granting that applicant cut-off protection, only if there were no other expressions of interest in the allotment or if there was an additional television channel available to accommodate the expressions of interest.[2] *See Notice of Proposed Rule Making (Copeland, Kansas),* 4 FCC Rcd 8490 (1989). Channel 46 can be allotted to Roseburg in compliance with the Commission's minimum distance separation requirements with a site restriction of 16.5 kilometers (10.3 miles) south to avoid the Portland "freeze" area. [3] *See Order*, 52 FR 28346, July 29, 1987.

4. Accordingly, we seek comments on the proposed amendment of the TV Table of Allotments, Section 73.606(b) of the Commission's Rules, for the community listed below, to read as follows:

	Channel No.	
City	Present	Proposed
Roseburg, Oregon	4+, 36	4+, 36, 46+

5. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

6. Interested parties may file comments on or before **March 4, 1991,** and reply comments on or before **March 19, 1991,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

John Crigler, Esq.
James E. Dunstan, Esq.
Haley, Bader & Potts
2000 M Street, N.W.
Suite 600
Washington, D.C. 20036
(Counsel to petitioner)

7. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the TV Table of Allotments, Section 73.606(b) of the Commission's Rules. *See Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202 (b), 73.504 and 73.606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

8. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been

served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Andrew J. Rhodes
Acting Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the TV Table of Allotments, Section 73.606(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTES

[1] Population figures are taken from the 1980 U.S. Census.

[2] A Commission engineering analysis has determined that Television Channels 25, 52, 57, 58, 59, 62, and 63 may be available for allotment to Roseburg in the event that additional expressions of interest are filed for Channel 46.

[3] The coordinates for Channel 46 at Roseburg are North Latitude 43-04-15 and West Longitude 123-23-18.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-650

In the Matter of

Amendment of Section 73.202(b),
Table of Allotments,
FM Broadcast Stations.
(Augusta, Kansas)

RM-7545

NOTICE OF PROPOSED RULE MAKING

Adopted: December 24, 1990; Released: January 11, 1991

By the Acting Chief, Allocations Branch:

1. Before the Commission for consideration is a petition for rule making filed by Gregory Ray Steckline ("petitioner") requesting the substitution of FM Channel 283C2 for Channel 283A at Augusta, Kansas. Petitioner also requests modification of his construction permit (BPH-880727MO) for Channel 283A to specify Channel 283C2.[1] Petitioner submitted information in support of the proposal and expressed his intention to apply for the channel.

2. We believe petitioner's proposal warrants consideration because adoption of the proposal could provide Augusta with a wide coverage area FM station. Channel 283C2 can be allotted to Augusta, Kansas, in compliance with the minimum distance separation requirements of the Commission's Rules at a site 11.4 kilometers (7 miles) northeast of the community.[2] The site restriction will prevent a conflict with Station KMYZ-FM, Channel 283C1, Pryor, Oklahoma, and to a counterproposal to add Channel 230C2 at Andover, Kansas, in MM Docket No. 89-429. We shall also propose to modify petitioner's construction permit for Channel 283A to specify Channel 283C2. In accordance with Section 1.420(g) of the Commission's Rules, we shall not accept competing expressions of interest in the use of the higher powered channel at Augusta or require the petitioner to demonstrate the availability of an additional equivalent class channel for use by such interested parties.

3. In view of the above, the Commission believe it appropriate to propose amending the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, as follows:

	Channel No.	
City	Present	Proposed
Augusta, Kansas	283A	283C2

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **March 4, 1991,** and reply comments on or before **March 19, 1991,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

James P. Riley
Lonna A. Thompson
Fletcher, Heald & Hildreth
1225 Connecticut Avenue, N.W.
Suite 400
Washington, D.C. 20036-2679
(Counsel for the petitioner)

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202 (b), 73.504 and 73.606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Andrew J. Rhodes
Acting Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required*. Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures*. The following procedures will govern the consideration of filings in this proceeding.

> (a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)
>
> (b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.
>
> (c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service*. Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies*. In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings*. All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTES

[1] Petitioner was granted a construction permit in MM Docket No. 90-292, FCC 90M-3230, released October 15, 1990.

[2] The coordinates for Channel 283C2 at Augusta are 37-46-21 and 96-54-15. Petitioner's proposed site 13 kilometers (8.1 miles) north of Augusta (37-48-11 and 96-57-24) is short spaced to a counterproposal to add Channel 230C2 at Andover, Kansas, in MM Docket No. 89-429. To avoid the conflict and proceed with petitioner's request, we have used a reference site 11.4 kilometers (7 miles) northeast of Augusta.

Before the
Federal Communications Commission
Washington, D.C. 20554

GEN Docket No. 90-264

In the Matter of

Proposals to Reform the
Commission's Comparative
Hearing Process to Expedite
the Resolution of Cases

REPORT AND ORDER

Adopted: December 13, 1990; Released: December 21, 1990

By the Commission: Commissioner Quello issuing a statement.

1. By this *Report and Order*, the Commission intends to substantially reduce the time consumed in the conduct of comparative hearings and agency review in cases involving applicants for new broadcast facilities. The *Notice of Proposed Rule Making* in this proceeding solicited comment on ways to expedite the Commission's comparative hearing processes for new applicants. 5 FCC Rcd 4050 (1990). Comments were filed by the Administrative Conference of the United States (ACUS); professional organizations, including the Federal Communications Bar Association (FCBA) and the American Women in Radio and Television (AWRT); public interest groups such as the National Association for the Advancement of Colored People, *et al* (NAACP) and Black Citizens for a Fair Media, *et al* (BCFM); law firms filing on their own behalf or on behalf of their clients; and applicants, licensees and individuals filing on their own behalf.[1]

I. SUMMARY OF CONCLUSIONS

2. The *Notice* observed that during the process of selecting among otherwise qualified applicants for new broadcast facilities the public is deprived of a valued service, and the ultimate licensee is deprived of the opportunity to provide that service. We therefore proposed a number of procedural and organizational strategies intended to reduce the amount of time consumed by this process. We also fully recognize that the comparative hearing process serves the important goal of selecting the best qualified applicant.[2] After balancing these considerations, we are convinced that unnecessary delay in the comparative hearing process can be substantially reduced while still preserving the fundamental fairness and public interest benefits of our proceedings. Accordingly, the actions taken herein are designed to expedite comparative hearing cases by:

> (I) Encouraging more and/or earlier settlements through earlier payment of the hearing fee, modifying the *Ruarch* policy, and providing for settlement conferences before settlement judges;
>
> (II) Expediting discovery through the use of standardized document production orders and integration statements, and imposing time limits on discovery;
>
> (III) Expediting hearings by encouraging written proceedings and establishing time guidelines for the various phases of the hearing and the preparation of the ID; and
>
> (IV) Expediting appeals through limitations on oral argument before the Review Board and imposing time guidelines on the completion of the review process.

II. ENCOURAGING SETTLEMENTS

3. Settlements can be a significant factor in expediting the new service, and most commenters support the objective of encouraging settlements. BCFM and K&N, however, suggest that encouraging settlements may be inconsistent with the primary purpose of the comparative hearing process, selection of the best qualified applicant.[3] We recognize that, in a particular case, a settlement may result in a grant to an applicant that might not be considered "best qualified" under our comparative criteria. However, the settlement process takes place within the context of the comparative criteria, in that an applicant's evaluation of its own comparative standing, as well as that of its competitors, has an impact on its decision to offer or accept a settlement or to persevere to the end of the process. Thus, any reduction in the comparative merits of an applicant that is granted after settlement, as opposed to one that is granted in a case that is not settled, is likely to be marginal, if it occurs at all. Further, settlements expedite the provision of new broadcast service to the public and permit government resources to be turned to the more expeditious resolution of those cases that remain. In these circumstances, we think the benefit of conducting the hearing is outweighed by the public interest benefits of settlement.

A. The Hearing Fee

4. Experience indicates that the opportunity to avoid payment of the hearing fee provides an incentive to conclude settlements before that fee must be paid. Moreover, particularly in proceedings that involve numerous applicants, the fee requirement weeds out non-serious applicants, and parties may prefer to wait until the payment of the hearing fee "separates the wheat from the chaff" before engaging in settlement talks. To enhance these salutary effects of the hearing fee on settlements, the *Notice* proposed to require payment of the fee earlier than is currently required.

5. Most commenters addressing the issue agree that the earlier payment of the hearing fee would have a beneficial affect on the comparative hearing process. Vince Lee Broadcasting, Ltd., J. M. Broadcasting, Ltd., and Henderson Broadcasting of Memphis, Inc. observe that it is only in the rarest cases that settlement discussions can get anywhere before the serious applicants can be separated from the speculators through payment of the hearing fee. Radio New Jersey (RNJ) would require that the fee be paid with the filing of the application, but the FCBA and Michael J. Hirrell suggest later dates, approximately 60 days after the filing of the last filed mutually exclusive application. The FCBA would provide for refunds of the

hearing fee if the case is settled prior to the Notice of Appearance deadline or to applicants that withdraw from the case before that filing. RNJ believes that the fee should be refunded only where the applicant is unopposed or is dismissed, because refund of the fee on settlement, or even inclusion of the fee amount in the calculation of expenses reimbursable at settlement, dilutes the beneficial effect of the fee requirement. RNJ and Caldwell Communications Corp. (Caldwell) urge the Commission to seek an increase in the hearing fee.[4] On the other hand, AWRT believes that any increase in the hearing fee would impose additional barriers to participation in the comparative process.[5] Walker, Bordelin, Hamlin, Theriot and Hardy (the Hardy Group) and AWRT believe that the HDO performs an important role in settlements by identifying the applicants and issues, thereby facilitating evaluation of the comparative standings of the participants. AWRT also opposes payment of the fee before the HDO, believing that such a requirement would delay the issuance of the HDO.

6. We believe that the suggestion that the hearing fee be collected shortly after the filing of the last filed mutually exclusive application has merit. In each broadcast service, a public notice announces the acceptance of mutually exclusive applications and establishes a deadline for filing petitions to deny those applications.[6] We will use that same public notice to establish a date for paying the hearing fee. The use of that date, as opposed to a date established in a pre-designation letter, will not delay the processing of applications or the issuance of HDOs. Also, applicants will have adequate time to study the competing applications, engage in settlement talks, and make a decision as to whether they wish to proceed with their applications.[7] Moreover, with the identification of mutually exclusive applications in the public notice of acceptance for filing, it is clear that the identified applications have been grouped together, and, after processing by the staff, those applications will be designated for hearing. Thus, our decision to collect the hearing fee prior to the HDO is within the discretion granted the Commission to adopt appropriate rules to collect the fees mandated by Congress. *See* 47 U.S.C. § 158(f).[8] Accordingly, we will amend our rules to provide that the hearing fee in broadcast comparative cases will be due approximately 30 days after the petition to deny deadline, on a date established in the public notice announcing the acceptance for filing of mutually exclusive applications.

7. *Hearing Fee Refunds*. Although the fee legislation permits collection of the hearing fee prior to designation of a case for hearing, we do not believe that Congress intended that the Commission should retain hearing fees paid by applicants that are not designated for hearing. Thus, refunds of the hearing fee paid prior to designation will be available to applicants that are dismissed, voluntarily or involuntarily, before an HDO is issued or granted without being designated for a comparative hearing. After an applicant has been designated for hearing, the hearing fee may also be refunded under the circumstances provided for in section 1.1111(c) of our rules. 47 C.F.R. § 1.1111(c).[9]

8. *Transition Period*. We will make the transition from our current rule (payment of the hearing fee with Notices of Appearance) to the new rule (payment prior to the HDO) in the following manner. For all commercial broadcast applications that have not been placed on a "B" cut-off list released prior to February 13, 1991 (the effective date of the rule change), the date for making payment of the hearing fee will be established in the public notice setting the "B" cut-off deadline. All commercial broadcast applications that have been placed on a "B" cut-off list released prior to February 13, 1991, will be required to pay their hearing fee by March 15, 1991, unless such applications are designated for hearing before that date. All applicants designated for hearing before March 15, 1991, should pay their hearing fee with their Notices of Appearance.[10]

B. Pre-Designation Settlements

9. The *Notice* in this proceeding proposed to specify "settlement advocates" to encourage applicants to settle the case before the HDO. It also sought comments on whether the pre-designation settlement process would be enhanced by requiring all pending applicants that have not supplied the additional information on financing and integration proposals now required by FCC Form 301 to provide that information in an amendment to their applications.[11] To further encourage settlements through mergers, we sought comment on whether we should permit the merged applicant to enjoy the comparative advantages achieved by virtue of the merger.[12]

10. The FCBA supports the settlement advocate process, but it opines that it should be purely voluntary. RNJ and Glen Gerberg suggest that conferences with settlement advocate must include principals. and they should be off the record. On the other hand, AWRT opposes the settlement advocate proposal, arguing that settlements are more likely without FCC presence. The FCBA and AWRT would provide all pending applicants that filed on the old Form 301 60 days to file the financial and integration information now required on the application. RNJ would require all applicants to submit their written direct case with their applications. The FCBA is concerned that the settlement advocate process not be used as a "bludgeon" that penalizes applicants that want to pursue their applications through hearing. Thus, the FCBA opposes comparative upgrading through mergers.

11. Although the settlement advocate process may result in some increase in the number of cases that are settled before designation, it may also delay the processing of applications that partake of the process. On balance, we do not believe that the anticipated increase in pre-designation settlements would be worth the staff resources that would have to be devoted to the process and the resulting delay in processing. Accordingly. we will not implement the pre-designation settlement advocate process. We are also persuaded that permitting merged applicants to upgrade their comparative standing by virtue of the merger would only lead to comparative gamesmanship. Finally, with regard to the financial and integration information now called for on the Form 301. we recently denied a petition for reconsideration that argued that the new requirements should be applied to applications filed before June 26, 1989. *Revision of Application for Construction Permit for Commercial Broadcast Station*. 4 FCC Rcd 3853, *recon. denied*, 5 FCC Rcd (1990). As that decision fully considered the salutary effect of the requested change on the pre-designation settlement process. we shall not revisit the matter in this proceeding.

C. Settlement Conferences

12. To encourage more settlements after designation but before trial, the *Notice* proposed that applicants should participate in an off-the-record settlement conference before a "settlement judge." *See* Joseph and Gilbert, *Breaking the Settlement Ice: The Use of Settlement Judges in Administrative Proceedings*, 24-26 (1988). To facilitate this process in cases involving mergers, we proposed to permit the settlement judge to recommend that the merged applicant could take full advantage of the comparative merits that may flow from the merger. To add monetary incentives to the process, we also proposed to permit a settlement judge to recommend a refund of up to half the hearing fee in cases that are settled in this manner.

13. ACUS and the FCBA support the use of settlement judges in comparative proceedings. ACUS asserts that frank, open, off-the-record, confidential and even *ex parte* discussions are important parts of the process. Even if settlements are not forthcoming, ACUS opines that the process may greatly reduce the scope of the parties' disagreements. The FCBA suggests that the settlement judge process be a voluntary one. RNJ suggests that the settlement judge process should take place after the filing of motions to enlarge issues, when, in the commenter's opinion, the settlement judge will be in a better position to make an informal assesment of the applicants.

14. AWRT, Hirrel, and Cohen and Berfield (C&B) oppose the settlement judge process. AWRT believes that settlements are more likely if the FCC is not involved in the process and that our present procedures requiring the filing of Notices of Appearance, discovery requests and motions to enlarge issues do not provide adequate time after the HDO to explore settlements. It would suspend all procedural dates for a 60 day period after the HDO for settlement discussions. The applicants would be required to hold at least one meeting and submit three reports on the status of settlement negotiations during that period. Notices of Appearance would be filed on the 60th day, and motions to enlarge, modify or delete issues would be due 30 there after. The Hardy Group proposes a similar, but shorter, "settlement window" between the HDO and the first pre-hearing conference. Hirrel contends that applicants are already aware of settlements, and additional procedures to focus on the possibility of settlements will only delay the decisional process. C&B opines that limits on the amount of settlement payments would severely reduce the motive to settle, and the proposed "institutionalized persuasion" would likely do nothing more than divert staff resources. The commenter further suggests that forced settlements are bad policy in that they may result in unstable licensees comprised of antagonistic parties.

15. The FCBA, RNJ, and Hirrel oppose any rule that would permit the settlement judge to allow comparative upgrading. AWRT would permit comparative upgrades resulting from partial settlements by the Notice of Appearance (NOA) date, but AWRT, Hirrel, and RNJ oppose partial fee refunds for cases settled in the settlement judge procedure. Koteen and Naftalin (K&N) suggest that, where there are significant differences among applicants, the judge should consider those differences and only approve settlements that achieve the goal of best practicable service.

16. After considering the comments, we have decided to make settlement judges available to applicants on a voluntary, experimental basis.[13] Where all parties believe that a settlement judge might facilitate settlement efforts, a request for the assignment of a settlement judge should be submitted to the presiding judge who will forward it to the Chief Administrative Law Judge. In the Chief ALJ's discretion, a settlement judge will be assigned. After reviewing the applicants' proposals, the settlement judge will meet with the applicants individually and/or in concert to explore a potential settlement of the matter.[14]

17. As with pre-designation mergers, we will not permit comparative upgrading of applications that enter partial settlements through the settlement judge process. While the prospect of such upgrading may encourage participation in the process, it may also encourage comparative gamesmanship and the filing of speculative applications. Similarly, we will not refund all or part of the hearing fee paid by the applicants that participate in the process. To do so would only decrease incentives to settle the case even earlier. In this regard, we believe that the prospect of avoiding the costs and delays of litigation provide adequate incentives to settlements.

D. The Ruarch Policy

18. In *Ruarch Associates*, 103 FCC 2d 1178 (1986), the applicant had committed itself to divest a co-owned station to avoid a comparative demerit. In approving the settlement submitted after the ID and a Review Board decision in the case, the Commission relieved the applicant of that commitment.[15] The *Notice* asked whether we should reverse *Ruarch Associates* and its progeny. We also sought comment on appropriate means to ensure the future adherence to promises made in applications for purposes of enhancing an applicant's comparative standing under diversity and integration criteria.

19. MAP, Hirrel, and RNJ believe the *Ruarch* policy should be overturned, and applicants should be held to their comparative commitments. On the other hand, AWRT and the law firm of Pepper and Corrazini (P&C) argue that the policy should be retained because it facilitates settlements. The FCBA takes no position on the elimination of the *Ruarch* policy, but it suggests that parties should be permitted to withdraw divestiture and integration proposals only if the proceeding is resolved by a global settlement on or prior to the hearing exhibit exchange. K&N suggests that applicants requesting approval of a settlement should indicate which promises will survive the settlement, and the presiding judge should consider this in his ruling.

20. The FCBA contends that the lack of post-grant enforcement of comparative promises has been a contributor to abuses of the Commission's processes. Although many false and questionable commitments are exposed at hearing, the FCBA notes that others remain hidden until the applicant is granted, and, to enforce adherance to commitments in applications, the FCBA proposes that we select a runner-up who would acquire the construction permit in the event that the winner fails to materially honor its hearing commitments during construction. After construction, the license would be conditioned on fulfilling the obligations on which its comparative superiority was based for a period of three years. Hirrel would also impose a 3-year holding period on licenses, during which time the applicant would be required to keep all comparative promises and report such compliance in their annual ownership reports. MAP suggests that an applicant's failure to fully comply with its comparative com-

mitments should be grounds for a renewal hearing or adding an issue in another proceeding involving the same applicant.

21. It is possible that the *Ruarch* policy may encourage inflated comparative commitments, which in turn affect settlement negotiations. Retaining the policy, however, may provide an added incentive to settle. In striking a balance between these conflicting considerations, we believe there is merit to the FCBA proposal to permit the successful applicant in a "global" settlement to withdraw divestiture and integration proposals where the settlement is entered into early in the hearing process. Thus, where a settlement of the case is entered into and filed with the presiding judge on or before the NOA date, the judge may entertain and grant a request to relieve the successful applicant of divestiture and integration proposals.[16] The notice of appearance deadline was selected as the cut-off point because it is the date on which applicants will be exchanging detailed information on their integration proposals. *See* paragraph 27, below. In settlements reached after the notice of appearance deadline, the successful applicant will be expected to fulfill its divestiture and integration proposals.

22. We also agree with the commenters that some oversight of applicant adherence to comparative promises is appropriate. We believe, however, that ensuring at least one full year's compliance with such promises is sufficient to test the applicant's *bona fides* and to discourage inflated commitments.[17] Thus, a new section 73.1620(g) will require permittees authorized out of the comparative hearing process, including those granted after a settlement, to file a statement with their applications for a license to cover their permits (FCC Form 302), identifying any deviations from the divestiture and/or integration promises contained in their applications, unless they have been relieved of those obligations under the policy enunciated above. A similar statement will be required to be filed on the first anniversary of the commencement of program tests.[18] Program tests generally commence within ten days of the filing of the Form 302. *See* 47 C.F.R. § 73.1620(a). The Commission will take appropriate enforcement action in any case in which deviations from these comparative proposals indicate that the proposals, as made to the Commission, consititute a misrepresentation.

III. EXPEDITING THE HEARING PROCESS

A. Discovery

23. We proposed to commence discovery with the issuance of the HDO, permit 60 days for the conclusion of discovery, and limit the discovery tools available to the parties. Generally, the commenters view discovery as an essential element of the hearing process, necessary to expose exaggerated or sham proposals. Hirrel suggests that restrictions on discovery will encourage speculation and reduce the quality of decisions. P&C notes that, without discovery, the Commission would have to take all proposals at face value. In the same vein, K&N contend that applicants are less likely to fictionalize proposals that will be tested in discovery. Although FCBA, K&N, and MAP agree that the time allowed for discovery can be shortened, they generally argue that discovery tools should not be limited, and a number of commenters including the FCBA note any limitation on the time allowed for discovery must also consider the effect of issue enlargement and the need to conduct additional discovery to explore any new issues.

24. To shorten the time consumed by discovery, the FCBA proposes that we adopt a standard document production order identifying those basic threshold documents that every party would be required to produce within 20 days of the HDO. Any requests for additional documents should be filed within 10 days of the initial exchange. If a party claimed a privilege with regard to the documents, motions to compel should be filed within 10 days of production date, and the presiding judge should rule on the motions within 20 days. Under this scheme, the production of documents should be completed within 60 days of the HDO; depositions would consume the next 60 days, and discovery would be completed within 120 days of the HDO. To further facilitate the process, the FCBA would require the submission of an applicant's integration statement, in a standardized format, on the same date as the documents must be initially produced. K&N suggest that we require the exchange of direct cases 30 days after HDO. Then, discovery would be concluded 60 days later.

25. We are convinced that substantial time savings can be achieved in the discovery phase of comparative cases by commencing discovery with the issuance of the HDO. Thus, we will amend section 1.325 of our rules to incorporate a standardized document production order for use in comparative proceedings, requiring applicants to make the enumerated documents available to their competitors, or object to their production on the basis of a claim of priviledge, within 20 days after the issuance of the HDO, *i.e.*, concurrently with the filing of their notices of appearance.[19] Any motions to compel the production of documents for which a privilege has been asserted should be filed within 5 working days, and the presiding judge would be expected to dispose of any such motions within 10 calendar days. To facilitate this process, we encourage judges to convene a pre-hearing conference to hear argument on and dispose of these motions to compel.

26. As suggested by the FCBA, the new rule will require applicants to produce documents in the following categories: (1) all formation and organizational documents, including articles of incorporation, by laws, partnership agreements, voting rights, proxies, and any amendments to the foregoing documents; (2) all minutes of meetings relating to the application; (3) all documents relating to the rights or plans of persons or entities to purchase an interest in the applicant or of current owners to alienate their interests; (4) all documents relating to pledges, mortgages, security interests, or other encumbrances of any kind with respect to the applicant; (5) all bank letters and other financing documents with the dollar amounts unexpurgated; (6) all documents relating to the applicant's proposed transmitter site; (7) all documents relating to communications by proposed integrated principals with respect to their proposed participation in the management of the station and the disposition of their current employment; (8) all documents relating to prior integration pledges made by principals who propose to be integrated into the management of the station at issue; (9) all documents relating to communications by and between principals of the applicant concerning the application, including communications between active and passive principals; (10) representative documents relating to enhancement credits and preferences sought by the applicant's principals for local residence, civic participation,

past broadcast experience, minority/female status, and the like; (11) all documents relating to commitments to divest other media interests; and (12) all documents that identify or describe the principals who are responsible for completing the application, arranging financing, obtaining the applicant's transmitter site, publishing the required notices, establishing the local public inspection file, and retaining lawyers, engineers, and other professionals.

27. The HDO will also require applicants to file and exchange a standardized integration statement on the same date. That statement shall include the following information: (1) a description of the applicant's ownership structure (whether it is an individual, a partnership, a limited partnership or a corporation, and if it is a corporation, whether it has both voting and non-voting stock); (2) the ownership percentage of each owner; (3) the identity of the owners who will work at the proposed station, what titles and duties they will have, how many hours they will work per week, and how they will reconcile any current business interests or employment with that commitment to the station; (4) all other media interests held by the persons identified under (2), above; (5) whether the integrated owners will claim credit for minority or female ownership and if so, specifically on what basis; (6) whether the integrated owners will claim credit for local residence and civic involvement in the city of license or service area and if so, specifically on what basis (including a detailed chronology of past residence and a description of civic activities and their duration); (7) whether the integrated owners will claim credit for previous broadcast experience and if so, provide a detailed list of the stations they worked at, the titles and duties they had, and the years in which they were so employed; and (8) whether the applicant will claim a daytimer preference and if so, specifically on what basis. With the early provision of the information required in the standardized document production order and the uniform integration statement, we would expect that the remainder of the discovery process could be expedited.

28. We are also adopting the FCBA's suggestion that parties be permitted to request additional documents without making a "good cause" showing and to eliminate the requirement that ALJs rule on unopposed document requests. Parties may request additional relevant documents, not called for in the standardized production order, at any time after the issuance of the HDO, but initial supplemental requests for documents must be filed no later than ten days after the notice of appearance deadline. Any supplemental document requests must be complied with or objected to within ten calendar days. Any motions to compel the production of documents for which a privilege has been asserted should be filed within five working days of the document production date, and the presiding judge would be expected to dispose of any such motions within 10 calendar days. To facilitate this process, we encourage judges to convene a pre-hearing conference to hear argument on and dispose of these motions to compel.

29. Oral depositions would generally be scheduled after the initial document production. As suggested by the FCBA, the rules are amended to require that all applicants be prepared to make their active and passive owners available for such depositions after the notice of appearance deadline, and the 21 day notice provision for depositions will not apply to depositions of these applicant principals. *See* 47 C.F.R. § 1.315. Further, depositions of these principals will be held in Washington, D.C. or in the proposed community of license, at the deponents' option, unless all parties agree to some other location. In this manner, we believe that discovery in the routine comparative case can be completed within 90 days of the issuance of the HDO. However, we recognize that there will be cases in which more time is needed, and the administrative law judges have the discretion to permit discovery to extend beyond that time limit in unusual cases or when the issues have been enlarged.

30. In order to facilitate discovery on new issues added to a proceeding in response to petitions to enlarge issues, we will amend section 1.229 of our rules to require that a motion to enlarge identify those documents the moving party wishes to have produced and any other discovery procedures the movant wishes to employ. If the motion is granted, the ALJ will simultaneously rule on the additional discovery requests. Such additional discovery will be scheduled to be completed within 30 days of the action on the motion, unless the requested discovery is directed against persons who are not parties to the proceeding. In such circumstances, additional time will be necessary to provide required notice to persons against whom discovery is sought. Moreover, we note that section 1.229 places the burden of establishing that the enlargement of issues is warranted on the moving party and sets forth pleading standards that must be met in moving to enlarge issues. To avoid the need to try unnecessary issues, we expect ALJs and the Review Board to strictly adhere to the standards established in the rule.

B. The "Anax" Doctrine.

31. In *Anax Broadcasting, Inc.*, 87 FCC 2d 483 (1981), we allowed applicants to exclude limited partners (and the owners of non-voting stock) from the calculus by which we determine the comparative credit for integration of ownership and management (as well as for diversity). The *Notice* recognized that active/passive ownership structures that take advantage of the *Anax* doctrine had spawned lengthy litigation, and it asked whether the Commission should eliminate or modify that doctrine to curtail such litigation.

32. The FCBA and AWRT take no position on the elimination of the *Anax* doctrine, but they both suggest that, if it is eliminated, the change should not apply to pending applications. This latter position is shared by numerous commenters, including applicants that have proposed a two-tier ownership structure and prosecuted their applications through hearing, who argue that it would be unfair to apply any change in the *Anax* doctrine to applicants that expended time and money in reasonable expectation that certain policies would govern their application. Hirrel and C&B argue that the *Anax* doctrine should be retained, but K&N and RNJ assert that it should be eliminated.

33. A number of parties recommend changes in the *Anax* doctrine. The FCBA suggests that applicants relying on *Anax* should have the burden of proving the passivity of investors, but the Commission should recognize that even fully insulated passive investors may undertake a more active role in the formation and prosecution of an application than is permitted by Commission case law. *See Coast TV*, 4 FCC Rcd 1786 (1989). MAP, NAACP, and the Congressional Black Caucus argue that *Anax* provides an important financing tool for potential minority broadcasters, and the Commission can eliminate

abuses of the *Anax* doctrine by treating integrated minority or female owners holding 80% or more of the equity in the applicant as if they were 100% owners or requiring that integrated owners hold at least a 20% equity interest in the applicant. On the other hand, C&B believes that a 20% benchmark is unrealistic, because, if the other 80% is owned by a single individual, the same active/passive questions arise, but even a 10% active participant, who is also the largest single owner should not face the same questions. To address potential abuses of the active/passive ownership structure, MAP and Hirrel would have the winning applicant certify, in its application for a license to cover the construction permit that the active owners have retained sole control. MAP also suggests that follow-up reports be submitted with the licensee's first three ownership reports, and it asserts that the Commission should rank comparative applicants so that runners-up could act as watch dogs of the passive ownership structure.

34. Upon consideration of the comments, we have decided to not eliminate or alter the *Anax* doctrine in this proceeding. The underlying premise of that doctrine is that certain passive ownership interests are not cognizable under the Commission's attribution rules, 47 C.F.R. § 73.3555 Note 2, and such interests should not dilute the integration credit available to applicants whose organization includes such nonattributable interests. That premise remains viable, and we will not overturn the *Anax* case or modify the *Anax* doctrine in this proceeding.[20] However, as suggested by several commenters, a new section 73.1620(g) will require successful applicants proposing an active/passive ownership structure to report any deviations from their proposal that active owners retain sole control of the permittee/licensee in applications for a license to cover the construction permit and again on the first anniversary of program test authority. The Commission will take appropriate enforcement action in any case in which deviations from the active/passive ownership structure indicate that the proposal, as made to the Commission, constitutes a misrepresentation.

C. Written Cases

35. Based on our experience in major market cellular comparative cases, the *Notice* proposed to require the use of written cases except in the most unusual circumstances. Parties desiring to present oral testimony or cross examine opponents on their written cases would be required to make a specific showing to the presiding judge supporting that request. All of the commenters addressing this proposal oppose limitations on cross examination in hearings. The FCBA, Hirrel, and P&C assert that the cellular comparative proceedings do not provide a basis for eliminating cross examination in broadcast cases. The commenters point out that the decisional factors in the cellular proceedings were objectively ascertainable facts, but in broadcast comparative cases, the decisional factors often turn on promises which cannot be verified or disproven without cross examination and the judges observations on a witness's credibility. Glen Gerberg suggests that cross examination by applicants' counsel should be eliminated, and all witnesses should be questioned by the ALJ only.

36. Although our experience indicates that the use of strictly written procedures can expedite the hearing process, we did not propose to preclude ALJ's from taking oral testimony. For some types of issues, it may be necessary to observe the demeanor of the witnesses to assess their credibility, and, in other instances, cross examination may be required. Section 1.248 of our rules empowers ALJs to limit oral testimony, 47 C.F.R. § 1.248, and, in the exercise of the discretion granted ALJs by that rule, we will make it clear that ALJs should permit oral testimony and cross examination only where material issues of decisional fact cannot adequately be resolved without oral evidentiary hearing procedures or the public interest otherwise requires oral evidentiary proceedings.[21] Witnesses should not be requested for cross-examination unless there is a legitimate expectation that some part of their direct testimony, as reflected in exhibits, is subject to a question of substantial decisional significance.

D. Time Guidelines

37. The *Notice* proposed time guidelines that would result in the issuance of an ID in a routine comparative case within seven months of the HDO. In comments, ACUS asserts that reasonable timetables can help reduce administrative delay, accommodating exceptional cases while not delaying routine ones. The FCBA, Hirrel, and AWRT suggest that our guidelines provide inadequate time to prepare thorough and thoughtful findings and IDs, and the FCBA points out that our guidelines do not consider the time required to resolve motions to enlarge issues. Such motions must be filed within 30 days of the publication of the HDO in the *Federal Register*, 47 C.F.R. § 1.229, but several weeks could be saved if the time ran from the release of the HDO. The FCBA would also impose strict limits on late motions, and it suggests that the judge resolve any such motions at a pre-hearing conference rather than in a written decision.

38. The FCBA recommends the following time guidelines for the hearing phase of a comparative case. Discovery would consume the first 120 days after the HDO; exhibits would be exchanged 45 days later and the hearing would commence 30 days thereafter.[22] After the hearing, parties would be afforded 45 days to file findings if there was no oral testimony, but, because of the time required to obtain transcripts of the hearing, 60 days would be permitted in cases in which there was oral testimony. The ALJ would be given between 90 and 120 days to prepare the ID. Under this proposal, the hearing phase of the case would be concluded in about 13 months. The FCBA points out that its time frame is faster than the average for cases in the federal courts (about 14 months), and it represents about a 25% reduction in the time currently consumed in the hearing phase of FCC cases.

39. Although the FCBA proposal represents some time savings, we believe that additional savings are possible, particularly in the routine case that does not involve delays associated with the enlargement of issues. Thus, we have determined that our goal should be the resolution of routine comparative cases by ID within nine months of the HDO. As noted above, the HDO would commence the discovery process by requiring the exchange of documents pursuant to a standardized document production order and the filing of uniform integration statements. The routine discovery phase of the case generally would be terminated 90 days after the issuance of the HDO. Exhibits would be exchanged 30 days after completion of discovery, and the hearing would be scheduled about 15 days thereafter.[23] The record should be closed immediately at the end of whatever hearing is necessary, and 60 days provided for the filing of proposed findings and reply

findings.[24] The ALJs should make every effort to prepare and release the ID in these routine cases within 90 days of the last pleading.[25]

40. The decision time guideline being adopted herein is the same as was accomplished, on averge, in the expedited cellular cases. We recognize that the decision times achieved in the cellular cases reflect, to some extent, the fact that the ALJs were assisted by a staff of attorneys and engineers in their writing efforts. In this regard, we note that meeting the 90-day time guideline in broadcast comparative cases will most probably require similar assistance. Thus, the Office of Managing Director will prepare a proposal to provide the ALJs with either individual writing assistants or a pool of paralegals, attorneys, and/or engineers that can assist them in preparing these decisions. We have also asked the Office of Managing Director to look into the assignment of additional administrative resources for the ALJs, to track the progress of hearing cases so that problem areas can be identified. The Chief ALJ is also directed to make appropriate efforts to expedite cases that appear to be falling behind the time guidelines.[26]

IV. EXPEDITING REVIEW

A. Eliminate Intermediate Review

41. The *Notice* sought comments on whether elimination of the Review Board would expedite the resolution of broadcast comparative cases after the ID. The commenters generally believe that the Review Board operates expeditiously and efficiently. The FCBA strongly opposes elimination, asserting that the Board functions better than any other element of the comparative process. Hirrel suggests that the time consumed before the Review Board is not unreasonable, and intermediate review is vitally important to the process of careful selection of the best applicant. The FCBA recommends that the Board's resources should be enhanced with additional Board members and staff. On the basis of these comments and the reservations expressed in the *Notice*, we will not eliminate the intermediate review function.

B. Reorganize the Intermediate Review Function

42. The *Notice* also solicited comment on the possible reorganization or modification of the two-tiered review system, including a consolidation of the Review Board and its staff with the staff that prepares adjudicatory decisions for the Commission. Moreover, because the purpose of the Review Board is to free the Commission from burdensome review functions, we proposed an amendment to section 0.361(b) of our rules to permit the Commission or any of its members to provide legal and policy guidance and advice to the Board or any of its members. 47 C.F.R. § 0.361(b).

43. The commenters addressing reorganization generally opposed our proposals. Hirrel opines that a sound result is more likely to be reached in a decision on the record alone, unswayed by policy considerations. ACUS expresses concerns that the proposed consolidation could compromise the Board's ability to process routine matters efficiently and public perception of independent review by injecting "policy" review prematurely and negating the appearance of impartial decisionmaking at the Review Board stage. The FCBA suggests that permitting Commissioners to discuss the merits of cases with Board would give the impression that decisions in comparative cases are based on politics rather than reasoned decisionmaking. MAP proposes its own reorganization plan that would increase the Board's membership and staff and delegate full reviewing authority to the Board. Under this plan, the Commission could review Board decisions on its own motion within a limited time.

44. To an extent, the commenters that oppose the consolidation plan misperceive the purpose behind that proposal. With access to the decision writing staff of the Adjudication Division, the Review Board could prepare its decisions in less time, and, if a case is appealed to the Commission, the fact that a staffer is already familiar with the record would enable the Commission to render a decision faster. Nevertheless, we have determined that the best course would be to maintain the current organization of the Board,[27] and, in consideration of the comments, we will not amend section 0.361 to permit consulations between the Commission and the Board.[28] However, to further expedite the intermediate review process, we are amending section 1.277 of our rules to further restrict the permissible length of consolidated briefs and exceptions to 25 double spaced typewritten pages. We believe that this limitation will focus the pleadings on critical questions in the case, thereby honing the issues and fostering a more efficient disposition of appeals from IDs.

C. Oral Argument

45. To expedite the review process, we proposed to limit oral argument before the Review Board and the Commission to cases involving extraordinary circumstances. The commenters generally oppose restrictions on oral argument, although the FCBA agrees that the Board should not routinely grant requests for oral argument as it does now. The commenters generally assert that oral argument serves the important function of focusing and defining key appellate issues, and it probably shortens rather than lengthens review time.

46. In 1961, Congress deleted a provision of section 409 of the Communications Act that had required the Commission to hear oral argument or exceptions from initial decisions. Thus, the Commission and the Board have the discretion not to hear oral argument. *See* S. Rep. No. 576, 87th Cong., 1st Sess. 15 (1961). Although we recognize that oral argument may, in some cases, provide valuable assistance to the reviewing authority in resolving the issues before it, the scheduling of oral argument also delays the ultimate resolution of the case. Thus, we will amend section 1.277 of the rules to provide that oral argument be allowed only where it is requested by the parties and the Board or Commission finds that it will assist in the resolution of the issues presented on appeal.

D. Time Guidelines

47. The Commission's rules currently require the Review Board to adopt a decision within 180 days after release of an ID, and section 5(d) of the Communications Act requires the Commission to conduct its business with the objective of rendering a decision in hearing cases "within six months from the final date of the hearing...." 47 U.S.C. § 155(d).[29] The *Notice* proposed internal guidelines establishing a goal of issuing final agency decisions in these comparative cases within six months of the IDs by issuing Review Board decisions within 3 months and Commission decisions 3 months thereafter. In the alternative, we sought comment on an FCBA proposal that

the Commission adopt a rule requiring that applications for review from Review Board decisions be acted upon within six months after they are filed. Under the FCBA proposal, if the application for review was not acted on in six months, it would be deemed denied, and Review Board's decision would become final. The case would then be subject to judicial review on the basis of the Review Board's decision.

48. Consistent with their view that the Review Board process is not overly time consuming, the commenters generally focus on time guidelines for Commission decisions on applications for review. The FCBA reiterated its 6-month proposal in which the Review Board decision would become final if an application for review were not acted upon by the Commission within six months of its filing. FCBA states that six months would give the Commission "ample time to consider whether applications for review present novel or important policy questions."[30] AWRT suggests a process under which applications for review would be accepted or denied within 30 to 60 days. K&N assert that the application for review should be limited to matters of policy, leaving evidentiary questions and non-policy matters to the Review Board. K&N also contend that the decision to grant review should not take more than 3 months, and, once review is granted, the Commission should call for the submission of briefs focused on the issue the Commission wishes to resolve. In the commenter's opinion, such briefs will expedite the preparation of the Commission's decision. Hirrel would eliminate the application for review process; the Review Board would issue recommended decisions; only the decision would be reviewed by the Commission, and, if the decision complies with Commission policy, the Commission would promptly issue an order adopting it. That order would be subject to appeal or reconsideration. RNJ suggests that both the Review Board and Commission should have six months to issue their decisions.

49. Upon consideration of the comments, we believe that time savings can be achieved in the resolution of these cases by the Review Board. With the elimination of oral argument in appropriate cases, the Review Board should be able to complete its consideration of routine cases within four months of the filing of exceptions, *i.e.*, approximately five and a half months after the issuance of the ID.[31]

50. As to Commission review, the Communications Act provides that parties aggrieved by a decision taken pursuant to delegated authority "may file an application for review" of that decision by the Commission and "every such application shall be passed upon by the Commission." 47 U.S.C. § 155(c)(4). It therefore appears that we could not, consistent with the application for review process established in the Act, limit the scope of applications for review solely to policy issues (as proposed by K&N) or substitute a "recommended decision" process (as proposed by Hirrel). Similarly, it does not appear that a rule providing that applications for review would be deemed denied or automatically denied satisfies the statutory requirement that they be "passed upon by the Commission." 47 U.S.C. § 155(c)(4).[32] In any event, we conclude that a commitment to disposing of applications for review within five months is more appropriate than the commenters' proposals.[33] We are amending our rules to include an express statement of this policy and a commitment to either dispose of applications for review within five months of their filing or issue an order indicating that additional time will be required in a particular case. To implement this policy, the staff is being instructed to prepare orders disposing of applications for review in routine cases and present them for Commission consideration well before the expiration of the five month period.[34]

V. OTHER PROPOSALS

51. The *Notice* proposed to give ALJs the authority to impose forfeitures, in addition to denying the application, in cases in which applicants made misrepresentations to the Commission or engaged in other misconduct during the application process. The authority to impose forfeitures on applicants is conferred by the Communications Act. *See* Omnibus Budget Reconciliation Act of 1989, Pub. L. No. 101-239, § 3002, 103 Stat. 2106, codified at 47 U.S.C. § 503(b)(2)(A). This proposal was not addressed in the comments, and we have therefore determined that our ALJs will have the authority to impose forfeitures up to the statutory maximum amount as proposed. *See* 47 U.S.C. § 503(b)(2)(A) ($25,000 for each violation to a maximum of $250,000 for continuing violations). In any case in which the ALJ, the Review Board or the Commission enlarge the issues to inquire into allegations of such misconduct, the enlarged issues shall include notice that, after hearings on the enlarged issue and upon a finding that the alleged misconduct occurred and warrants such penalty, in addition to or in lieu of denying the application, the applicant may be liable for a forfeiture of up to the maximum statutory amount.[35]

52. A number of commenters submitted proposals to change the policies under which the Commission awards comparative credits and demerits in comparative broadcast proceedings. For example, RNJ would have us establish a comparative preference in FM proceedings for applicants that proposed to turn in an AM license. The NAACP suggests that interests held by Minority Enterprise Small Business Investment Companies not be attributable; that we expand broadcast experience credit to include comparable management experience; revise the minority sensitivity credit, making it available in any proceeding, not just to counter a minority ownership credit; and award comparative credit to applicants that have divested an FM or VHF TV station to minorities for no more than 75% of fair market value. These proposals were not raised in the *Notice*, and they are beyond the scope of this proceeding which focuses, for the most part, on the procedures employed in broadcast comparative cases rather than the comparative criteria used to evaluate the applicants.

VI. CONCLUSION

53. The process of selecting which of otherwise qualified applicants should be granted must remain fair and effective; but undue delay in that process disserves the public by delaying the institution of new service and exacting an economic toll on both the Government and the applicants. To the extent that we can eliminate unnecessary delays in that process, we will be serving the potential listening and viewing public, the American taxpayer and the applicants. Our review of the comments in this proceeding lead us to the conclusion that much can be done to expedite the resolution of these cases. Thus, we have adopted procedural changes that are designed to

reduce significantly the time consumed in resolving these comparative cases. Where cases had been resolved in an average of almost three years, we believe the procedures adopted herein will reduce the duration of routine cases prosecuted from HDO through ID, Review Board decision, and Commission decision to approximately 21 months. That is a reduction of one year in the time consumed in the resolution of these cases. The time saved will inure directly to the benefit of the public in terms of the faster provision of new service without any sacrifice in the Commission's ability to select the best from among the otherwise qualified applicants for new broadcast facilities.

54. The rules adopted herein have been analyzed with respect to the Paperwork Reduction Act of 1980, 44 U.S.C. §§ 3501-3520, and found to impose new or modified requirements or burdens on the public. As such, the new rules are subject to approval by the Office of Management and Budget under the Paperwork Reduction Act and a copy of this Report and Order is being transmitted to the Office of Management and Budget along with a request for approval of these new paperwork requirements.

55. Final Regulatory Flexibility Analysis

I. Reason for the Action:

To expedite the resolution of comparative hearings involving applicants for new broadcast facilities.

II. Objective of this Action:

To expedite the resolution of comparative hearings involving applicants for new broadcast facilities.

III. Legal Basis:

These changes are taken under sections 4(i), 4(j), 5(b), 5(c), 303(r) and 309 of the Communications Act of 1934, as amended.

IV. Number and Type of Small Entities Affected by the Proposed Rule:

Applicants for available new broadcast facilities are, for the most part small entities. Presently, the Commission has pending approximately 3,000 such applications that may come under the rules proposed herein.

V. Reporting, Recordkeeping, and Other Compliance Requirements Inherent in the Proposed Rule: None.

VI. Federal Rules which Overlap, Duplicate, or Conflict with the Proposed Rule: None.

VII. Any Significant Alternative Minimizing Impact on Small Entities and Consistent with the Stated Objective of the Action:

Because these changes will expedite the resolution of comparative broadcast hearings for new applicants, it will generally permit the successful applicant to commence operation of the new station at an earlier date. Thus, the applicants, generally small entities, will be benefited by these changes. The Commission has considered, and in some cases adopted, commenters' suggestions to fulfill its goal of expediting the comparative hearing process with a minimum of cost or inconvenience to applicants.

58. Accordingly, IT IS ORDERED that the motions to accept late filed comments filed by the Howard University Small Business Development Center and the Congressional Black Caucus ARE GRANTED.

59. IT IS FURTHER ORDERED that Parts 0, 1, and 73 of the Commissions rules, 47 C.F.R. Parts 0, 1, and 73, ARE AMENDED as set forth in the Appendix hereto.

60. IT IS FURTHER ORDERED that the rule changes adopted herein shall be effective on February 13, 1991, except that the requirement for the submission of reports by permittees and licensees contained in 47 C.F.R. § 73.1620(g) will become effective 90 days from the publication of a summary of this *Report and Order* in the *Federal Register* or upon approval of that requirement by the Office of Management and Budget, whichever is sooner.

61. IT IS FURTHER ORDERED that the modification of the *Ruarch* policy enunciated herein shall become effective on March 21, 1991, and it shall apply to all requests for approval of agreements filed on that date and thereafter.

62. IT IS FURTHER ORDERED that all commercial broadcast applications that have been the subject of a public notice released prior to February 13, 1991, announcing the acceptance for filing of mutually exclusive applications, shall pay their hearing fee by March 15, 1991, unless an order designating such applications for hearing is released before that date. All applicants designated for hearing by orders released before March 15, 1991, should pay their hearing fee with their Notices of Appearance.

63. IT IS FURTHER ORDERED that the Secretary shall send a copy of this Report and Order to the Chief Counsel for Advocacy of the Small Business Administration.

64. This action is taken pursuant to authority contained in sections 4(i), 4(j), 5(b), 5(c), 303(r) and 309 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), 155(b), 155(c), 303(r) and 309.

For further information concerning this proceeding, contact Martin Blumenthal, Office of General Counsel (202) 254-6530.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

The parties filing comments in this proceeding were:

Administrative Conference of the United States
American Women in Radio and Television
Black Citizens for Fair Media, *et al* *
Caldwell Communications Corporation
Virginia Carson, Esq.
Cohen & Berfield
Congressional Black Caucus **
Federal Communications Bar Association *
Glen Gerberg
Giles Television Inc.

Henderson Broadcasting of Memphis, Inc.
Michael J. Hirrel, Esq. *
Hope Valley FM Limited Partnership **
Howard University Small Business Development Center **
J. M. Broadcasting, Ltd.
James River Communications Corporation
Koteen & Naftalin
Mid-West Family Group **
National Association for the Advancement of Colored People, *et al*
National Association of Black Owned Broadcasters, Inc. **
Pepper and Corazzini
Radio New Jersey
Sandpiper Broadcasting, Inc.
Stonewall Broadcasting, Inc.
Vince Lee Broadcasting, Ltd.
Walker, Bordelon, Hamlin, Theriot and Hardy
Dr. William D. Ward
* Indicates that the party filed Initial and Reply Comments.
** Indicates that the party filed Reply Comments only.

APPENDIX

47 C.F.R. Parts 0, 1, and 73 are amended as follows:

1. The authority citation for Part O continues to read as follows:

Authority: Sec. 5, 48 Stat. 1068, as amended; 47 U.S.C. § 155, unless otherwise noted.

2. Section 0.251 is amended by adding a new paragraph (f)(12) as follows:

* * * * *

(12) In preparing decisions for Commission consideration on applications for review of routine broadcast comparative cases involving applicants for only new facilities, the General Counsel will make every effort to submit such draft decisions for Commission consideration within four months of the filing of the last responsive pleading. If the Commission is unable to adopt a decision in such cases within five months of the last responsive pleading, it shall issue an order indicating that additional time will be required to resolve the case.

* * * * *

3. Section 0.341 is amended by adding a new paragraphs (d) and (e) to read as follows:

* * * * *

(d) In the conduct of routine broadcast comparative hearings involving applicants for only new facilities, *i.e.*, cases that do not involve numerous applicants and/or motions to enlarge issues, the presiding administrative law judge shall make every effort to conclude the case within nine months of the release of the hearing designation order. In so doing, the presiding judge will make every effort to release an initial decision in such cases within 90 days of the filing of the last responsive pleading.

(e) Upon assignment by the Chief Administrative Law Judge, Administrative Law Judges, including the Chief Judge, will act as settlement judges in appropriate cases. *See* 47 C.F.R. § 1.244.

4. The authority citation for Part 1 continues to read as follows:

Authority: Secs. 4, 303, 48 Stat. 1066, 1082, as amended; 47 U.S.C. 154, 303; Implement, 5 U.S.C. 552, unless otherwise noted.

5. Section 1.221 is amended by deleting paragraphs (f) and (g) and the Note and by adding a new paragraph (c)(1) to read as follows:

* * * * *

(c) * * *

(1) In comparative broadcast proceedings involving applicants for only new facilities, the notice of appearance filed by all applicants in the proceeding shall indicate that service of the notice of appearance on the other parties in the case was accompanied by the materials required to be exchanged pursuant to the Standard Document Production Order (see section 1.325(c)(1) of this part) and the Standardized Integration Statement (see section 1.325(c)(2) of this part). The Standardized Integration Statement should be filed with the presiding Administrative Law Judge, but, unless the presiding Administrative Law Judge rules otherwise, the documents exchanged pursuant to the Standard Document Production Order should not be submitted to the presiding Administrative Law Judge. Failure to serve the required materials on all other parties to the case will be tantamount to a failure to file a notice of appearance.

6. Section 1.229 is amended by revising paragraphs (a) and (b) and adding new paragraphs (e) and (f) to read as follows:

* * * * *

(a) A motion to enlarge, change or delete the issues may be filed by any party to a hearing. Except as provided for in paragraph (b), such motions must be filed within 15 days after the full text or a summary of the order designating the case for hearing has been published in the *Federal Register*.

(b)(1) In comparative broadcast proceedings involving applicants for only new facilities, such motions shall be filed within 30 days of the release of the designation order, except that persons not named as parties to the proceeding in the designation order may file such motions with their petitions to intervene up to 30 days after publication of the full text or a summary of the designation order in the *Federal Register*. (*See* section 1.223 of this part).

(2) In comparative broadcast proceedings involving renewal applicants, such motions shall be filed within 30 days after publication of the full text or a summary of the designation order in the *Federal Register*.

(3) Any person desiring to file a motion to modify the issues after the expiration of periods specified in paragraphs (a), (b)(1), and (b)(2), above, shall set forth the reason why it was not possible to file the motion within the prescribed period. Except as provided in paragraph (c) of this section, the motion will be granted only if good cause is shown for the delay in filing. Motions for modifications of issues which are based on new facts or newly discovered facts shall be filed within 15 days after such facts are discovered by the moving party.

* * * * *

(e) In comparative broadcast proceedings involving applicants for only new facilities, in addition to the showing with respect to the requested issue modification described in paragraph (d), the party requesting the enlargement of issues against an applicant in the proceeding shall identify those documents the moving party wishes to have produced and any other discovery procedures the moving party wishes to employ in the event the requested issue is added to the proceeding. In the event the motion to enlarge issues is granted, the Commission or delegated authority acting on the motion will also rule on the additional discovery requests, and, if granted, such additional discovery will be scheduled to be completed within 30 days of the action on the motion unless the persons subject to such additional discovery are not parties to the proceeding. In such case, additional time will be required to afford such persons adequate notice of the discovery procedures being employed.

(f) In any case in which the presiding judge, the Review Board or the Commission grants a motion to enlarge the issues to inquire into allegations that an applicant made misrepresentations to the Commission or engaged in other misconduct during the application process, the enlarged issues shall include notice that, after hearings on the enlarged issue and upon a finding that the alleged misconduct occurred and warrants such penalty, in addition to or in lieu of denying the application, the applicant may be liable for a forfeiture of up to the maximum statutory amount. *See* 47 U.S.C. § 503(b)(2)(A).

7. A new section 1.244 is added as follows:

§ 1.244 Designation of a settlement judge

(a) In broadcast comparative cases involving applicants for only new facilities, the applicants may request the appointment of a settlement judge to facilitate the resolution of the case by settlement.

(b) Where all applicants in the case agree that such procedures may be beneficial, such requests may be filed with the presiding judge no later than 15 days prior to the date scheduled by the presiding judge for the commencement of hearings. The presiding judge shall suspend the procedural dates in the case and forward the request to the Chief Administrative Law Judge for action.

(c) If, in the discretion of the Chief Administrative Law Judge, it appears that the appointment of a settlement judge will facilitate the settlement of the case, the Chief Judge will appoint a "neutral" as defined in 5 U.S.C. §§ 581 and 583(a) to act as the settlement judge.

(1) The parties may request the appointment of a settlement judge of their own choosing so long as that person is a "neutral" as defined in 5 U.S.C. § 581.

(2) The appointment of a settlement judge in a particular case is subject to the approval of all the applicants in the proceeding. *See* 5 U.S.C. § 583(b).

(3) The Commission's Administrative Law Judges are eligible to act as a settlement judges, except that an Administrative Law Judge will not be appointed as a settlement judge in any case in which the Administrative Law Judge also acts as the presiding officer.

(4) Other members of the Commission's staff who qualify as neutrals may be appointed as settlement judges, except that staff members whose duties include drafting, review, and/or recommendations in adjudicatory matters pending before the Review Board or the Commission shall not be appointed as settlement judges.

(d) The settlement judge will have the authority to require applicants to submit their Standardized Integration Statements and/or their written direct cases for review. The settlement judge may also meet with the applicants and/or their counsel, indivudually and/or at joint conferences, to discuss their cases and the cases of their competitors. All such meetings will be off-the-record, and the settlement judge may express an opinion as to the relative comparative standing of the applicants and recommend possible means to resolve the proceeding by settlement. The proceedings before the settlement judge shall be subject to the confidentiality provisions of 5 U.S.C. § 584. Moreover, no statements, offers of settlement, representations or concessions of the parties or opinions expressed by the settlement judge will admissible as evidence in any Commission licensing proceeding.

8. Section 1.248 is amended by adding a new paragraph (d)(4) as follows:

* * * * *

(d) * * * *

(4) In broadcast comparative cases involving applicants for only new facilities, oral testimony and cross examination will be permitted only where, in the discretion of the presiding judge, material issues of decisional fact cannot be resolved without oral evidentiary hearing procedures or the public interest otherwise requires oral evidentiary proceedings.

* * * * *

9. Section 1.277 is amended by revising paragraph (c) to read as follows:

* * * * *

(c) Except by special permission, the consolidated brief and exceptions will not be accepted if the exceptions and agrument exceed 25 double-spaced typewritten pages in length. (The table of contents and table of citations are not counted in the 25 page limit; however, all other contents of and attachments to the brief are counted.) Within 10 days, or such other time as the Commission or delegated authority may specify, after the time for filing exceptions has expired, any other party may file a reply brief, which shall not exceed 25 double spaced typewritten pages and shall contain a table of contents and a table of citations. If exceptions have been filed, any party may request oral argument not later than five days after the time for filing replies to the exceptions has expired. The Commission or delegated authority, in its discretion, will grant oral argument by order only in cases where such oral presentations will assist in the resolution of the issues presented. Within five days after release of an order designating an initial decision for oral argument, as provided on paragraph (d) of this section, any party who wishes to participate in oral argument shall file a written notice of intention to appear and participate in oral argument. Failure to file a written notice shall constitute a waiver of the opportunity to participate.

* * * * *

10. Section 1.311 is amended by revising paragraph (c) as follows:

* * * * *

(c) Schedule for use of the procedures.

> (1) In comparative broadcast proceedings involving applicants for only new facilities, discovery commences with the release of the hearing designation order, and, in routine cases, the discovery phase of the proceeding will be conducted in a manner intended to conclude that portion of the case within 90 days of the release of the designation order.
>
> (2) In all other proceedings, except as provided by special order of the presiding officer, discovery may be initiated before or after the prehearing conference provided for in section 1.248.
>
> (3) In all proceedings, the presiding officer may at any time order the parties or their attorneys to appear at a conference to consider the propoer use of these procedures, the time to be allowed for such use, and/or to hear agrument and render a ruling on disputes that arise under these rules.

* * * * *

11. Section 1.313 is amended by revising the introductory paragraph as follows:

* * * * *

The use of the procedures set forth in §§ 1.311 through 1.325 is subject to control by the presiding officer, who may issue any order consistent with the provisions of those sections which is appropriate and just for the purpose of protecting parties and deponents or of providing for the proper conduct of the proceeding. Whenever doing so would be conducive to the efficient and expeditious conduct of the proceeding, the presiding officer may convene a conference to hear argument and issue a ruling on any disputes that may arise under these rules. The ruling, whether written or delivered on the record at a conference, may specify any measures, including the following to assure proper conduct of the proceeding or to protect any party or deponent from annoyance, expense, embarassment or oppression:

* * * * *

12. Section 1.315 is amended by adding a new paragraph (e) as follows:

* * * * *

(e) *Broadcast comparative proceedings involving applicants for only new facilities*. In these cases, the 21-day advance notice provision of paragraph (a) shall be inapplicable to depositions of active and passive owners of applicants in the proceeding. All applicants in such proceedings should be prepared to make their active and passive owners available for depositions during the period commencing with the deadline for filing notices of appearance and ending 90 days after the release of the designation order, if such depositions are requested by a party to the proceeding. All such depositions will be conducted in Washington, D.C. or in the community of license of the proposed station, at the deponent's option, unless all parties agree to some other location.

13. Section 1.325 is amended by revising paragraph (a) and adding a new paragraph (c) as follows:

* * * * *

(a) A party to a Commission proceeding may request any other party except the Commission to produce and permit inspection and copying or photographing, by or on behalf of the requesting party, of any designated documents, papers, books, accounts, letters, photographs, objects, or tangible things which constitute or contain evidence within the scope of the examination permitted by § 1.311(b) and which are in his possession custody, or control or to permit entry upon designated land or other property in his possession or control for purposes of inspecting, measuring, surveying, or photographing the property or any designated object or operation thereon within the scope of the examination permitted by § 1.311(b).

> (1) Such requests need not be filed with the presiding officer, but copies of the request shall be served on all other parties to the proceeding.
>
> (2) The party against whom the request was made must, within 10 days, comply with the request or object to the request, claiming a priviledge or raising other proper objections. If the request is not complied with in whole or in part, the requesting party may file a motion to compel production of doucments or access to property with the presiding officer. A motion to compel must be accompanied by a copy of the original request and the responding party's objection or claim of priviledge. Motions to compel must be filed within five business days of the objection or claim of priviledge.

(3) In resolving any disputes involving the production of documents or acccess to property, the presiding officer may direct that the materials objected to be presented to him for *in camera* inspection.

* * * * *

(c) In comparative broadcast proceedings involving applicants for only new facilities, on the date established for filing notices of appearance (see § 1.221 of this part), all applicants will serve the materials listed in the Standard Document Production Order and the Standardized Integration Statement on all other parties in the case.

(1) *Standard Document Production Order.* The following documents must be produced or objected to on grounds of priviledge on the notice of appearance deadline (Unless otherwise directed by the presiding officer, copies of these documents should not be filed with the presiding officer): (A) all formation and organizational documents, including articles of incorporation, by laws, partnership agreements, voting rights, proxies, and any amendments to the foregoing documents; (B) all minutes of meetings relating to the application; (C) all documents relating to the rights or plans of persons or entities to purchase an interest in the applicant or of current owners to alienate their interests; (D) all documents relating to pledges, mortgages, security interests, or other encumbrances of any kind with respect to the applicant; (E) all bank letters and other financing documents with the dollar amounts unexpurgated; (F) all documents relating to the applicant's proposed transmitter site; (G) all documents relating to communications by proposed integrated principals with respect to their proposed participation in the management of the station and the disposition of their current employment; (H) all documents relating to prior integration pledges made by principals who propose to be integrated into the management of the station at issue; (I) all documents relating to communications by and between principals of the applicant concerning the application, including communications between active and passive principals; (J) representative documents relating to enhancement credits and preferences sought by the applicant's principals for local residence, civic participation, past broadcast experience, minority/female status, and the like; (K) all documents relating to commitments to divest other media interests; and (L) all documents that identify or describe the principals who are responsible for completing the application, arranging financing, obtaining the applicant's transmitter site, publishing the required notices, establishing the local public inspection file, and retaining lawyers, engineers, and other professionals.

(2) *Standardized Integration Statement.* The following information must be provided by all applicants on the notice of appearance deadline (Copies of this statement should be filed with the presiding officer and served on all parties to the proceeding):

(A) the ownership structure of the applicant, *i.e.*, whether it is a partnership, limited partnership, or a corporation (if a corporation, indicate whether it has voting and non-voting stock);

(B) the ownership percentage of each owner;

(C) the identity of the owners who will work at the proposed station, what titles and duties they will have, how many hours they will work per week, and how they will reconcile any current business interests or employment with that commitment to the station;

(D) all other media interests held by the persons identified under (B), above;

(E) whether the integrated owners will claim credit for minority or female ownership and if so, specifically on what basis;

(F) whether the integrated owners will claim credit for local residence and civic involvement in the city of license or service area and if so, specifically on what basis (including a detailed chronology of past residence and a description of civic activities and their duration);

(G) whether the integrated owners will claim credit for previous broadcast experience and if so, provide a detailed list of the stations they worked at, the titles and duties they had, and the years in which they were so employed; and

(H) whether the applicant will claim a daytimer preference and if so, specifically on what basis.

(3) *Supplemental document production.* Parties may request additional relevant documents, not called for in the Standard Document Production Order, at any time after the release of the designation order. Initial supplemental requests for documents must be filed no later than ten days after the notice of appearance deadline. Supplemental document requests will be handled under the procedures established in paragraph (a) of this section. To facilitate the resolution of disputes concerning the production of documents, the presiding officer may convene a pre-hearing conference to hear argument on and dispose of any such disputes.

14. Section 1.1111 is amended by revising paragraph (c) as follows:

* * * * *

(c) Broadcast applicants that pay the hearing fee before the release of an order designating them for hearing are entitled to a refund of that fee, upon request therefor, whenever

(1) the application is granted without being designated for hearing;

(2) the application is dismissed, voluntarily or involuntarily, prior to designation for hearing, in the order designating the case for hearing, or for failure to file a Notice of Appearance (see § 1.221);

(3) the applicant is the only applicant designated in the proceeding that files a Notice of Appearance and that single remaining applicant is immediately grantable or grantable upon deletion of any matters specified in the designation order and requiring resolution (see § 1.229); or

(4) a settlement agreement filed with the presiding judge by the Notice of Appearance deadline provides for the dismissal of all but one of the applicants, and the single remaining applicant is immediately grantable. However, if the single remaining applicant is not immediately grantable, it is not entitled to a refund of the hearing fee unless all outstanding matters can be deleted (see § 1.229).

(5) however, under paragraphs (3) or (4), hearing fees will be retained by the Commission in any case requiring a decision on the merits of an applicant's post-designation amendment or evidentiary showing, whether by Summary Decision or otherwise. *See* §§ 1.251 and 1.267.

15. The authority citation for Part 73 continues to read as follows:

Authority: 47 U.S.C. 154, 303.

16. Section 73.1620 is amended by adding a new paragraph (g) as follows:

* * * * *

(g) *Reports required.* In their application for a license to cover a construction permit (FCC Form 302) and on the first anniversary of the commencement of program tests, applicants for new broadcast facilities granted as a result of a settlement or other decision in a comparative proceeding must report

(1) any deviations from comparative proposals relating to integration of ownership and management and diversification of the media of mass communciation contained in their application for a construction permit at the time such application was granted; and

(2) any deviations from an active/passive ownership structure proposed in their application for a construction permit at the time such application was granted.

(3) The reports referred to in paragraphs (1) and (2) shall not be required in any case in which the order granting the application relieved the applicant of the obligation to adhere to such proposals.

17. Section 73.3571 is amended by adding new paragraphs (c)(1) and (c)(2) as follows:

* * * * *

(c) * * * *

(1) In addition to announcing the acceptance of mutually exclusive applications and establishing a date for the filing of petitions to deny such applications, the public notice referred to in paragraph (c) will also announce the date on which all mutually exclusive applicants (including the previously accepted lead applicant) will be required to pay the hearing fee established in Part 1 of these rules, 47 C.F.R. § 1.1104(2)(c). The date for fee payment shall be at least 30 days after the date established for petitions to deny.

(2) Whenever the public notice announces the acceptance of an application that is mutually exclusive with a renewal application, it shall also announce that the mutually exclusive applicants and the renewal applicant will be required to pay the hearing fee on the date established in the public notice.

* * * * *

18. Section 73.3572 is amended by adding new paragraphs (c)(1) and (c)(2) as follows:

* * * * *

(c) * * * *

(1) In addition to announcing the acceptance of mutually exclusive applications and establishing a date for the filing of petitions to deny such applications, the public notice referred to in paragraph (c) will also announce the date on which all mutually exclusive applicants (including the previously accepted lead applicant) will be required to pay the hearing fee established in Part 1 of these rules, 47 C.F.R. § 1.1104(1)(c). The date for fee payment shall be at least 30 days after the date established for petitions to deny.

(2) Whenever the public notice announces the acceptance of an application that is mutually exclusive with a renewal application, it shall also announce that the mutually exclusive applicants and the renewal applicant will be required to pay the hearing fee on the date established in the public notice.

* * * * *

19. Section 73.3573 is amended by adding new paragraphs (f)(2)(A) and (f)(2)(B) as follows:

* * * * *

(f) * * * *

(2) * * * *

(A) In addition to announcing the acceptance of mutually exclusive applications and establishing a date for the filing of petitions to deny such applications, the public notice referred to in paragraph (f)(2) will also announce the date on which all mutually exclusive applicants will be required to pay the hearing fee established in Part 1 of these rules, 47 C.F.R. § 1.1104(2)(c). The date for fee payment shall be at least 30 days after the date established for petitions to deny.

(2) Whenever the public notice announces the acceptance of an application that is mutually exclusive with a renewal application, it shall also announce that the mutually exclusive applicants and the renewal applicant will be required to pay the hearing fee on the date established in the public notice.

* * * * *

FOOTNOTES

[1] A complete list of parties filing comments and reply comments is contained in an Appendix hereto. We are also accepting and considering late filed reply comments submitted by the Howard University Small Business Development Center and the Congressional Black Caucus.

[2] *See, e.g.*, comments of Koteen and Naftalin (K&N) and the NAACP.

[3] Hirrel opines that making settlements less attractive will actually facilitate hearings by discouraging the filing of speculative applications. Discouraging applicant speculation in the comparative process by reducing the expectation of monetary rewards at settlement is the subject of our companion *Report and Order* in *Amendment of Section 73. 3525 of the Commission's Rules Regarding Settlement Agreements Among Applicants for Construction Permits*, FCC 90-411 (adopted December 13, 1990).

[4] RNJ suggests $12,000.

[5] The FCBA also opposes any increase in the hearing fee.

[6] *See* 47 C.F.R. §§ 73.3571(c) (for AM), 73.3572(c) (for TV), 73.3573(f)(2) (for non-reserved band FM filed during a "window").

[7] The public notice announcing the "B" cut-off date identifies all the mutually exclusive applications, and the "B" cut-off date is at least 30 days after the release of the public notice.

[8] The legislative history of the Consolidated Omnibus Budget Reconciliation Act of 1985 describes the hearing fee as "[t]he charge levied when an application is designated for hearing." Conference Report to Accompany H.R. 3128, H.R. Rep. No. 453, 99th Cong., 1st Sess. 427 (1985). However, we do not believe that Congress' description of the fee was intended to limit our discretion to collect the fee at a particular time. Similarly, the legislative history of the Omnibus Budget Reconciliation Act of 1989 states that "[a]pplicants designated for hearing in mutually exclusive, comparative new construction permit, comparative renewal or major/minor change adjudicative proceedings are required to pay fees prior to the applicant's participation in the hearing." 135 *Congressional Record* H 9612 (Nov. 21, 1989). The earlier collection of the hearing fee would not be inconsistent with the 1989 language, but, as with the 1985 legislative history, there is no indication that Congress intended to limit the Commission's discretion to devise regulations for the efficient collection of the fees, including regulations that would alter the time that such payments were required.

[9] We recognize, as observed by RNJ, that preserving the hearing fee refund in settlement cases under section 1.1111(c)(1) may dilute some of the effect achieved by the earlier payment of the hearing fee. On the other hand, as noted by the Hardy Group and AWRT, the HDO plays a role in precipitating settlements, and our own experience indicates that many settlements are filed early in the process to take advantage of the fee exemption in section 1.1111(c)(1). Thus, on balance, we are retaining the fee exemptions in section 1.1111(c) and providing for a refund of the earlier paid fees in the circumstances set out in that rule.

[10] After publication of this rule change in the *Federal Register*, the Commission will issue a public notice specifying the method for payment of the hearing fee.

[11] The Form 301 was amended to require the additional information for applications filed on or after June 26, 1989. Applications that were pending prior to that date were not required to provide the newly required information. *Revision of Application for Construction Permit for Commercial Broadcast Station*, 4 FCC Rcd 3853, *recon. denied*, 5 FCC Rcd (1990).

[12] Presently, such comparative upgrades are not permitted. *See Daytona Broadcasting Co., Inc.*, 101 FCC 2d 1010, 1012, *recon. granted in part*, 102 FCC 2d 931 (1986).

[13] The settlement judge process is an alternate means of dispute resolution within the meaning of the Administrative Dispute Resolution Act. P.L. 101-552 (November 15, 1990). *See* 5 U.S.C. § 581(3). The *Notice* also solicited comments on the potential uses of other alternative dispute resolution techniques in the comparative process. William Ward and Virginia Carson support the use of mediators in the pre-designation settlement process. Section 3 of the Administrative Dispute Resolution Act requires agencies to adopt a policy that addresses alternate means of dispute resolution, and we will take up the question of what other forms of alternative dispute resolution may be efficacious in a separate proceeding commenced under that Act.

[14] The settlement judge shall be a "neutral" as defined in the Administrative Disputes Resolution Act, 5 U.S.C §§ 581(9) and 583(a -d), and he shall have all the powers conferred by that Act. On December 31, 1992, the Chief ALJ shall submit a report to the Commission reflecting the number of cases in which settlement judges have been assigned and the resolution of those cases.

[15] *See also WCVQ, Inc.*, 4 FCC Rcd 4079 (Rev. Bd. 1989) *application for review pending* ; *Mark W. Wodlinger*, FCC 891-04 (Gen. Counsel Jan. 10, 1989); *Breaux Bridge Broadcasters Limited Partnership*, 4 FCC Rcd 5409 (Rev. Bd. 1989).

[16] Under this policy, an applicant could only be relieved of divestiture proposals relating to its comparative standing. Divestiture required by operation of the Commission's ownership restrictions would remain in force.

[17] Compare Section 73.3597 of our rules, which generally provides for a one year holding period for stations authorized after a comparative hearing. 47 C.F.R. § 73.3597(a). The one year period commences with the date on which the stations initiated program tests. 47 C.F.R. § 73.3597(b).

[18] We believe that FCBA's proposal to select a runner-up, who would displace the winning applicant if it failed to live up to its promises, raises legal and other issues that go far beyond the scope of matters set forth in the *Notice*. Accordingly, that proposal will not be considered in this proceeding.

[19] As with the notice of appearance, the documents will be served on counsel for all competing applicants. If no counsel is indicated in an applicant's previous filings, the material will be served on the applicant at the address indicated in the application.

[20] This decision should not be taken as an indication of Commission action in adjudicatory cases that involve questions relating to the active/passive ownership structure under the *Anax* doctrine. As such cases come before us, we will decide them on the basis of the record compiled by the parties.

[21] Similarly, the ALJs retain the discretion to permit the submission of rebuttal cases in the form most conducive to the efficient resolution of the case.

[22] In a companion to this decision, in the *Report and Order* in *Amendment of Section 73. 3525 of the Commission's Rules Regarding Settlement Agreements Among Applicants for Construction Permits*, we determined that applicants entering into settlements after the commencement of the hearing would be ineligible for reimbursement of any expences incurred in the prosecution of their applications.

[23] We are aware of commenters' observations that hearings are often delayed by the unavailability of hearing rooms. In order to meet this guideline, the Office of Managing Director will ascertain how many, if any, additional hearing rooms are necessary and whether that need can be accomodated by putting existing conference rooms and the Commission meeting room into service as hearing rooms. If these alternatives should prove insufficient and additional space is required, we will undertake to make additional hearing rooms available within the limitations of the Commission's budget.

[24] That is, 45 days for findings and 15 days for replies. However, if delays in obtaining hearing transcripts is not a factor, findings should be filed within 30 days. Generally, this time allotment and the time guidelines for the hearing phase of the routine comparative case reflect the fact that motions for extension of the time within which to file pleadings are "not routinely granted." 47 C.F.R. § 1.46(a). In ruling on any extension requests that may be filed under the section 1.46(a) standard, ALJs should closely examine the pleadings to determine whether the request is based on a clear showing of good cause.

[25] Because we expect changes in the nature and number of comparative proceedings as a result of changes accomplished in this *Report and Order* and the *Report and Order* on settlement reimbursement, the 90-day time guideline for IDs is, at this stage, only an estimate of the appropriate time for the preparation of these decisions. So that we can refine this estimate, two years after the effective date of these changes, the Chief Administrative Law Judge will report to the Commission on the ability of our ALJs to meet the time guidelines in routine cases. In cases in which motions to enlarge issues are filed, additional time will be necessary to accommodate the handling of the motion and any additional discovery or hearings that may be required as a result of enlarged issues. We previously determined that expedited discovery procedures would apply to enlarged issues, and, to further reduce the time consumed by issue enlargement, we will adopt FCBA's proposal to require the filing of motions to enlarge within 30 days of the release of the HDO.

[26] Time limits on the ALJs are permissible so long as they do not unduly interfere with a judge's independence to control the course of the proceeding, *Butz v. Economou*, 438 U.S. 478, 513 (1978), or subject the judge to performance appraisals. *See* 5 C.F.R. § 930.211. We do not believe that the proposed time guideline for decisions unduly circumscribes an ALJ's independence, and the proposed guidelines and tracking system would not be used for performance appraisals.

[27] In this regard, we believe that MAP's proposal to delegate additional reviewing authority to the Board would be inconsistent with the limitations on such delegations in section 5(c) of the Communications Act. 47 U.S.C. § 155(c)(1)-(6).

[28] The FCBA's suggestion that we eliminate petitions for reconsideration of Review Board decisions appears inconsistent with section 5(c)(5) of the Act, 47 U.S.C. § 155(c)(5), which provides that parties filing applications for review of Board decisions may not rely on questions of fact or law upon which the Board has been afforded no opportunity to pass. The petition for reconsideration permits parties to raise such "new matter" with the Board before seeking Commission review. Thus, we reject this proposal.

[29] The provision was enacted in 1952, prior to the authorization of the Review Board. Thus, the policy enunciated in this section did not contemplate the two-stage review process that now exists.

[30] We note that the FCBA's suggestion to eliminate petitions for reconsideration of Board decisions, rejected at note 28, above, also appears to be inconsistent with the FCBA's proposal that the Commission limit its review to important policy matters. The proposed limitation on the Commission's review function could result in judicial review of Board decisions that were not subject to Commission review and in which the Board had been afforded no opportunity on reconsideration to correct or address possible legal errors. To the extent any legal errors are not corrected by the Board itself, the Commission's review, in addition to considering important policy questions, must focus on whether the Board's decision is adequate to withstand judicial review.

[31] Exceptions to IDs are filed within 30 days of the release of the decision, and oppositions (or replies) are filed 15 days there after.

[32] Even if such a rule were permissible under the statutory scheme, an order, "disposing of all applications for review," would be required for the computation of time for judicial review. *See* 47 U.S.C. § 155(c)(7).

[33] Applications for Review must be filed within 30 days of the release of the Board's decision, and oppositions must be filed within 15 days of the Application for Review. Thus, considering this pleading cycle, in the routine case, the Commission will act within approximately six and a half months of the release of the Board decision.

[34] As with the time guidelines for the hearing phase of the case, the time allotment for Review Board and Commission review of these cases reflects the fact that motions for extension of the time within which to file pleadings are "not routinely granted." 47 C.F.R. § 1.46(a). In ruling on any extension requests that may be filed under the section 1.46(a) standard, the Review Board and the Commission will closely examine the pleadings to determine whether the request is based on a clear showing of good cause.

[35] Where such issues are specified in the HDO, that order will contain a similar notice.

SEPARATE STATEMENT
OF
COMMISSIONER JAMES H. QUELLO

In the Matter of Proposals to Reform the Commission's Comparative Hearing Process to Expedite the Resolution of Cases, Gen. Doc. No. 90-264.

I fully support the Commission's decision to reform the comparative hearing process for awarding broadcast licenses. Encouraging settlements at an earlier stage in the process and structuring the proceedings in a systematic way should reduce significantly the time and resources devoted to this aspect of our statutory mission. If the rules we adopt today have their intended effect, and I have every reason to believe they will, everybody will benefit.

I am writing separately only to direct the Commission's attention to certain issues raised by commenters that were outside the scope of the instant proceeding. Specifically, several commenters advocated changing the policies for assigning comparative merits and demerits.[1] We declined to address their proposals because they were not raised in the Notice. *Report and Order* at ¶ 52. I have no quarrel with this outcome, but we should not shelve the idea of reevaluating our comparative criteria.

I think the Commission should initiate a new rulemaking proceeding to reexamine some of our policies for evaluating competing applications. Some of the proposals submitted in this proceeding might provide a good point of departure for such an analysis. In addition, I have long argued that the Commission should adopt a "finder's preference" for the applicant that searches for and finds a vacant allotment or successfully obtains a change in the table of allotments. It seems to me that our policies should reward those applicants who go to the trouble and expense of locating available frequencies.

For this reason, I sincerely hope that a reevaluation of our comparative criteria can be made a part of the anticipated "attic to basement" review of broadcast regulations in the coming year.

FOOTNOTE FOR STATEMENT

1 *See, e.g.,* Comments of NAACP; Comments of Radio New Jersey.

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 90-623

In the Matter of

Computer III Remand Proceedings:
Bell Operating Company Safeguards;
and Tier 1 Local Exchange Company
Safeguards

NOTICE OF PROPOSED RULE MAKING AND ORDER

Adopted: December 13, 1990; Released: December 17, 1990

By the Commission: Commissioner Duggan concurring and issuing a statement.

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I. INTRODUCTION

1. In the *Computer III* proceeding, the Commission adopted major changes to the rules governing the Bell Operating Companies' (BOCs') participation in the enhanced services market.[1] In particular, the Commission replaced the requirement that the BOCs offer enhanced services through separate subsidiaries with a set of nonstructural safeguards designed to protect against both discrimination against competing enhanced service providers (ESPs) and cross-subsidization of BOC enhanced services by basic service offerings. In *California v. FCC*, the United States Court of Appeals for the Ninth Circuit vacated and remanded the first three of the Commission's *Computer III* orders.[2] The Court concluded that the Commission had not sufficiently justified the decision to replace structural separation with nonstructural safeguards for BOC provision of enhanced services. The Ninth Circuit also held that the Commission's preemption of certain kinds of state regulation lacked adequate justification.

2. Since the *California* decision, this Commission has undertaken a re-examination of our regulatory regime in this area to consider what safeguards would best encourage the broad-based delivery of enhanced services to the American consumer through the growth of full and fair competition. A technologically innovative and economically efficient telecommunications infrastructure is central to continued United States prominence in the increasingly information-oriented global economy in which we live. To this end, we must remove unnecessary regulatory barriers that impede the responsiveness of American companies to marketplace incentives that foster increasing use and advancement of the nation's telecommunications assets. At the same time, it is equally critical to the development of full and fair competition to establish and maintain effective regulatory safeguards against possible anticompetitive conduct. Our duty to protect regulated service ratepayers requires us to guard against cross-subsidy between basic and enhanced services. Our goal is to put into place effective regulatory safeguards that will best further these public interest goals and serve American consumers.

3. We here propose to institute a strengthened set of nonstructural safeguards to govern BOC provision of enhanced services, including strengthened cost allocation and accounting safeguards applicable to all Tier 1 LECs. We also propose to re-examine the Customer Proprietary Network Information (CPNI) requirements applied to the integrated provision of interstate basic and enhanced services by the BOCs.[3] We propose as well to preempt only those state regulations differing from our federal safeguards that would thwart or impede federal policy, such as our policy permitting the integrated provision of interstate basic and enhanced services by the BOCs, AT&T, and the independent telephone companies (ITCs). Finally, we extend until the completion of this Rule Making

proceeding the interim waiver of *Computer II* requirements granted the BOCs by the Common Carrier Bureau, and clarify the scope of that waiver.[4]

II. REGULATORY SAFEGUARDS GOVERNING BOC PROVISION OF ENHANCED SERVICES

A. Background

1. *Computer II*

4. In the *Computer II* proceeding,[5] the Commission decided that enhanced services are not subject to Title II of the Communications Act.[6] Nonetheless, the Commission was concerned about the potential for anticompetitive conduct and cross-subsidization that could result from AT&T's participation in the enhanced services market. In particular, the Commission was concerned that AT&T could discriminate against competing ESPs through its control over basic services, and shift costs from unregulated to regulated activities.[7] Accordingly, the Commission required AT&T to offer any enhanced services through a fully separated, arm's length subsidiary.

5. Under *Computer II*, AT&T's separate subsidiary was prohibited from providing basic services or owning any network or local distribution transmission facilities, and AT&T was prohibited from offering enhanced services on an integrated basis.[8] The Commission required that AT&T's separate subsidiary obtain under tariff all transmission facilities necessary for the provision of enhanced services.[9] In addition, the Commission required the subsidiary to elect separate officers; maintain separate books of account; employ separate operating, installation, and maintenance personnel; and perform its own marketing and advertising.[10] Moreover, the Commission prohibited the regulated companies and their affiliates from performing software development for each other. Thus, the enhanced service subsidiary had to undertake software design itself or obtain the software from an independent contractor.[11] The regulated companies, however, could provide the affiliate with other types of research and development so long as any transactions were performed on a fully compensatory basis.[12]

6. In addition, the Commission required that AT&T disclose certain kinds of network information. The Commission required that AT&T disclose network information regarding certain new services and network modifications to the public whenever it disclosed such information to its enhanced service subsidiary or to third parties for the benefit of the subsidiary.[13] Furthermore, the Commission established rules regarding customer proprietary information, which required AT&T to disclose this information to independent ESPs at the same time the subsidiary received the information, and under the same terms and conditions.[14] The *Computer II* decision was affirmed on review.[15]

2. Modification of Final Judgment and BOC Separation Order

7. In 1982, two years after the Commission had imposed structural safeguards on AT&T's provision of enhanced services, the United States District Court for the District of Columbia adopted the Modification of Final Judgment (MFJ) in *United States v. AT & T*.[16] Under the MFJ, AT&T was required to divest itself of its twenty-two wholly-owned operating companies, which were then reorganized into seven regional holding companies. As a result of divestiture, the BOCs owned and operated the local exchange facilities and provided intra-LATA toll service, while AT&T provided inter-LATA services.[17] The Court also prohibited the BOCs from manufacturing telecommunications equipment and providing information services.[18] The MFJ Court initially left the question of whether to apply structural separation requirements to BOC CPE and enhanced service operations to legislators and regulators.[19] The Commission addressed this question in the *BOC Separation Order* in late 1983, and required that the BOCs provide CPE, enhanced services, and cellular services through separate subsidiaries.[20] In deciding to apply structural separation requirements to the BOCs, the Commission recognized that various circumstances, including divestiture and state regulatory oversight, had reduced the opportunities for the BOCs to engage in cross-subsidization and discrimination.[21] Nevertheless, the Commission found that the BOCs retained the ability to shift costs from unregulated to regulated activities, otherwise misallocate joint and common costs, and discriminate against competitors through control of the local exchange. The Commission therefore concluded that the benefits of structural separation outweighed the costs of requiring the BOCs to form and operate separate subsidiaries.

8. The Commission undertook, however, to review the appropriateness of structural separation for BOC unregulated activities within two years.[22] In addition, the Commission permitted the BOCs to engage in some joint operations for the provision of CPE and basic services.[23] In the *BOC Separation Reconsideration Order* of June 1984, the Commission affirmed the imposition of structural separation, but noted that nonstructural safeguards might, in the future, prove adequate to protect the public interest.[24]

3. *Computer III*

9. In the *Computer III* proceeding,[25] the Commission re-examined the regulatory framework for BOC provision of enhanced services adopted in *Computer II* and the *BOC Separation Order*. In the *Phase* I Ord er of June 1986, the Commission found that the competitive nature of the enhanced services market, along with various technical and market developments since *Computer II* and the *BOC Separation Order*, had limited the BOCs' ability to engage in cross-subsidization.[26] Using a cost/benefit analysis, the Commission concluded that when compared to nonstructural safeguards, structural separation requirements for BOC enhanced services imposed significant costs on both the public and the BOCs. These costs included decreased efficiency, innovation, and service availability caused in part by the requirement for BOC duplication of facilities and personnel as well as by limitations on joint marketing. The Commission found that, relative to nonstructural safeguards, the costs of structural separation outweighed the benefits. The Commission therefore replaced structural separation with nonstructural safeguards designed to guard against cross-subsidization and discrimination.[27] These measures included, among other things, CEI requirements to ensure the BOCs' ESP competitors "equal access" to BOC basic network services, ONA provisions for expanded ESP access to unbundled network functionalities, and the rules to be developed in the *Joint Cost* proceeding for the allocation of joint costs between regulated and nonregulated activities.[28]

4. California v. FCC

10. In *California v. FCC,* the Court of Appeals reviewed the cost/benefit analysis underlying the *Computer III* decision to replace structural separation with nonstructural safeguards for the provision of BOC enhanced services. The Court stated that the Commission had justified the use of nonstructural safeguards, such as ONA, to prevent the BOCs from providing ESP competitors with discriminatory access to basic network services.[29] But the Court found that the Commission's decision to rely on cost accounting safeguards was arbitrary and capricious, stating that the record did not adequately support the use of cost accounting safeguards to guard against cross-subsidization of enhanced services by the BOCs.[30] The Court vacated the Commission's decision to substitute nonstructural safeguards for structural separation in its entirety and remanded the proceeding to the Commission.

11. In order to avoid disruption of service to consumers following the Ninth Circuit's decision vacating *Computer III,* the Common Carrier Bureau granted an interim waiver of the *Computer II* requirements to allow the BOCs to continue offering enhanced services on an integrated basis pursuant to approved CEI plans. The BOCs, however, were required to withdraw all pending CEI plans, directed to refrain from filing new CEI plans, and ordered to discontinue integrated planning and development of BOC enhanced services except for those that are the subject of an approved CEI plan. The Bureau invited comment on whether the waiver should be extended for the duration of the remand proceeding.[31]

B. Discussion

1. Benefits of Integrated Enhanced Service Operations

12. The California Court, despite its remand, upheld the Commission's determination in *Computer III* that BOC structural separation requirements impose significant public interest costs. Specifically, the Court found record support for the Commission's conclusion that structural separation has resulted in increased prices for enhanced services, the withdrawal of certain enhanced services from the market, and the unavailability of some new forms of enhanced services.[32] The Court also found record support for the FCC's determination that structural separation imposes costs on consumers who have to pay for separate facilities.[33] The Court specifically noted that in the absence of structural separation, "the BOCs would not have to maintain, and customers would not have to pay for, separate organizations and facilities for operating and repairing basic and enhanced services."[34] Moreover, the Court said that the Commission had record support for its conclusion that integration of BOC enhanced and basic service operations would yield economies of scale. For example, as the *California* Court stated, the removal of structural separation requirements allows the BOCs to market and offer customized basic and enhanced service packages. These packages, according to the Court, minimize transaction costs and reduce delays in the delivery of such services.[35]

13. We propose to readopt the Commission's findings that a structural separation requirement imposes substantial public interests costs and that permitting the BOCs to integrate their enhanced and basic service operations would provide benefits to both the enhanced services industry and consumers. As the Commission found in *Computer III*, and the Court affirmed, the substitution of nonstructural safeguards for structural separation would increase the development and availability of enhanced services not only to large business customers but to residential and small business customers as well.[36] Our experience indicates that since adoption of *Computer III*, the BOCs have successfully begun to market enhanced services to these sectors. We request that parties comment on these tentative conclusions and provide evidence in support of their views. We are particularly interested in receiving comments that draw on parties' own experience to date with integrated operations and that rely as much as possible on existing or planned services.

2. Safeguards Against Cross-Subsidization

14. The *California* Court overturned the Commission's decision in *Computer III* to rely on nonstructural safeguards to protect against cross- subsidization because of an absence of record support for "the Commission's position that market and technological changes since *Computer II* and the *BOC Separation Order* have reduced the danger of cross-subsidization by the BOCs."[37] For instance, the Court found that the Commission had failed to explain the reasons in *Computer III* for its "new-found faith" in the efficacy of state regulation in preventing improper cross-subsidization, which it had just questioned in the *BOC Separation Order*.[38] Nor did the Commission, according to the Court, identify the change in circumstances that occurred during the 14 months between the conclusion of the *BOC Separation* proceeding and the initiation of the *Computer III* proceeding that justified the Commission's new emphasis on the importance of the AT&T divestiture in evaluating the risks of cross-subsidization.[39] In sum, the Court found that the Commission had failed to "cite any changes since the *BOC Separation Order* that logically reduces the danger of cross-subsidization by the BOCs."[40] Although concluding that the record failed to show reduced cost-shifting opportunities or incentives for the BOCs,[41] the Ninth Circuit noted that the FCC could have justified its decision on the grounds "that the national interest in allowing the BOCs to compete more efficiently in the enhanced services industry justified reduced regulatory protection against cross- subsidization," but stated "that this is not the case before us."[42]

15. Given these criticisms in the *California* Court's opinion, we have re-examined the public interest benefits of nonstructural safeguards in light of regulatory developments since adoption of the *BOC Separation Order* in late 1983. A possible cost of permitting integrated operations in reliance on nonstructural safeguards is an increased risk of cross-subsidization. Our goal is to protect ratepayers from possible cross-subsidization without placing unnecessary restrictions on the BOCs that hamper their ability efficiently to provide enhanced services to the American consumer. For the reasons described below, we tentatively conclude that our cost allocation safeguards with the revisions proposed in this *Notice* will effectively guard against cross-subsidization. Even assuming that there may be some diminution in protection with cost allocation safeguards relative to structural separation, we tentatively conclude that the danger of this is outweighed by the benefits of integated operations.[43]

16. One critical factor in this analysis is our experience with the adoption and implementation of detailed cost allocation rules and related cost accounting safeguards that separate nonregulated service costs from regulated service costs.[44] At the time of the *BOC Separation Order*,

and at the time of *Computer III*, no effective cost allocation safeguards existed. These rules are now in place and operating.

17. The Commission's joint cost and affiliate transaction rules represent a careful approach geared to protect ratepayers.[45] In particular, carriers are not permitted to recover costs designated as nonregulated in their provision of regulated products and services. Under the Commission's cost allocation rules, costs are directly assigned to regulated or nonregulated activities whenever possible. Costs that cannot be directly assigned are attributed, if possible, to regulated or nonregulated activities in accordance with cost causation principles. All remaining costs are allocated according to a general allocation factor based on the division of total company expense. In specifying cost allocation factors, the Commission acted to ensure that ratepayer interests were protected. For instance, the Commission declined to adopt an incremental costing approach, which would have encouraged faster development and deployment of enhanced services by fostering lower prices. Instead, the Commission used a fully distributed cost allocation methodology, assigning a portion of general overhead to nonregulated activities, which ensured that regulated service ratepayers benefit from efficiencies gained through joint use of the network. The Commission also adopted affiliate transaction rules that prevent the BOCs from charging ratepayers inflated prices for goods and services obtained from nonregulated affiliates, or from providing these affiliates with goods and services at unduly low prices.[46]

18. The Commission has also implemented various cost accounting mechanisms to enforce the joint cost rules. The *Joint Cost Order* required that AT&T and all Tier 1 LECs[47] file cost allocation manuals implementing the Commission's cost allocation rules. The BOCs filed the required cost allocation manuals in 1987. After public comment and careful review, the Common Carrier Bureau conditionally approved the BOC manuals, but required significant revisions in the manuals for each cost category to ensure that the allocations were as precise as possible. For example, the BOCs initially proposed allocating the costs in many of the executive and administrative categories on the basis of a general allocation factor, *i.e.*, the ratio of all directly assigned or attributable nonregulated expenses to total company expenses. The Commission rejected this method since many of the costs could be directly assigned or attributed.[48] Based on detailed instructions from the Bureau, the BOCs refiled their manuals in early 1988. The Commission has now approved all of the BOCs' revised cost allocation manuals subject to certain conditions.[49]

19. The *Joint Cost Order* also directed each of these carriers to obtain and file audits by independent accounting firms of the carriers' cost allocation results reported to the Commission.[50] In implementing this requirement, the independent auditors were required to provide a positive opinion on whether the carriers' methodologies for separating regulated and nonregulated costs were consistent with the carrier's cost allocation manual approved by the Commission and whether the carrier's financial reports reflected an accurate application of those methodologies.[51] The BOCs have now submitted the 1988 and 1989 independent audits of their joint cost allocations.

20. In a separate proceeding, the Commission has also instituted the Automated Reporting and Management Information System (ARMIS),[52] which establishes a computerized information reporting system that provides detailed cost and revenue information from the BOCs and other large carriers. This system, which was also established after the *Computer III* decision, permits easy benchmark comparisons among large local exchange carriers and across time periods to identify serious discrepancies warranting particular Commission attention. In the *ARMIS Order*, the Commission required carriers to file new computerized reports aimed at detecting improper cost-shifting. The quarterly report contains aggregated financial data reflecting the results of the accounting and cost allocation requirements prescribed in Part 32[53] and Part 64[54] of the Commission's Rules. Also, carriers were required to file an annual USOA Report displaying the results of their total activities for every account in the USOA, and a Joint Cost Report showing the allocation to regulated and nonregulated activities for all accounts involved in the ratemaking process.

21. Now in its third year of implementation, the benchmarking process embodied in the Commission's various cost accounting safeguards has allowed the Commission to identify significant disparities in the individual BOC's cost allocations. For example, in the tariff review process, the Commission relied on information developed in staff audits and used the benchmarking process, along with other regulatory techniques, to save consumers hundreds of millions of dollars by comparing the allocations made by the carriers. In particular, in the 1989 and 1990 annual access tariff review process, the Bureau disallowed approximately $214 million in local exchange carriers' interstate basic service rates. The Bureau concluded that the costs should have been allocated to the installation and maintenance of nonregulated inside wiring rather than regulated service offerings.[55]

22. In another action enforcing our safeguards, we issued a *Notice of Apparent Liability* against the NYNEX telephone companies for apparently improper affiliate transactions between NYNEX's local exchange telephone subsidiaries, New York Telephone (NYT) and New England Telephone and Telegraph Company (NET), and NYNEX's nonregulated affiliate, the Material Enterprises Company (MECO), which provided centralized procurement and support services for the NYNEX telephone companies.[56] Based on a Common Carrier Bureau audit, we tentatively concluded that MECO had overcharged its telephone company affiliates by a total of $118.5 million from 1984 through 1988. Accordingly, this Commission ordered NYT and NET to show cause why they should not be required to remove $32.6 million in excessive capital costs from their rate base, and perform ratemaking adjustments to return $35.5 million in improper charges imposed on interstate ratepayers.[57] This Commission also found NYT and NET apparently liable for forfeitures totaling in excess of $1.419 million for violation of the Commission's rules.[58] On October 3, 1990, this Commission entered into a consent decree in which NYNEX agreed to reduce its interstate capital account balances by $32.6 million, reduce interstate revenue requirements by $35.5 million, and make contributions to the United States Treasury in the amount of $1.419 million.[59] Having obtained for interstate ratepayers and the Treasury all of the relief sought by the *Order to Show Cause*, without delay or litigation risk, we agreed to terminate the proceeding without a finding of wrongdoing on the part of NYNEX.

23. This Commission also has vigorously pursued other apparent violations of our cost accounting rules, and has taken action where appropriate. For instance, as a result of a Commission audit of the National Exchange Carrier Association (NECA), we have notified Pacific Bell, Southwestern Bell Telephone Company, New England Telephone and Telegraph Company and New York Telephone Company that they are apparently liable for forfeitures totaling $ 1 million for violation of our accounting rules. This audit focused on the NECA settlement process and certain unusually large adjustments reported to the NECA pool by these carriers during the last three months of 1988.[60]

24. As the preceding paragraphs demonstrate, the Commission has made significant strides since it committed to develop cost allocation safeguards as part of a system of nonstructural safeguards in the initial *Computer III* decision. We have adopted cost allocation safeguards and affiliate transaction rules, reviewed and required substantial changes in the carriers' implementing cost allocation manuals, reviewed the first two sets of independent audits, and conducted our own field audits. In addition to this, we have undertaken a number of important enforcement actions that produced significant benefits for consumers.[61]

25. This Commission's recent adoption of incentive regulation for the LECs is yet a further step that reduces BOC incentives to cross-subsidize. That major development also has occurred long after the *BOC Separation Order* and was not a part of the record before the Court in *California*. Under price cap regulation, the BOCs are no longer automatically entitled to increase rates to recoup cost increases as they would have been under a cost-plus, rate of return system of regulation. Instead, rate levels are adjusted to reflect inflation and anticipated efficiency gains by the BOCs. Thus, unlike under rate-of-return regulation, any misallocation of nonregulated costs to regulated operations under price cap regulation normally would not permit higher prices and increased earnings.[62] Rather, any such additional costs would merely reduce BOC earnings.[63] Although reducing cross-subsidy incentives, LEC price cap regulation does not by itself eliminate improper cost allocation as a matter of regulatory concern, but serves as an effective complement to cost accounting, reporting, auditing, and enforcement safeguards.

26. After thorough re-examination, we now believe that significant regulatory developments since adoption of the *BOC Separation Order*, and indeed since the Commission's *Computer III* decision, have reduced the incentives for BOCs to engage in improper cross-subsidization of their enhanced service operations, as well as their ability successfully to do so. Nevertheless, our re-examination has identified a number of actions we can take that will substantially strengthen even further our cost accounting safeguards that we have applied to the BOCs and other Tier 1 LECs.![64] Similarly, although this proceeding is being initiated in response to the *California* decision, which addresses cost accounting safeguards applicable to the BOCs, we propose to apply each of our strengthened safeguards to all Tier 1 LECs. Accordingly, we propose to require that: (1) all carriers treat enhanced services as nonregulated activities for accounting and cost allocation purposes; (2) the independent auditors be directed to provide the same level of assurance in their required audits as that undertaken in a financial statement audit engagement; (3) the Common Carrier Bureau study means of achieving greater uniformity in the carriers' cost allocation manuals and, if appropriate, take the steps necessary to accomplish this goal; (4) the carriers quantify the effect of cost allocation manual changes when such changes are submitted to the Commission; and (5) the Bureau study whether to establish a reasonable threshold for determining the materiality of errors and omissions discovered in the independent audits of carrier filings, and, if appropriate, take the steps necessary to implement such a threshold. Appendix A contains new and revised rule language implementing these proposed changes and codifying pre- existing manual filing and independent audit requirements. We believe that these measures will provide regulated service ratepayers and the BOCs' (and other Tier 1 LECs') competitors with important additional protections against cross-subsidization.

27. The first of these measures involves continued nonregulated treatment of enhanced services for accounting and cost allocation purposes. The costs of nonregulated activities are removed from the carriers' prescribed Part 32 accounts prior to the jurisdictional separations process.[65] It is essential that telephone company shareholders, not regulated service ratepayers, bear the costs of telephone company nonregulated operations. Isolating the cost of nonregulated activities before applying jurisdictional separations procedures is a cost-effective means of achieving this goal. Under this approach, the carriers are not required to isolate enhanced service costs in each jurisdiction, because all such costs have been allocated to the nonregulated category through a single set of allocation procedures subject to an independent audit.[66]

28. The second proposal involves strengthening the annual independent audits of carrier cost allocation data filed with the Commission. Based on the Bureau's review of the carriers' 1988 and 1989 independent audits, we believe that these audits can be improved in order to increase further both the reliability of this process and its value as a means of assisting the Commission in the most effective use of our own auditing resources. Specifically, we believe that the independent auditors should provide the same level of assurance as that provided with a financial statement audit engagement. An attest engagement results in an opinion by the auditor about the reliability of a written assertion that is the responsibility of another party. A financial statement audit engagement, by contrast, results in an opinion by the auditor whether the company's financial statements are presented fairly, in all material respects, in conformity with generally accepted accounting principles. The audit must include an examination, on a test basis, of evidence supporting the amounts and disclosures in the financial statements, an assessment of the accounting principles used and of significant estimates made by management, and an evaluation of the overall financial statement presentation. The professional standards of field work for financial statement audit engagements specifically require auditors to obtain evidential matter through inspection, observation, inquiries, and confirmations to afford a reasonable basis for the statements under examination, and to evaluate internal controls when those controls are relied upon in determining the extent of auditing procedures. We tentatively conclude that these standards' requirements for the additional examination of source data and for the testing of allocation procedures and reported results are necessary to satisfy fully the Commission's cost allocation require-

ments. We propose to require such a heightened level of assurance for all future independent audits required under our rules.[67]

29. This Commission also tentatively concludes that the joint cost allocation process could be improved further through efforts to achieve greater uniformity in the carriers' cost allocation manuals. The Commission has allowed each carrier to file its own cost allocation manual subject to public review and comment and to Commission review. The Commission initially declined to require uniformity in the cost allocation manuals, stating that it was important, at the beginning of the cost allocation process, to allow the carriers to develop different solutions to cost allocation problems so that the Commission and the carriers could evaluate which methods worked best. At the same time, however, the Commission expressed an expectation that the carriers would gradually adopt procedures from each others' manuals, making the manuals more alike. At this point in time, we believe that both the carriers and the Commission have had an adequate opportunity to examine disparate means of dealing with cost allocation issues, and determine which methods produce the best results. We now believe that the cost allocation process would benefit from efforts to increase uniformity. Accordingly, this Commission proposes to direct the Common Carrier Bureau to take the appropriate action on delegated authority to achieve greater uniformity in the cost allocation manuals.[68]

30. In addition, we propose to require carriers to provide estimates, at the time they file future manual revisions, of the dollar effects that these revisions will have on joint cost allocation results. This will assist the Commission staff and other interested parties in focusing attention on the most significant revisions. We further propose to direct the Bureau to examine whether to establish a specfic standard or standards for the materiality of errors and omissions discovered in the independent audit process and, if appropriate, take steps to implement such standards. Establishing specific standards, if practicable, would further define the obligations of the independent auditors and would affect the kinds of procedures they employ in the conduct of their audits as well as the level of scrutiny,[69] and thus could help ensure the correction of all significant cost allocation errors or omissions discovered in these audits.

31. Thus, after re-examination, we tentatively conclude that a set of nonstructural safeguards, particularly as strengthened by the proposals herein, can effectively protect against possible improper cross-subsidization due to misallocation of BOC costs between basic and enhanced services. We recognize that this approach represents a change from the *BOCSeparation Order*. While we were concerned in that proceeding that effective accounting safeguards against cross-subsidization might be difficult to develop, we have now developed, implemented, and enforced such safeguards and believe that they are indeed effective. In this regard, there have been a number of recent Rule Making and enforcement actions (not before the Court in *California)* demonstrating our commitment and ability to deter, and if it occurs, to detect and remedy, cross-subsidization. Implementation of our detailed cost accounting regime has resulted in FCC actions to prevent or remedy improper cost allocations, and thereby limited BOC opportunities to cross-subsidize. Implementation of the added safeguards proposed in this *Notice* will, as a whole, strengthen the effectiveness of our cost accounting safeguards, and thus further limit BOC cross-subsidization opportunities. Furthermore, implementation of price cap regulation for the BOCs will sever the direct link between any improperly shifted costs and regulated basic service prices, and thereby should reduce BOC incentives to cross-subsidize.

32. We therefore tentatively conclude that our regulations will protect ratepayers and others from the effects of any misallocation of costs between basic and enhanced services, and that structural separation is not now necessary to guard against cross-subsidization. In light of this conclusion and the public interest benefits of permitting integrated BOC enhanced service operations,[70] we tentatively conclude, contrary to the Commission decision in late 1983 in the *BOC Separation Order*, that the costs of a structural separation requirement outweigh any benefits. To the extent cost accounting safeguards may involve any diminution in protection against cross-subsidization, the danger of this is outweighed by the benefits of integration. We seek comment on these tentative conclusions and on our proposals to strengthen our cost accounting safeguards. Although our tentative view is that reliance on nonstructural safeguards is the best means for accomplishing our public interest goals, parties may also comment on alternative approaches. To the extent that any parties support retention of structural separation, we ask that they provide evidence to show why they believe structural separation to be more effective than nonstructural safeguards in detecting and deterring discrimination and cross-subsidization, and that they identify the specific benefits of structural separation that would outweigh the costs -- in terms of lost public benefits -- of structural separation.

3. Safeguards Against Discrimination

33. In the *Computer III Phase I* and *Phase II* orders, the Commission established a number of nonstructural safeguards to protect against possible BOC discrimination against their competitors in the provision of access to underlying basic services. In the *Phase I Order*, the Commission adopted CEI requirements to ensure that unaffiliated ESPs could obtain nondiscriminatory access to underlying basic network services. Thus, the BOCs were required to provide their ESP competitors with "equal access" interconnections to basic network services at the same rates that the BOCs themselves paid.[71] As a result, the basic services used by the BOC enhanced service operations had to "be available to others on an unbundled basis, with technical specifications, functional capabilities, and other quality and operational characteristics, such as installation and maintenance times, equal to those provided to the carrier's enhanced services."[72] As an interim measure, the Commission allowed the BOCs to provide enhanced services on an integrated basis pursuant to Commission-approved service-specific CEI plans, prior to implementing ONA.[73]

34. The Commission also required that the BOCs implement ONA, which extends CEI principles to the overall design of the BOCs' basic networks. In addition, ONA requires that the BOCs give their competitors access to BOC network functionalities by tariffing unbundled basic service building blocks (basic service elements or BSEs). After significant revisions and improvements in the plans resulting from the BOCs working with the ESP industry

under Commission direction, the Commission approved the BOCs' amended ONA plans on May 8, 1990, subject to minor modifications.[74]

35. The Commission adopted additional nonstructural safeguards in the *Phase II Order*. First, the Commission required that the BOCs file quarterly nondiscrimination reports concerning the timing of installation and maintenance, and the quality and reliability, of the basic services used by the BOCs' competitors.[75] Second, the Commission adopted network information disclosure rules to ensure that independent ESPs obtained timely access to technical information related to new or modified network services affecting the interconnection of enhanced services to the network. Finally, the Commission established rules governing BOC and ESP access to CPNI.[76]

36. In reviewing the *Computer III* decisions, the *California* Court did not criticize the Commission's nondiscrimination safeguards. In fact, the Court stated that the record supported the Commission's conclusions that "ONA, CEI, and the growth of bypass technology will be effective in reducing the risk of BOC access discrimination,"[77] and that "lifting the structural separation requirements will benefit consumers of enhanced services by permitting the BOCs to operate more efficiently in the enhanced services market."[78] Thus, despite the decision to vacate the *Computer III* orders, the Court did not find fault with the Commission's nonstructural safeguards designed to prevent discrimination against the BOCs' competitors in access to basic services.

37. In this proceeding, we propose to readopt the *Computer III* nonstructural safeguards against discrimination except for ONA, which we have adopted in our companion order,[79] and for our CPNI requirements, which are discussed separately below. The Commission's experience to date confirms the *Computer III* conclusion that these nonstructural safeguards, implemented within the ONA framework, are sufficient to guard against discrimination. We have received very few complaints from ESPs concerning discriminatory access to the BOC networks. Indeed, many of the later CEI plans filed by the BOCs generated little or no public comment. We seek comment on our tentative reaffirmation of our *Computer III* conclusion. We also note that this proposal includes readoption of our *Computer III* decisions to eliminate both the capitalization plan requirement[80] and the prohibition against the regulated BOC company and its affiliates performing software development for one another. Accordingly, we seek comment on our proposal to reinstitute the pre-existing nonstructural safeguards designed to ensure nondiscriminatory access to BOC basic services. We also ask parties to comment on any relationship between LEC price cap regulation and those nonstructural safeguards that are designed to protect against possible discrimination. We also seek comment on readopting the *Computer III* decisions concerning capitalization plans and software development independent of the broader regulatory regime ultimately adopted in this proceeding.

38. While we propose generally to reinstitute the nondiscrimination safeguards, we request comment about whether we should modify our CPNI rule for enhanced services, which addresses the question of access by the BOCs and by independent ESPs to a customer's CPNI for the purpose of marketing enhanced services. In this area, the Commission has balanced the goals of promoting efficiency in BOC delivery of enhanced services to customers, protecting customer expectations of privacy, and promoting competitive equity in the provision of enhanced services by the BOCs and independent ESPs. Under the current rule,[81] BOC enhanced service personnel are allowed generally to access a customer's CPNI for marketing purposes, but the customer has a right to require the BOC to withhold CPNI from its enhanced service personnel. Upon customer request, the BOCs are required to release CPNI to unaffiliated ESPs on the same terms and conditions that it is made available to their own enhanced service personnel.[82] Thus, if a customer does not affirmatively choose to withhold its CPNI from BOC enhanced service personnel or release it to unaffiliated ESPs, BOC enhanced service personnel can access a customer's CPNI for marketing purposes but independent ESPs cannot.

39. In the *BOC ONA Reconsideration Order* this past spring, we noted that BOC implementation of the current rule may give rise to legitimate concerns regarding the important issues of informed customer choice and competitive equity. We found that the implementation of the rule could affect "whether a customer purchases BOC enhanced services before it is aware either that independent enhanced service providers exist or that those providers can make use of whatever benefits that CPNI provides in structuring a service offering for that customer's needs." We decided that the BOCs "must evidence a good faith effort to address any legitimate concerns of their ESP competitors on this issue," and specifically required that the BOCs include proposed solutions to these issues in their amended ONA plans to be filed in April 1991.[83]

40. Although the *California* Court did not find fault with the Commission's nonstructural safeguards against possible discriminatory conduct, we have decided to expand and accelerate the scope of our review of the CPNI safeguard applicable to BOC provision of enhanced services. We here request not only proposals for improving the implementation of the current CPNI rule, but also comment on possible modifications to the current CPNI rule, such as applying a prior authorization requirement to the BOCs as well as to independent ESPs in some or in all circumstances.[84] Parties should demonstrate in their comments how their proposed rule or implementation procedures effectively balance considerations of efficiency, competitive equity, and privacy. Parties proposing to change the current rule should also address the propriety of various requirements that implement the current rule, such as requirements for the annual notification of multiline business customers and for a computerized password/ID system.

III. PREEMPTION

A. Background

41. As explained above, in *Computer II* the Commission permitted AT&T and its operating companies to provide enhanced services only through corporate affiliates fully separated from their basic services operations. The Commission preempted the states from exempting AT&T and its operating companies from the Commission's structural separation requirements for intrastate regulatory purposes.[85] The Commission did not, however, preclude states from imposing safeguards to protect intrastate ratepayers in addition to those created by the Commission;[86] and states were free to impose structural separation requirements on the unregulated activities of GTE and

other ITCs.[87] In the *BOC Separation Order* the Commission similarly preempted the states from altering the structural separation requirements imposed on the BOCs.[88]

42. In *Computer III* the Commission concluded that it would be in the public interest to permit AT&T and the BOCs to integrate their provision of basic and enhanced services pursuant to nonstructural safeguards. The Commission found that state structural separation requirements would interfere with federal policies, and that facilities and services used by carriers for the provision of basic and enhanced services could not practicably be separated into interstate and intrastate components in a manner that would permit application of conflicting federal and state safeguards.[89] Accordingly, the Commission preempted the states from imposing structural separation requirements or inconsistent nonstructural safeguards on the enhanced service operations of AT&T and the BOCs.[90] The Commission also found that it would be anomalous to have more stringent safeguards applicable to the enhanced services of the ITCs than applied to the BOCs, in view of the ITCs' smaller potential for engaging in anticompetitive conduct. Therefore, the Commission preempted states from imposing on the ITCs structural separation requirements or nonstructural safeguards more stringent than those applied to the enhanced service operations of AT&T and the BOCs.[91]

43. *California v. FCC* vacated the Commission's *Computer III* preemption decisions. The Court was not persuaded that the Commission had adequately justified preemption of state structural separation requirements and of inconsistent nonstructural safeguards. The Court found that the Commission had failed to demonstrate that *all* state-imposed structural separation requirements would negate the federal interest in permitting AT&T and the BOCs to offer integrated enhanced services because the *Computer III Order* failed to address the possibility that some enhanced services might be offered on a purely intrastate basis. The Court stated that the Commission had made a plausible argument that some forms of state structural separation requirements -- for instance, those that could require physical separation of intrastate enhanced and basic service facilities -- could negate federal policies permitting structural integration.[92] The Court found, however, that the Commission had failed to explain how the possibility that some forms of state structural separation requirements could negate federal policy justified the Commission's preemption of *all* state structural separation requirements.[93]

44. The Court also found that the Commission had failed to justify the breadth of the preemption of inconsistent state nonstructural safeguards applicable to AT&T and the BOCs.[94] The Court found inadequate as well the Commission's explanation for preemption of state nonstructural safeguards applicable to the ITCs more stringent than those imposed by the Commission on AT&T and the BOCs.[95] According to the Court, the Commission stated only that it is desirable that the ITCs not be subject to a greater degree of regulation than the BOCs.[96]

B. Discussion

45. This Commission is committed to the development of a strong information services market that makes new, innovative services available to the general public as well as to large businesses. Our goals, which we believe are shared by many state commissions, are to promote the efficient provision of enhanced and basic services by common carriers, while protecting against anticompetitive behavior. In this *Notice*, we tentatively conclude that the best way of achieving these goals at the federal level is to permit the BOCs to develop and market interstate enhanced services on an integrated basis, subject to the safeguards described above. ITCs, under prior Commission determinations, are permitted to integrate their basic and enhanced services. With the adoption of the *Report and Order* today, we have readopted nonstructural safeguards for AT&T's provision of enhanced services.[97] This *Notice* considers the extent to which this Commission might find it necessary to preempt state safeguards applicable to provision of intrastate enhanced services by these carriers.

46. It is inevitable that the various state and federal regulatory authorities will have different perspectives and experiences, and this may lead state commissions to adopt safeguards that are at variance with each other, and with the federal safeguards. Some state requirements are likely to be very similar to federal requirements; others may be complementary. Section 2(b) of the Communications Act generally leaves to the states regulatory jurisdiction over intrastate communications. We may, however, preempt inconsistent state regulation that as a matter of economics and practicality of operation "would necessarily thwart or impede" federal regulation.[98] We propose in this *Notice* to preempt only state regulation of intrastate communications that would necessarily thwart or impede federal regulation.

47. At the same time, we must ensure that disparate federal and state regulatory requirements do not undermine the efficiency of interstate communications. The enhanced services market generally is national or regional in scope, and a degree of certainty and uniformity may be necessary to enable the enhanced services market to develop in the way that both state commissions and this Commission desire. Ensuring a rapid and efficient nationwide communications system is one of the explicitly stated purposes for creation of this Commission,[99] and a mandate which we are committed to fulfilling. Thus, we emphasize that the Commission has jurisdiction over interstate enhanced services,[100] and our jurisdiction over interstate communications encompasses communications over physically intrastate facilities used in those communications.[101]

1. Structural Separation Requirements

48. In *Computer III* the Commission preempted states from requiring AT&T, the BOCs, and ITCs to provide enhanced services through a separate corporate entity with separate facilities and personnel. In this proceeding we propose to preempt those categories of state structural regulation that, as a practical matter, prevent these carriers from integrating their interstate basic and enhanced service operations, thereby thwarting or impeding a valid federal regulatory goal.

49. It is possible that some state structural regulation may not impermissibly thwart federal policies in this area. For example, upon initial analysis, it appears that a simple requirement that a carrier establish a separate corporate entity for provision of intrastate enhanced services by itself may not make it impractical for carriers to provide interstate basic and enhanced services on an integrated basis. It appears to us, however, that a state requirement that separate facilities or personnel be used

for provision of intrastate enhanced services would, as a practical matter, make it impossible for carriers to integrate their interstate basic and enhanced service operations. For instance, as the *California* Court noted, it would appear that general state requirements that carriers use separate facilities to provide intrastate enhanced services would almost inevitably require a separation of facilities used to provide interstate basic and enhanced services because the same facilities are ordinarily used to provide both interstate and intrastate services.[102] If such state structural regulation were not preempted, many of the public interest benefits we have identified as associated with integration would be lost.

50. We seek comment on the practical ability of AT&T and the BOCs to separate different types of facilities and personnel functions for provision of intrastate enhanced services while simultaneously integrating interstate basic and enhanced services pursuant to federal nonstructural safeguards. Specifically, we seek comment on state regulation requiring separate communications facilities and equipment, computer facilities and software, and other facilities such as real estate and vehicles. We also seek comment on the effect of state structural regulation on the following personnel functions: general management, operations, marketing, installation and maintenance, and research and development. These types of facilities and personnel functions should not be regarded as rigidly divided categories. They will in some cases overlap and be closely related. Commenters are requested to delineate special features that weigh for, or against, permitting states to apply structural separation requirements to these types of facilities and personnel functions, or to any other BOC activities. Commenters should fully support claims of economic, technical, or other practical impossibility. If the record shows that state regulations requiring separation of any of these facilities, functions, or activities would thwart or impede the ability of AT&T and the BOCs to integrate their interstate basic and enhanced services, the Commission proposes to preempt those state requirements.

51. In *Computer III* the Commission preempted state structural separation requirements applicable to the ITCs, as well as to AT&T and the BOCs, thereby permitting ITCs to provide integrated interstate enhanced and basic services. We tentatively conclude that the scope of any preemption of state structural requirements adopted in this proceeding likewise should not differ when applied to the ITCs. We solicit comment on this tentative conclusion. Any commenter advocating a different scope of preemption should identify the considerations justifying such a different result, and should define with specificity the suggested scope of preemption.

2. Network Disclosure Rules

52. In *Computer III* we applied special network disclosure rules to the BOCs and AT&T.[103] In this proceeding we propose to re-establish the *Computer III* network disclosure rules applicable to the BOCs. In CC Docket No. 90-368 the Commission is today re-establishing the *Computer III* network disclosure rules applicable to AT&T. These network disclosure obligations are designed to address the potential that these carriers, in the absence of structural separation, may discriminate against their enhanced service competitors in designing new network services or changing network technical specifictions. These rules help ensure that independent ESPs can obtain, on a nondiscriminatory basis, technical and marketing information related to any new or modified network service affecting interconnection of enhanced services to the network. In general, disclosure subject to a protective agreement is required to independent ESPs at the "make/buy" point, *i.e.*, the point in time at which the carrier decides to make itself, or to procure from an unaffiliated entity, any product the design of which affects or relies on the network interface. Public disclosure generally is required at least twelve months before introduction of a new or modified network service.[104] These rules strike a balance between assuring that independent ESPs receive network information on a timely basis and preventing premature disclosure that could impair carriers' development efforts and inhibit network innovation.

53. We tentatively conclude that it will be impossible to apply different state and federal timing requirements for initial disclosure of this network information. In our view, disclosure is inseverable for interstate and intrastate regulatory purposes because, by definition, initial disclosure can occur only once. A state network disclosure rule that mandates disclosure at an earlier time, or prevents disclosure at the time specified in the federal rule, effectively negates the timing specified in the federal rule. Accordingly, we propose to preempt that part of any state network disclosure rule that requires initial disclosure at a time different than that in the federal rule.[105] We do not propose, however, to preempt state procedures that require broader dissemination of this information, but do not affect the timing of the disclosure. We solicit comment on these proposals and on the potential for state network disclosure rules generally to frustrate the ability of AT&T and the BOCs to provide interstate integrated enhanced services. We also solicit comment on whether state network disclosure rules applicable to the ITCs could frustrate their ability to integrate interstate basic and enhanced services.

3. Customer Proprietary Network Information Rules

54. Under *Computer III*, the Commission established CPNI safeguards identical to those applied to the integrated provision by AT&T and the BOCs of CPE and basic services. Balancing efficiency, privacy, and competitive equity considerations, those rules generally permit the carriers' enhanced service operations to access CPNI, but require carriers to provide customers with the right to direct that their CPNI be withheld from the carrier's enhanced services personnel and/or released to other enhanced service vendors. Thus, ESPs are required to obtain a customer's permission in order to access that customer's CPNI, whereas AT&T and the BOCs may access this CPNI without such prior authorization. As set forth earlier in this *Notice*, we are proposing to re-examine the CPNI safeguard as applied to the integrated provision by the BOCs of interstate basic and enhanced services. In a companion order, we are readopting the *Computer III* CPNI restrictions applicable to AT&T's integrated enhanced service operations. States may wish to adopt CPNI rules for intrastate regulatory purposes that differ from FCC rules. We seek comment on whether any preemption of state CPNI regulation differing from federal CPNI safeguards is appropriate or necessary. We also seek comment on whether any preemption of state CPNI requirements should also apply to the ITCs.[106] Parties arguing for preemption of some types of state CPNI regulations

should craft their proposals so that the proposals affect only those narrow categories of state requirements that would thwart or impede federal policy.

4. Nondiscrimination Reporting Requirements

55. In this proceeding we are proposing to re-establish the nondiscrimination reporting requirements applicable to the BOCs. In a companion order, we are readopting reporting requirements applicable to AT&T. The purpose of these requirements is to reduce the potential for the BOCs and AT&T to discriminate in the timing or quality of their provision of basic services to their enhanced service competitors or their competitors' customers. Under these requirements, AT&T and the BOCs report quarterly on the timing of installation and maintenance of, and file annual affidavits on the quality of, basic services provided under CEI plans and ONA.[107] The ITCs are not subject to federal nondiscrimination reporting requirements. We solicit comment on which, if any, state reporting requirements differing from federal requirements would thwart or impede those objectives, or the ability of carriers to integrate provision of interstate basic and enhanced services.

IV. WAIVER OF COMPUTER II

56. After the Ninth Circuit vacated *Computer III*, the BOCs filed a joint petition for an interim waiver of the *Computer II* rules.[108] The Common Carrier Bureau granted an interim waiver of *Computer II* to allow the BOCs to offer enhanced services on an integrated basis to existing and new customers under previously approved CEI plans.[109] The Bureau, however, directed the BOCs to refrain from filing any new CEI plans, to withdraw all pending CEI plans before the Bureau but not yet approved, and to discontinue the integrated planning and development of BOC enhanced services except for those services subject to an approved CEI plan. The waiver order requested comment on whether the waiver should continue throughout the pendency of the remand proceeding, and if so, under what conditions.[110] In light of our proposal to adopt nonstructural safeguards for BOC provision of enhanced services, we conclude that it would be in the public interest to extend the waiver until the completion of the remand proceeding. We take this opportunity to clarify certain aspects of the Bureau waiver, but decline to expand its scope.

57. Most commenters support an extension of the interim waiver for the duration of this Rule Making.[111] Generally, these parties state that it is in the public interest to waive the *Computer II* rules requiring structural separation for BOC enhanced service operations until conclusion of these proceedings in order to avoid disruption for the thousands of customers that currently subscribe to BOC enhanced services.[112]

58. Only three parties, MCI, ATSI and Mid Atlantic, oppose extending the waiver during the pendency of the remand proceeding.[113] MCI and ATSI assert that to obtain a waiver of the *Computer II* rules, a petitioner must demonstrate that concerns about cross-subsidization are outweighed by the possibility of imposing unreasonable costs upon consumers, or the unavailability of an enhanced service if the waiver is not granted.[114] MCI contends that the BOCs have failed to make the showing necessary to justify a waiver.[115] MCI, ATSI and Mid Atlantic also oppose an extension of the waiver on the grounds that the Commission's cost accounting and nonstructural safeguards are not effective in protecting ratepayers and consumers against anticompetitive behavior by the BOCs.[116]

59. For the reasons stated below, we conclude that a limited interim waiver of the Commission's *Computer II* rules to permit the BOCs to offer enhanced services on an integrated basis to existing and new customers pursuant to previously approved CEI plans is in the public interest. The narrow waiver we grant today will avoid unnecessary disruption to customers and the industry, with little attendant risk of anticompetitive behavior.

60. We agree with those parties that state that establishing structural separation requirements on BOC enhanced service operations during the remand proceeding is likely to impose substantial costs on ratepayers and enhanced service customers.[117] To comply with such a requirement, the BOCs would have to form and organize a separate subsdiary, maintain separate books of account, hire separate officers and operating personnel and utilize computer equipment and telecommunications facilities separate from those used in the provision of regulated services.[118] Indeed, in light of the limited duration of this proceeding, the significant costs involved in forming a fully separate subsdiary and the loss of efficiencies of integrated operations, failure to extend this waiver might force the BOCs to suspend some enhanced service offerings and make some enhanced services unavailable in the marketplace.[119] These costs, and the risk of loss of service, will prove to be unnecessary if we adopt our proposed nonstructural safeguards.[120] Thus, requiring structural separation for BOC enhanced services during this interim period would create severe customer disruption and dislocation.[121]

61. Furthermore, we have responded to the *California* Court's concerns. For example, we have prevented the BOCs from expanding the enhanced services that they provide on an integrated basis. They instead are limited to those services that have been the subject of notice and comment and individualized Commission scrutiny in the CEI process. In addition, we are confident that our current cost accounting rules and CEI requirements, as strengthened by interim Bureau actions, will minimize the potential risk of anticompetitive behavior by the BOCs during the pendency of the Rule Making proceeding.[122] Therefore, we have determined that extending the limited waiver granted by the Bureau would serve the public interest by preventing unnecessary customer dislocation and industry disruption with little attendant risk of anticompetitive behavior by the BOCs.[123] We believe our conclusion is consistent with relevant case law. Courts have upheld an agency's authority to adopt interim measures to prevent industry disruption after agency rules have been vacated, and these interim measures may remain in effect while the agency conducts remand proceedings.[124]

62. Several parties also request that we expand the scope of the interim waiver and permit the BOCs to file new CEI plans and to continue integrated planning and development for new enhanced services.[125] U S West requests the right to amend existing CEI plans to add new, "related" enhanced services.[126] Two BOCs also request that the Commission clarify whether the BOCs can file permanent CEI plans for enhanced services presently offered under a market trial waiver upon expiration of that trial.[127] Several BOCs urge us to waive the *Computer II* restriction prohibiting joint research and development for

software."[128] Finally, a few BOCs request that we define "planning and development.""[129] Several parties other than the BOCs assert that any waiver should be limited to the terms of the *Interim Waiver Order*. "[130]

63. We decline to expand the scope of the waiver beyond the *Interim Waiver Order*, but take this opportunity to clarify the parameters of the waiver. During the pendency of this proceeding, the BOCs may not file new CEI plans or engage in integrated planning or development of enhanced services other than those for which CEI plans have been approved. We recognize that the scope of the waivers for AT&T and the BOCs are quite different, but determine that this different treatment is appropriate. The Commission's decision to substitute nonstructural safeguards for structural separation for the BOCs was challenged and briefed before the Court of Appeals; the Commission's decision on structural relief for AT&T was not. It was not necessary to limit the scope of AT&T's waiver, but it is necessary to place limits on the BOC waiver in order to be consistent with the Court's decision. "[131] Moreover, services that have not yet been approved do not raise the customer disruption issues that have led to our decision to grant a limited interim waiver for BOC enhanced services that are the subject of approved CEI plans. To the extent that the BOCs offer enhanced services through a separate subsidiary, they are free to engage in joint research and development, provided that they comply with the *Computer II* requirement for full compensation, which may be achieved through compliance with our affiliate transaction rules."[132]

64. We also wish to clarify several aspects of this waiver. The BOCs may not file new CEI plans or engage in integrated planning and development for enhanced services that are "direct outgrowths" or "logical extensions" of enhanced services offered under approved CEI plans."[133] Second, the BOCs may not amend existing CEI plans to add "related" enhanced services or file permanent CEI plans for enhanced services offered pursuant to a market trial waiver."[134] The *California* decision found that the Commission had not adequately justified use of cost accounting safeguards to protect against cross-subsidization. We think it important, during the pendency of this proceeding, to safeguard against concerns identified by the Court by not generally permitting the BOCs to expand the enhanced services they can provide on an integrated basis. Administratively, we want to avoid questions of line-drawing that these BOC requests would appear to entail."[135] We will, however, permit companies that currently do software research and development on a joint basis to continue to do so for the duration of the Rule Making. Our proposed regulations permit carriers to do joint research and development for software."[136] It appears unnecessarily disruptive to compel a carrier to move its software development for enhanced services into a separate subsidiary when that removal may be temporary."[137] If we decide not to alter the software rule, we will require carriers to separate their software development at that time.

65. In the companion ONA proceeding, Bell Atlantic raises an issue regarding capitalization plans. Bell Atlantic asks that the Commission reinstate the *Computer III* decision eliminating the requirement that the BOCs have a capitalization plan approved before a separate subsidiary may operate. Our proposal, if adopted, would eliminate the capitalization plan requirement."[138] It appears unnecessarily burdensome and not particularly useful to require the BOCs to file capitalization plans for any interim *Computer II* subsidiaries they may establish. During the pendency of this proceeding, the BOCs may establish separate subsidiaries without filing capitalization plans, provided that they comply with the Commission's accounting safeguards. Should we decide not to eliminate the capitalization plan rule, we will require the BOCs to file capitalization plans at that time.

66. Finally, some BOCs have asked us to clarify the meaning of planning and development. It is neither reasonable, nor necessary, to prohibit BOC employees from thinking any thoughts that might lead to the development of an enhanced service."[139] When a company develops a business plan, however, and assigns resources to a specific service, we will consider, for purposes of this waiver, that it is engaged in planning and development. Accordingly, the BOCs must use separate subsidiaries to conduct technology or market trials, and to prepare feasibility studies for enhanced services that are not the subject of an approved CEI plan. The BOCs, however, may perform on an integrated basis activities that precede planning and development, including the identification of customer needs, general market research, and analysis of service or product alternatives."[140]

V. REGULATORY FLEXIBILITY ACT ANALYSIS

67. We certify that the Regulatory Flexibility Act"[141] is not applicable to the rule changes we are proposing in this proceeding. In accordance with the provisions of Section 605 of that Act, a copy of this certification will be sent to the Chief Counsel for Advocacy of the Small Business Administration at the time of publication of a summary of this *Notice* in the Federal Register.

VI. PAPERWORK REDUCTION ACT ANALYSIS

68. The proposals contained herein have been analyzed with respect to the Paperwork Reduction Act of 1980 and found to impose new or modified information collection requirements on the public. Implementation of any new or modified requirement will be subject to approval by the Office of Management and Budget as prescribed by the Act.

VII. EX PARTE REQUIREMENTS

69. For purposes of this non-restricted notice and comment Rule Making proceeding, members of the public are advised that *ex parte* presentations are permitted except during the Sunshine Agenda period. *See generally* Section 1.1206(a) of the Commission's Rules, 47 C.F.R. § 1.1206(a). The Sunshine Agenda period is the period of time which commences with the release of a public notice that a matter has been placed on the Sunshine Agenda and terminates when the Commission: (1) releases the text of a decision or order in the matter; (2) issues a public notice stating that the matter has been deleted from the Sunshine Agenda; or (3) issues a public notice stating that the matter has been returned to the staff for further consideration, whichever occurs first. Section 1.1202(f) of the Commission's Rules, 47 C.F.R. § 1.1202(f). During the Sunshine Agenda period, no presentations, *ex parte* or otherwise, are permitted unless specifically requested by the Commission or staff for the clarification or adduction

of evidence or the resolution of issues in the proceeding. Section 1.1203 of the Commission's Rules, 47 C.F.R. § 1.1203.

70. In general, an *ex parte* presentation is any presentation directed to the merits or outcome of the proceeding made to decision-making personnel which: (1) if written, is not served on the parties to the proceeding; or (2), if oral, is made without advance notice to the parties to the proceeding and without opportunity for them to be present. Section 1.1202(b) of the Commission's Rules, 47 C.F.R. § 1.1202(b). Any person who makes or submits a written *ex parte* presentation shall provide on the same day it is submitted two copies of same under separate cover to the Commission's Secretary for inclusion in the public record. The presentation (as well as any transmittal letter) must clearly indicate on its face the docket number of the particular proceeding(s) to which it relates and the fact that two copies of it have been submitted to the Secretary, and must be labeled or captioned as an *ex parte* presentation.

71. Any person who in making an oral *ex parte* presentation presents data or arguments not already reflected in that person's written comments, memoranda, or other previous filings in that proceeding shall provide on the day of the oral presentation an original and one copy of a written memorandum to the Secretary (with a copy to the Commissioner or staff member involved) which summarizes the data and arguments. The memorandum (as well as any transmittal letter) must clearly indicate on its face the docket number of the particular proceeding and the fact that an original and one copy of it have been submitted to the Secretary, and must be labeled or captioned as an *ex parte* presentation. Section 1.1206 of the Commission's Rules, 47 C.F.R. § 1.1206.

72. All relevant and timely comments and reply comments will be considered by this Commission. In reaching our decision, this Commission may take into account information and ideas not contained in the comments, provided that such information or a writing containing the nature and source of such information is placed in the public file, and provided that the fact of this Commission's reliance on such information is noted in the Order. For purposes of this proceeding, we incorporate the record before the Commission in the *Computer III* docket.

VIII. ORDERING CLAUSES

73. Accordingly, IT IS ORDERED that NOTICE IS HEREBY GIVEN of the proposed regulatory changes described above, and that COMMENT IS INVITED on these proposals."[142]

74. IT IS FURTHER ORDERED that pursuant to applicable procedures set forth in Sections 1.415 and 1.419 of the Commission's Rules, 47 C.F.R. §§ 1.415 and 1.419, comments SHALL BE FILED with the Secretary, Federal Communications Commission, Washington, D.C. 20554 on or before February 15, 1991, and reply comments SHALL BE FILED with the Secretary on or before March 18, 1991. To file formally in this proceeding, participants must file an original and four copies of all comments, reply comments, and supporting comments. If participants want each Commissioner to receive a personal copy of their comments, an original plus nine copies must be filed. In addition, parties should file two copies of any such pleadings with the Policy and Program Planning Division, Common Carrier Bureau, Room 544, 1919 M Street, N.W., Washington, D.C. Parties should also file one copy of any documents filed in this docket with this Commission's copy contractor, International Transcription Services, Inc., Suite 140, 2100 M Street, N.W., Washington, D.C. Comments and reply comments will be available for public inspection during regular business hours in the Docket Reference, Room 239, 1919 M Street, N.W., Washington, D.C. 20554.

75. IT IS FURTHER ORDERED, that a waiver of the *Computer II* rules IS GRANTED to the extent described herein.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX A

Proposed Amendments to the Code of Federal Regulations

Title 47 of the C.F.R., Part 64, is proposed to be amended as follows:

Part 64 -- Miscellaneous Rules Relating to Common Carriers

1. The authority citation for Part 64 continues to read as follows:

Authority: Sec. 4, 48 Stat. 1066, as amended; 47 U.S.C. 154. Interpret or apply secs. 201, 218, 48 Stat. 1070, as amended, 1077; 47 U.S.C. 201, 218.

2. New section 64.903 is added to read as follows:

64.903 Cost Allocation Manuals

(a) Each local exchange carrier with annual operating revenues of $100 million or more shall file with the Commission a manual containing the following information regarding its allocation of costs between regulated and nonregulated activities:

(i) A description of each of the carrier's nonregulated activities;

(ii) A list of all the activities to which the carrier now accords incidental accounting treatment and the justification therefor;

(iii) A chart showing all of the carrier's corporate affiliates;

(iv) A statement identifying each affiliate that engages in or will engage in transactions with the carrier and a description of the nature, terms and frequency of each transaction;

(v) A table showing, for each account containing costs incurred in providing regulated services, the cost pools within that account, the procedures used to place costs into each cost pool, and the method used to apportion the costs within each cost pool between regulated and nonregulated activities; and

(vi) A description of the time reporting procedures that the carrier uses, including the methods or studies designed to measure and allocate non-productive time.

(b) Each carrier shall ensure that the information contained in its cost allocation manual is accurate. Carriers must update their manuals at least quarterly, except that changes to the sections dealing with time reporting and cost allocation procedures must be filed at least 60 days before the carrier plans to implement the changes. Proposed changes in time reporting and cost allocation procedures must be accompanied by a statement quantifying the impact of each change on regulated operations. The Chief, Common Carrier Bureau may suspend any such changes for a period not to exceed 180 days, and may thereafter allow the change to become effective or to prescribe a different procedure.

(c) The Commission may by order require any other communications common carrier to file and maintain a cost allocation manual as provided in this section.

3. New section 64.904 is added to read as follows:

64.904 Independent Audits

(a) Each local exchange carrier required by this Part or by Commission order to file a cost allocation manual shall have performed annually, by an independent auditor, an audit that provides a positive opinion on whether the carrier's cost allocation methodologies used in preparing reports to the Commission are in conformity with its cost allocation manual and whether the reported results are an accurate application of those methodologies and fairly present the financial results of the company's operations. In conducting this audit, the auditors shall obtain evidential matter through inspection, observation, inquiry and confirmation to afford a reasonable basis for the statements under examination. They shall also evaluate and report on the internal controls when those controls are relied upon in determining the extent of auditing procedures.

(b) The report of the independent auditor shall be filed at the time that the local exchange carrier files the annual report required by Section 43.21(f) of this Chapter.

APPENDIX B

Parties Filing Comments

American Newspaper Publishers Association (ANPA Comments)

Ameritech Operating Companies (Ameritech Comments)

Association of Telemessaging Services International, Inc. (ATSI Comments)

Bell Atlantic Telephone Companies (Bell Atlantic Comments)

BellSouth Corporation (BellSouth Comments)

CompuServe Incorporated (CompuServe Comments)

MCI Telecommunications Corporation (MCI Comments)

NYNEX Telephone Companies (NYNEX Comments)

People of the State of California and the Public Utilities Commission of the State of California (California Comments)

Public Service Commission of the District of Columbia (DC PSC Comments)

Southwestern Bell Telephone Company (SWBT Comments)

United States Telephone Association (USTA Comments)

U S West, Inc. (U S West Comments)

Parties Filing Replies

American Newspaper Publishers Association (ANPA Reply)

Ameritech Operating Companies (Ameritech Reply)

Bell Atlantic Telephone Companies (Bell Atlantic Reply)

BellSouth Corporation (BellSouth Reply)

Boston Technology, Inc. (Boston Reply)

CompuServe Incorporated (CompuServe Reply)

Florida Telemessaging Coalition

MCI Telecommunications Corporation (MCI Reply)

Mid-Atlantic Association of Enhanced Service Providers (Mid-Atlantic Reply)

NYNEX Telephone Companies (NYNEX Reply)

Pacific Bell and Nevada Bell (Pacific Reply)

People of the State of California and the Public Utilities Commission of the State of California (California Reply)

Public Service Commission of the District of Columbia (DC PSC Reply)

Southwestern Bell Telephone Company (SWBT Reply)

U S West, Inc. (U S West Reply)

FOOTNOTES

[1] Amendment of Sections 64.702 of the Commission's Rules and Regulations (*Computer III)*, CC Docket No. 85-229, Phase I, *Report and Order*, 104 FCC 2d 958 (1986) (*Phase I Order*), *recon.*, 2 FCC Rcd 3035 (1987) (*Phase I Reconsideration Order*), *further recon.*, 3 FCC Rcd 1135 (1988) (*Phase I Further Reconsideration Order*), *second further recon.*, 4 FCC Rcd 5927 (1989) (*Phase I Second Further Reconsideration Order*), *Phase I Order* and *Phase I Reconsideration Order vacated sub nom.* California v. FCC, 905 F.2d 1217 (9th Cir. 1990), *appeal pending sub nom.* Illinois Bell Telephone Co. v. FCC, No. 88-1364 (D.C. Cir. pet. for rev. filed May 16, 1988); Phase II, 2 FCC Rcd 3072 (1987) (*Phase II Order*), *recon.*, 3 FCC Rcd 1150 (1988) (*Phase II Reconsideration Order*), *further recon.*, 4 FCC Rcd 5927 (1989) (*Phase II Further Reconsideration Order*), *Phase II Order vacated sub nom.* California v. FCC, 905 F.2d 1217 (9th Cir. 1990), *appeal pending sub nom.* California v. FCC, No. 88-7183 (9th Cir. pet. for rev. filed May 13, 1988).

[2] California v. FCC, 905 F.2d 1217 (9th Cir. 1990) (*California*). The *Computer III* decisions before the Ninth Circuit were the *Phase I Order*, the *Phase I Reconsideration Order*, and the *Phase II Order*. Amendment of Sections 64.702 of the Commission's

Rules and Regulations, CC Docket No. 85-229, *Phase I Order*, 104 FCC 2d 958 (1986); *Phase I Reconsideration Order*, 2 FCC Rcd 3035 (1987); *Phase II Order*, 2 FCC Rcd 3072 (1987).

[3] We do not consider in this proceeding all the issues raised by the Ninth Circuit's opinion. On August 6, 1990, we issued a *Notice of Proposed Rule Making* that focused on certain *Computer III* decisions that were not addressed in the briefs before the Ninth Circuit, such as the adoption of Open Network Architecture (ONA) requirements and the application of nonstructural safeguards to AT&T's provision of enhanced services. Computer III Remand Proceedings, 5 FCC Rcd 5242 (1990). In a companion order, we today reinstate our ONA requirements established in the *Computer III* and *ONA* proceedings, regardless of whether the Commission ultimately readopts nonstructural, rather than structural, safeguards for the provision of BOC enhanced services. In that order, we also readopt nonstructural safeguards for AT&T's provision of enhanced services and decide a limited number of other *Computer III* issues. Computer III Remand Proceedings, CC Docket No. 90-368, FCC 90-415 (released December 17, 1990).

[4] The Ninth Circuit's vacation of the Commission's *Computer III* decision generally returned the industry to a *Computer II* regime. *See* Bell Operating Companies' Joint Petition for Waiver of Computer II Rules, 5 FCC Rcd 4714 (Com.Car.Bur. 1990) (*Interim Waiver Order*). Upon petition by the BOCs, the Common Carrier Bureau issued a limited interim waiver to allow the BOCs to continue offering enhanced services on an integrated basis pursuant to approved comparably efficient interconnection (CEI) plans. The Bureau invited comment on whether the Commission should extend the waiver until completion of the remand proceedings, and if so, under what conditions. *Id.* at 4715, para. 10.

[5] Amendment of Section 64.702 of the Commission's Rules and Regulations (*Computer II), 77 FCC 2d 384 (1980) (*Final Decision), modified on recon.*, 84 FCC 2d 50 (1981) (*Reconsideration Order), modified on further recon.*, 88 FCC 2d 512 (1981) (*Computer II Further Reconsideration Order), affirmed sub nom.* Computer and Communications Industry Association v. FCC, 693 F.2d 198 (D.C. Cir. 1982), *cert. denied*, 461 U.S. 938 (1983).

[6] *Final Decision*, 77 FCC 2d at 428-430, paras. 114-118.

[7] *Id.* at 463-464, para. 208.

[8] *Id.* at 475-486, paras. 233-260; *Reconsideration Order*, 84 FCC 2d at 75-86, paras. 72-105; 47 C.F.R. § 64.702.

[9] 47 C.F.R. § 64.702.

[10] *Final Decision*, 77 FCC 2d at 487, para. 261.

[11] *Id.* at 479-480, para. 243. This prohibition against software develpment did not preclude the separate subsidiary from obtaining generic software embedded in customer premises equipment (CPE) from the regulated company. *Id.* at 480, para. 244.

[12] *Id.* at 480-481, paras. 247-248.

[13] *Phase I Order*, 104 FCC 2d at 1081, para. 247; 47 C.F.R. § 64.702(d)(2). Other carriers were required to make such disclosure reasonably in advance of implementation. *Id.* at 970, para. 15.

In 1983, the Commission required AT&T to disclose all technical information involving new network services or modifications in network services, as well as information relating to the timing of introduction, pricing, and geographic availability of new network services or capabilities, at the time AT&T provides such information to its separate subsidiary or to others for the benefit of its separate subsidiary. Computer and Business Equipment Manufacturers Association, *Report and Order*, 93 FCC 1226, 1238, para. 37 (1983). Also, the Commission required AT&T to disclose information involving joint research and development by AT&T and its separate subsidiary leading to the design or manufacture of any product affecting the network interface or relying on an interface not yet implemented, as well as information relating to the development of new network services or features at the request of the subsidiary. Such disclosure was required at the "make/buy" point, *i.e.*, at the time when AT&T decides to manufacture the product itself or to procure the product from an unaffiliated company. *Id.* at 1239, 1244-1245, paras. 40, 58, 60.

[14] *Final Decision*, 77 FCC 2d at 481, para. 249; 47 C.F.R. § 64.702(d)(3).

[15] Computer and Communications Association v. FCC, 693 F.2d 198 (D.C. Cir. 1982), *cert. denied*, 461 U.S. 938 (1983).

[16] 552 F.Supp. 131 (D.D.C. 1982), *affirmed sub nom.* Maryland v. United States, 460 U.S. 1001 (1983).

[17] As part of the AT&T divestiture, the Court divided the BOC service territories into Local Access and Transport Areas that, with certain exceptions, define the geographic scope of toll service provided by the BOCs.

[18] 552 F.Supp. at 227. The Court subsequently authorized BOC provision of certain information transmission and gateway services, but prohibited BOC provision of information content. United States v. Western Electric Co., Inc., 714 F.Supp. 1 (D.D.C. 1988).

[19] 552 F.Supp. at 193, n. 251. For purposes of this *Notice*, the terms enhanced service and information service are used interchangeably. The District Court later required that the BOCs establish separate subsidiaries for the provision of noncommunications services as a condition of MFJ waivers. *See* U.S. v. Western Electric Co., 592 F.Supp. 846, 870-871 (D.D.C. 1984), *appeal dismissed*, 777 F.2d 23 (D.C. Cir. 1985). When Judge Greene modified the line of business restrictions in the first triennial review, the separate subsidiary requirement for the provision of noncommunications services was eliminated. U.S. v. Western Electric Co., 673 F.Supp. 525, 599 (D.D.C. 1987); United States v. Western Electric Co., 714 F.Supp. 1 (D.D.C. 1988), *motions for amendment and clarification denied*, 690 F.Supp. 22 (D.D.C. 1988).

[20] Policy and Rules Concerning the Furnishing of Customer Premises Equipment, Enhanced Services and Cellular Communications Equipment by the Bell Operating Companies, CC Docket No. 83-115, *Report and Order*, 95 FCC 2d 1117, 1120, para. 3 (1984) (*BOC Separation Order), affirmed sub nom.* Illinois Bell Telephone Co. v. FCC, 740 F.2d 465 (1984), *affirmed on recon.*, FCC 84-252, 49 Fed. Reg. 26056 (1984) (*BOC Separation Reconsideration Order), affirmed sub nom.* North American Telecommunications Association v. FCC, 772 F.2d 1282 (7th Cir. 1985).

[21] *BOC Separation Order*, 95 FCC 2d at 1129-1130, para. 28.

[22] *Id.* at 1140, para. 61.

[23] *See id.* at 1140-1145, para. 62-71.

[24] *BOC Separation Reconsideration Order* at para. 20.

[25] *See* note 1 *supra*.

[26] *Phase I Order*, 104 FCC 2d at 1010-1011, paras. 95-96.

[27] *Id.* at 1011-1092, paras. 98-99, 127-131, 147-166, 171-186, 190-193, 198-200, 210-222, 234-240, 246-255, 260-265.

[28] *See id.* at 1026-1077, paras. 127-131, 147-166, 210-222, 234-240.

[29] *California*, 905 F.2d at 1233, 1238.

[30] *Id.* at 1238.

[31] *See* note 4 *supra*.

[32] *California*, 905 F.2d at 1232.

[33] *Id.* at 1231.

[34] *Id.*

[35] *Id.*

[36] *Phase I Order,* 104 FCC 2d at 1007-1008, paras. 89, 91; *California,* 905 F.2d at 1232.

[37] *California,* 905 F.2d at 1238.

[38] *Id.* at 1236-1237.

[39] *Id.* at 1228, 1237.

[40] *Id.*

[41] *Id.* at 1238.

[42] *Id.* at 1238-1239.

[43] *See* paras. 12, 13 *supra.*

[44] Separation of Costs of Regulated Telephone Service From Costs of Nonregulated Activities & Amendment of Part 31, the Uniform System of Accounts for Class A and Class B Telephone Companies to Provide for Nonregulated Activities and to Provide for Transactions Between Telephone Companies and Their Affiliates, CC Docket No. 86-111, 2 FCC Rcd 1298 (1987) (*Joint Cost Order), recon.,* 2 FCC Rcd 6283 (1987) (*Joint Cost Reconsideration Order), further recon.,* 3 FCC Rcd 6701 (1988) (*Joint Cost Further Reconsideration Order), affirmed sub nom.* Southwestern Bell Corporation v. FCC, 896 F.2d 1378 (D.C. Cir. 1990).

[45] Several parties appealed portions of the affiliate transaction rules to the United States Court of Appeals for the District of Columbia Circuit. That Court affirmed the Commission's decision. Southwestern Bell Corporation v. FCC, 896 F.2d 1378 (D.C. Cir. 1990).

[46] 47 C.F.R. § 32.27.

[47] Tier 1 companies are those companies having annual revenues from regulated telecommunications operations of $100 million or more. The initial class of a company is determined by its lowest annual operating revenues for the five immediately preceding years. Subsequent changes in classification are made if annual operating revenues shows a greater or lesser classification for five consecutive years. Commission Requests for Cost Support Material to be Filed with January 1, 1991 Access Tariff Revisions, DA 90-1499, para. 3 n. 7 (released October 24, 1990).

[48] *See e.g.,* Nevada Bell's Permanent Cost Allocation Manual and Pacific Bell's Permanent Cost Allocation Manual, 3 FCC Rcd 287, 299 (Com.Car.Bur. 1988). The Commission also rejected several other BOC proposals to allocate the cost of land and buildings, finding that they did not reflect actual usage. *See e.g.,* Southwestern Bell Telephone Company's Permanent Cost Allocation Manual, 3 FCC Rcd 447, 454-455 (Com.Car.Bur. 1988).

[49] The approved cost allocation manuals describe, in considerable detail, the methods each carrier uses to implement the Commission's cost allocation requirements. For example, Pacific's manual describes how it allocates salary and wage expenses between regulated and nonregulated activities. Pursuant to its manual, Pacific uses an analysis of job functions to directly assign or attribute costs to regulated and nonregulated operations whenever possible. It also uses job functions to assign costs to cost pools for allocation between regulated and nonregulated operations. When direct assignment or attribution is not possible, Pacific uses positive time reporting, which requires that employees account for all their time in 15-minute increments, and exception time reporting, which requires that employees occasionally working on nonregulated projects report such activities when the time involved exceeds one hour. In addition, Pacific uses special studies to allocate salary and wage expenses in the case of employees whose functions involve increments of time that are impractical to report. Pacific's manual details the application of each of these methods to Pacific's various employment categories. *See* Pacific Bell's Permanent Cost Allocation Manual, page 2-1, filed December 30, 1988, page 2-2, filed December 29, 1989, page 2-3, filed January 31, 1990, pages 2-5 to 2-9, filed June 29, 1990, pages 2-10 to 2-18, filed December 29, 1990.

[50] *Joint Cost Order,* 2 FCC Rcd at 1304, para. 47.

[51] *See* Responsible Accounting Officer (RAO) Letter 12, DA 88-1060, revised July 7, 1988.

[52] Automated Reporting Requirements for Certain Class A and Tier 1 Telephone Companies (Parts 31, 43, 67, and 69 of the FCC's Rules), 2 FCC Rcd 5770 (1987) (*ARMIS Order), recon.,* 3 FCC Rcd 6375 (1988).

[53] Part 32 contains the Uniform System of Accounts (USOA), which lists over 250 accounts that are used by the carriers to record the costs and revenues of their regulated and nonregulated activities.

[54] Part 64 contains the rules adopted in the *Joint Cost Order* that separate regulated costs from the costs of nonregulated activities.

[55] *See* Annual 1990 Access Tariff Filings, CC Docket No. 90-320, 5 FCC Rcd 4177, 4179-4184, paras. 12-52 (Com.Car.Bur. 1990); Annual 1989 Access Tariff Filings, 4 FCC Rcd 3638, 3646-3647, paras. 81-85 (Com.Car.Bur. 1989), *recon. dismissed,* 4 FCC Rcd 5684 (Com.Car.Bur. 1989); applications for rev. pending; Local Exchange Acess Tariff Rate Levels, 4 FCC Rcd 5533, 5536-5540, paras. 28-64 (1989), Southwestern Bell Telephone Company Revisions to Tariff F.C.C. No. 68, 4 FCC Rcd 7939, 7940-7942, paras. 17-26 (Com.Car.Bur. 1989).

[56] *See* New York Telephone Co. and New England Telephone and Telegraph Co., Apparent Violations of the Commission's Rules and Policies Governing Transactions with Affiliates, *Order to Show Cause and Notice of Apparent Liability for Forfeitures,* 5 FCC Rcd 866 (1990).

[57] *Id.* at 870-871, paras. 31, 33. This $35.5 million represents the interstate portion of the apparently excessive charges imposed on ratepayers from 1984 through 1988. The remainder was assigned to the intrastate jurisdiction through the separations process. *Id.* at 872 n. 2, 873 n. 27.

[58] *Id.* NYT and NET denied any allegations of wrongdoing.

[59] New York Telephone Co. and New England Telephone and Telegraph Co. Apparent Violations of the Commission's Rules and Policies Governing Transactions with Affiliates, 5 FCC Rcd 5892 (1990), *pets. for recon. pending,* filed by Allnet Communication Services, Inc., November 2, 1990, Scott J. Rafferty, November 5, 1990, and New York State Department of Law and New York State Consumer Protection Board, November 5, 1990.

[60] New York Telephone Co., Apparent Violations of the Commission's Rules, *Notice of Apparent Liability for Forfeiture and Order to Show Cause,* FCC 90-384 (released November 9, 1990); New England Telephone and Telegraph Co., Apparent Violations of the Commission's Rules, *Notice of Apparent Liability for Forfeiture and Order to Show Cause,* FCC 90-383 (released November 9, 1990); Pacific Bell, Apparent Violations of the Commission's Rules, *Notice of Apparent Liability for Forfeiture and Order to Show Cause,* FCC 90-385 (released November 9, 1990); Southwestern Bell Telephone Company, Apparent Violations of the Commission's Rules, *Notice of Apparent Liability for Forfeiture and Order to Show Cause,* FCC 90-386 (released November 9, 1990).

[61] We also note that Congress recently authorized significant increases in the FCC's statutory authority to assess forfeitures. Pub. L. No. 101-239, 103 Stat. 2131 (1989). The Commission can now assess forfeitures for accounting rule violations under sec-

tion 220(d) of the Communications Act of up to $6,000 per day of the continuance of each such violation, with no cap. Forfeitures against common carriers under section 503(b)(2)(B) of the Act can be assessed for as much as $100,000 per violation with no cap, or $100,000 per day in the case of continuous violations subject to a cap of $1 million. Previously, the Commission's forfeiture authority under section 220(d) was limited to $500 per day with no cap, and its forfeiture authority regarding common carriers under section 503(b)(2)(A) was limited to $2000 per violation, or per day of a continuous violation, with a cap of $20,000 for a single Notice of Apparent Liability. The 1989 legislation also increased the Commission's forfeiture authority respecting common carriers under sections 202(c), 203(e), 205(b), 214(d), and 219(b) of the Communication's Act.

[62] Policy and Rules Concerning Rates for Dominant Carriers, CC Docket No. 87-313, FCC 90-314, at paras. 200, 213 (released October 4, 1990), *pets. for recon. pending*, filed November 19, 1990.

[63] To a limited extent, there may be some incentive under price cap regulation for a LEC whose earnings might be approaching the sharing mark to attempt to shift costs to the regulated side of its operations.

[64] The *Joint Cost Order* applied our most detailed cost accounting safeguards to all Tier 1 LECs, and not just to the BOCs. *Joint Cost Order*, 2 FCC Rcd at 1300, 1304-1305, paras. 4, 47-49.

[65] Because the Commission had preemptively deregulated enhanced services in *Computer III*, these services were classified as nonregulated for accounting and cost allocation purposes pursuant to the *Joint Cost Order* and the Commission's rules. *See* Section 32.23 (a) of the Commission's Rules, 47 C.F.R. § 32.23 (a). After the *California* decision, the Chief, Accounting and Audits Division directed the carriers to continue to account for enhanced services as nonregulated on an interim basis pending a Commission decision on permanent accounting treatment. Responsible Accounting Officer (RAO) Letter 16, DA 90-1408 (released October 18, 1990), *applications for rev. pending*, People of the State of California and the Public Utilities Commission of the State of California, filed November 16, 1990, Public Service Commission of the District of Columbia, filed November 19, 1990.

[66] Detariffing the Installation and Maintenance of Inside Wiring, *Second Further Notice of Proposed Rule Making*, CC Docket No. 79-105, 5 FCC Rcd 3407, 3409-3410 (1990). *See also Joint Cost Order*, 2 FCC Rcd at 1308-1309, para. 79.

[67] The Accounting and Audits Division of the Common Carrier Bureau has already implemented a similar requirement on a one-time basis for purposes of the 1990 independent audits. The 1988 and the 1989 independent audits involved a lesser standard. *See* note 51 *supra*.

[68] Given the differences in the carriers' operations and in their various nonregulated activities, we expect that certain differences in the manuals will remain.

[69] In general, the lower the threshold for materiality of errors and omissions, the closer and more costly the scrutiny required for the auditors to make the necessary certification.

[70] *See* paras. 12, 13 *supra*.

[71] We did not mandate exact technical equality so long as any technical variations were no greater than those for the basic services used by the BOCs. We did, however, reject proposals for interconnection that afforded only "rough comparability." *See Phase I Order*, 104 FCC 2d at 1036 n. 210, 1037, para. 150.

[72] *Id.* at 1036, para. 147.

[73] *Id.* at 1054-1055, para. 190. The Commission has approved 21 CEI plans and four market trial waivers. *Interim Waiver Order*, 5 FCC Rcd at 4715, para. 8.

[74] Filing and Review of Open Network Architecture Plans, CC Docket No. 88-2 Phase I, 5 FCC Rcd 3084 (1990) (*BOC ONA Reconsideration Order), pets. for rev. pending*, filed by Pacific Bell and Nevada Bell, BellSouth, NYNEX, U S West, and Southwestern Bell Telephone Company on August 6, 1990. In a companion order adopted today, we reinstitute our prior ONA requirements. *See* note 3 *supra*.

[75] *See Phase II Order*, 2 FCC Rcd at 3082, 3084, paras. 73, 89. In the *BOC ONA Order* and the *BOC ONA Amended Plans Order*, the Commission found that the BOCs had shown that their mechanized procedures and systems precluded quality-based discrimination. Accordingly, the Commission removed the quality reporting requirement for all the BOCs and, instead, required that the BOCs file annual affidavits attesting that they have not discriminated in the quality of services provided to ESP competitors. Filing and Review of Open Network Architecture Plans, CC Docket No. 88-2, Phase I, 4 FCC Rcd 1, 248-249, para. 481 (*BOC ONA Order*); 5 FCC Rcd 3103, 3120, para. 145 (*BOC ONA Amended Plans Order*). *See also Phase II Reconsideration Order*, 3 FCC Rcd at 1160, paras. 76-77.

[76] *Phase II Order*, 2 FCC Rcd at 3093-3098, paras. 141-176.

[77] *California*, 905 F.2d at 1238.

[78] *Id.*

[79] Issues related to ONA and nonstructural safeguards for AT&T are addressed in a separate order adopted today unless otherwise indicated herein. *See* note 3 *supra*.

[80] *See Phase I Order*, 104 FCC 2d at 1076-1077, paras. 238-240; *Phase II Order*, 2 FCC Rcd at 3098-3099, paras. 177-186.

[81] The BOCs are permitted to provide certain enhanced services on an integrated basis pursuant to the interim waiver granted by the Bureau and extended here until the end of this proceeding. *See* para. 56 *infra*. That waiver conditions provision of these services on compliance with the *Computer III* CPNI rule.

[82] *Phase II Order*, 2 FCC Rcd at 3095, paras. 154-155. Multiline business customers annually receive notification of their CPNI rights. *Id.* at 3096, paras. 165-165.

[83] *BOC ONA Reconsideration Order*, 5 FCC Rcd at 3094, para. 83.

[84] As a consequence, we eliminate the requirement that the BOCs amend their ONA plans on April 15, 1991, to address competitive equity and informed customer choice issues in implementing the current CPNI requirements. *BOC ONA Amended Plans Order*, 5 FCC Rcd at 3121 (1990). We will incorporate our consideration of those issues within the review of the CPNI safeguard in this proceeding.

[85] *Computer II Further Reconsideration Order*, 88 FCC 2d at 541, para. 83 n. 34.

[86] *Id.* at 541-542, para. 85.

[87] *Phase I Order*, 104 FCC 2d at 1125, para. 343.

[88] *BOC Separation Order*, 95 FCC 2d at 1131, paras. 34-35.

[89] *Phase I Reconsideration Order*, 2 FCC Rcd at 3062, para. 188.

[90] *Phase I Order*, 104 FCC 2d at 1127-1128, paras. 347-348.

[91] *Phase II Order*, 2 FCC Rcd at 3102, para. 210.

[92] *California*, 905 F.2d at 1244.

[93] *Id.*

[94] *Id.*

[95] *Id.* at 1245.

[96] *Id.* The *California* Court also found fault with our preemption of state tariff regulation of intrastate enhanced services provided by communications common carriers. *See California*, 905 F.2d at 1239-1243, 1246. We do not consider that issue in this *Notice*.

[97] Computer III Remand Proceedings, CC Docket No. 90-368, FCC 90-415 (released December 17, 1990).

[98] *California*, 905 F.2d at 1243, quoting NARUC v. FCC, 880 F.2d 422, 430 (D.C. Cir. 1989). *See also* Lousiana Public Service Commission v. FCC, 476 U.S. 355, 375 n. 4 (1986); North Carolina Utilities Commission v. FCC, 537 F.2d 787, 791 (4th Cir. 1976), *cert. denied*, 429 U.S. 1027 (1976); North Carolina Utilities Commission v. FCC, 552 F.2d 1036 (4th Cir. 1977), *cert. denied*, 434 U.S. 874 (1977); *Atlantic Richfield Co.*, 3 FCC Rcd 3089 (1988), *affirmed sub nom.* Public Utility Commission of Texas v. FCC, 886 F.2d 1325 (D.C. Cir. 1989).

[99] Section 1 of the Communications Act, 47 U.S.C. § 151.

[100] *Final Decision*, 77 FCC 2d at 432, paras. 124-126; *Reconsideration Order*, 84 FCC 2d at 91-96, paras. 120-133.

[101] Section 3(a) of the Act gives the Commission jurisdiction over interstate communications "between the points of origin and reception." 47 U.S.C. § 153(a). "[J]urisdiction over interstate communications does not end at the local switchboard, it continues to the transmission's ultimate destination." *Southern Pacific Communications*, 61 FCC 2d 144, 146 (1976). "The key to jurisdiction is the nature of the communication itself rather than the physical location of the technology." New York Telephone Company v. FCC, 631 F.2d 1059, 1066 (2d Cir. 1980). *See also* United States v. AT&T, 57 F.Supp. 451, 454 (S.D.N.Y. 1944), *affirmed sub nom.* Hotel Astor v. United States, 325 U.S. 837 (1945); Puerto Rico Telephone Company v. FCC, 553 F.2d 694, 699 (1st Cir. 1977); MCI Communications Corp. v. AT&T, 369 F. Supp 1004, 1029 (E.D. Pa. 1973).

[102] *See California*, 905 F.2d at 1244.

[103] ITCs were never subject to the *Computer III* network disclosure rules. All carriers, however, are subject to the network disclosure requirements of Section 68.110(a) and (b), or the Commission's Rules. 47 C.F.R. § 68.110(a) and (b). We do not address in this *Notice* preemption based on possible conflicts with the requirements of those rule sections.

[104] A carrier may introduce a new or modified service between six and twelve months after the make/buy point if it makes public disclosure at the make/buy point.

[105] This proposed preemption applies to state requirements for disclosure of the information encompassed within the federal network disclosure rules. If necessary, the Commission will address state requirements for disclosure of information different from that covered by the federal rule in the context of particular state actions.

[106] In *Computer III* the Commission did not apply, and we are not in this proceeding proposing to apply, CPNI restrictions to the integrated provision of interstate basic and enhanced services by the ITCs.

[107] *See Phase II Reconsideration Order*, 3 FCC Rcd at 1159-1160, paras. 66-71, 76-77; Filing and Review of Open Network Architecture Plans, CC Docket No. 88-2, Phase II, 4 FCC Rcd 2449, 2456-2457, paras. 56-62; *see also* note 75 *supra*.

[108] BOC Joint Contingency Petition for Interim Waiver of the Computer II Rules, filed July 3, 1990.

[109] *Interim Waiver Order*, 5 FCC Rcd at 4715, para. 10. In the *Interim Waiver Order*, the Bureau referred to both CEI plans and CEI waivers as CEI plans. We adopt that usage in this Order as well. *Id.* at 4716 n. 9.

[110] *Id.* at 4715, para. 10.

[111] As listed in Appendix B, thirteen parties filed comments and fifteen parties filed reply comments in this proceeding.

[112] Ameritech Comments at 3; Bell Atlantic Comments at 1; BellSouth Comments at 3-4; NYNEX Comments at 2-3; SWBT Comments at 4; U S West Comments at 1; USTA Comments at 1-2; Ameritech Reply at 2; and Boston Reply at 3-4.

[113] *See also* Letter from the Florida Messaging Coalition which opposes extending the waiver during the pendency of the remand proceeding.

[114] MCI Comments at 8-9; ATSI Comments at 5.

[115] MCI Comments at 13-16; MCI Reply at 2-8.

[116] ATSI Comments at 1, 4-13; MCI Comments at 24-49; Mid-Atlantic Comments at 1-3; and MCI Reply at 9-12.

[117] Bell Atlantic Comments at 4; SWBT Comments at 6; U S West Comments at 3-5; Ameritech Reply at 2; Bell Atlantic Reply at 3; BellSouth Reply at 13-14; NYNEX Reply at 4-5; and SWBT Reply at 5-6.

[118] *See* SWBT Comments at 7; U S West Comments at 3-5; and BellSouth Reply at 13-14.

[119] Bell Atlantic Comments at 4; BellSouth Comments at 4; Bell Atlantic Reply at 3; BellSouth Reply at 15-16; Boston Reply at 5; and SWBT Reply at 6.

[120] *See* Bell Atlantic Comments at 4; NYNEX Comments at 3; SWBT Comments at 4, 6; U S West Comments at 3-5; Ameritech Reply at 3-4; Bell Atlantic Reply at 3; BellSouth Reply at 15; Pacific Reply at 13-14; and SWBT Reply at 5, 9.

[121] Ameritech Comments at 3; U S West Comments at 5; Ameritech Reply at 2; BellSouth Reply at 15; Boston Reply at 3; NYNEX Reply at 5; Pacific Reply at 13-14, n. 38; and SWBT Reply at 5-6.

[122] *See* Bell Atlantic Comments at 5-6; BellSouth Comments at 5-6; SWBT Comments at 6; U S West Comments at 5; NYNEX Reply at 5-6, 9-11; and Pacific Reply at 10-12. The Bureau's Accounting and Audits Division has applied strengthened requirements to the BOCs' 1990 independent audits.

[123] To the extent that ATSI, MCI and Mid Atlantic wish to raise issues regarding the efficacy of our nonstructural and cost accounting safeguards for purposes of the choice of permanent safeguards rather than a limited, interim waiver, they will have another opportunity to file comments in this proceeding.

[124] The Courts have also stated that an interim measure following vacation should include sufficient provisions to safeguard against concerns identified by the Court on an interim basis, but should also avoid industry disruption. *See* Mid-Tex Electric Cooperative Inc., v. Federal Energy Regulatory Commission, 822 F.2d 1123 (D.C.Cir. 1987); American Gas Association v. Federal Energy Regulatory Commission, 888 F.2d 136 (D.C.Cir. 1989).

[125] Bell Atlantic Comments at 6-8; BellSouth Comments at 7-8; NYNEX Comments at 3-7; SWBT Comments at 8-11; USTA Comments at 2-4; Ameritech Reply at 7-9; BellSouth Reply at 17-23; Boston Reply at 6; and Pacific Reply at 18-22.

[126] U S West Comments at 10, n. 20.

[127] BellSouth Comments at 7 n. 7; U S West Comments at 10.

[128] U S West Comments at 11; Ameritech Reply at 9-10; BellSouth Reply at 20-21.

[129] U S West Comments at 7-8 n. 19; BellSouth Reply at 7, 21.

[130] ANPA Comments at 1, 3; CompuServe Comments at 1, 6-9; DC PSC Comments at 2-3; CompuServe Reply at 1-2; and DC PSC Reply at 2-3.

[131] *See* CompuServe Reply at 6-7; DC PSC Reply at 3; and MCI Reply at 12-14.

[132] *See* note 44 *supra*.

[133] *See* U S West Comments at 8-10.

[134] *See* U S West Comments at 10 n. 20.

[135] *See* CompuServe Reply at 7-8; MCI Reply at 15, n. 45. Of course, we understand that we cannot foreclose entirely the possibility that a BOC may justify a waiver of the *Computer II* requirement of structural separation on the basis of a public interest showing. *See* WAIT Radio v. FCC, 418 F.2d 1153 (D.C.Cir. 1969). We note, however, that any application for such a waiver faces a "high hurdle even at the starting gate," and that a petitioner "must plead with particularity the facts and circumstances which warrant such action." *Id.* at 1157 (quoting in part Rio Grande Family Radio Fellowship, Inc. v. FCC, 406 F.2d 664 (D.C.Cir. 1968)).

[136] *See* para. 37 *supra*.

[137] *See* U S West Comments at 7-8, n. 19; BellSouth Reply at 20-21.

[138] *See* para. 37 *supra*.

[139] U S West Comments at 11-12.

[140] By granting this waiver, we do not attempt or intend to prevent any state from regulating the provision of wholly intrastate enhanced services by the BOCs. *See* California Comments. We do require, however, that the BOCs inform us of any specific state regulatory proposals or actions in this area. This waiver does not alter BOC obligations to comply with the restrictions set forth in the MFJ.

[141] 5 U.S.C. §§ 601-612. The BOCs and AT&T are dominant carriers under the Commission's Rules and are not small entities as defined by the Regulatory Flexibility Act. We have also concluded that small telephone companies are dominant in their fields of operation and therefore are not small entities as defined by the Regulatory Flexibility Act. Thus, the parties directly subject to the proposals, do not fall within the Act's definition of a small entity. *Id.* § 601. *See* Third Report and Order, MTS And WATS Market Structure, CC Docket No. 78-72, Phase I, 93 FCC 2d 241, 338-339, paras. 358-362 (1983). Accordingly, this Commission is not required to apply the formal procedures set forth in the Regulatory Flexibility Act. We are nevertheless committed to reducing the regulatory burdens on small telephone companies whenever possible consistent with our other public interest responsibilities.

[142] This action is taken pursuant to Sections 1, 4(i), 4 (j), 201-205, 218, 220, and 403 of the Communications Act as amended, 47 U.S.C. §§ 151, 154(i), 154(j), 201-205, 218, 220, and 403.

CONCURRING STATEMENT OF COMMISSIONER ERVIN S. DUGGAN

In Re: Computer III Remand Proceedings: Bell Operating Company Safeguards; and Tier 1 Local Exchange Company Safeguards

Coming into the debate on current common carrier issues like price caps, open network architecture and nonstructural safeguards has been, for me, something like climbing aboard a rapidly moving train.

I have no particular desire to stop the train. I have no illusions about my my ability to do so, even if that were my desire. I do think, however, that there may be some value in asking some serious questions as we hurtle forward: questions designed not to disrupt the trip, but rather to help us arrive, as safely and sensibly as possible, at the destination we desire.

I endorse this action to open a Rule Making to resolve an important question: What safeguards should we put in place to govern enhanced services provided by the Bell Operating Companies? I endorse our effort to resolve, as quickly as we can, the uncertainties created by the Ninth Circuit's decision vacating our *Computer III* orders. And certainly I want to do everything possible to hasten the day that enhanced services are widely available at fair, competitive prices.

I fear, however, that in our eagerness to bring about these worthwhile results, we may allow our enthusiasm to overwhelm our caution; that we may overstate our confidence about the safeguards in which we place our hope. The dangers of letting zeal rather than experience guide us--- of placing too much confidence, for example, in accounting safeguards that are new and relatively untested--- are twofold. First, we risk weakening, by overstatement, the very arguments on which we build our case. Second, we risk--- if we are guided by hope and credulity rather than cool prudence and hard experience---an even worse fate: to have been wrong, and to watch the enhanced services market and the public suffer the consequences.

I choose, therefore, to concur in the action that the Commission takes today--- not because I have any doubt that our goals are worthwhile, but because I wish to underscore some questions that need to be faced as we pursue those goals.

THE JOINT COST ALLOCATION RULES

Our joint cost rules are, as this item argues, now in place, and the carriers' cost allocation manuals have been generally approved. These rules, we hope, will greatly improve our ability to require carriers to separate the costs of providing nonregulated services from those of regulated services. Our affiliate transaction rules also should help prevent manipulation of prices for transactions between regulated and nonregulated affiliates. The Commission, moreover, has made clear its seriousness about compliance with its rules by its actions in recent enforcement proceedings.

Are these straws in the wind enough, given the vast magnitude of what we must audit--- billions in revenues and thousands of accounting transactions--- and given the reality of our severely limited auditing resources? The very size of the task could threaten the efficacy of our cost allocation rules. Even under those rules, moreover, there is room for carrier discretion in allocating costs--- room, therefore, for some cost shifting. Requiring greater uniformity among manuals, as we propose in this notice today, will help. But under the Commission's proposal, the joint cost allocation process is our primary safeguard against cross subsidization. Is this membrane strong enough to bear the weight that is soon to press against it?

PRICE CAP REGULATION

Price cap regulation for the Bell Operating Companies will indeed change the incentives these companies face. Our hope and belief is that price caps will reduce carriers' incentives to shift nonregulated costs to regulated operations, because carriers will no longer be able to obtain an automatic rate increase to cover the shifted costs. But price caps are unlikely, in my judgment, to remove totally the threat of cost-shifting. For example, even under price caps a carrier might have the incentive to shift unregulated costs to regulated operations, because by doing so it could reduce its obligation to share with ratepayers any earnings above the no-sharing zone. Or, if we set our productivity factor too low, a company operating under price caps could use its extra earnings to subsidize its enhanced services operations.

IMPLEMENTATION OF ONA

Open Network Architecture, like price caps, holds out great hope. But hope and confidence are not precisely the same thing. ONA is still more a concept than a reality. It is, to be sure, the regulatory equivalent of the Modified Final Judgment's equal access requirement, which has been crucial in promoting competition in the interexchange market. Will ONA perform the same function for the enhanced services market--- preventing BOC control over bottleneck facilities from giving the BOCs an unfair competitive advantage? I hope so; I hope that ONA will prove as successful as the MFJ's equal access requirement. But it seems to me that the absence of a genuine track record on ONA calls for greater modesty and diffidence on the Commission's part at this stage. Hope is surely warranted; certainty can be gained only with experience.

Isn't it possible, for example, that the pricing flexibility afforded to the BOCs under price caps will threaten to subvert the effectiveness of ONA as a safeguard against discrimination? Although ONA services, at least for now, are outside the price cap scheme, cost-based pricing for ONA services may be difficult to achieve once we have moved away from cost-based tariff review of the other basic services that are subject to price caps. Will it still be possible, after price caps, for the Commission to deter and detect discrimination in the prices that BOCs charge for ONA services that competing providers of enhanced services depend upon? We simply don't know--- and in the absence of greater knowledge, claiming too much certainty will weaken, rather than strengthen, our argument for moving irretrievably away from all structural separation.

ALTERNATE APPROACHES?

Despite our uncertainty about these questions, the notice we adopt today treats the issue with confidence bordering upon insouciance, and poses a stark, either/or choice: nonstructural safeguards versus *Computer II* -type structural separation. Perhaps there is no realistic middle ground between these two polar options. But elementary prudence, and an eagerness to be guided by experience rather than hope, suggest to me that the Commission should be calling for comment on alternate approaches, such as stricter nonstructural safeguards or modified forms of structural separation. Isn't it also conceivable that structural separation might be appropriate in some cases, though not all? The practical difficulties of deciding between such cases would, no doubt, be great. We need to be open to the possibility, nevertheless, that while the benefits of integration may be great for services such as protocol processing or perhaps voice messaging, structural separation might be appropriate in other situations.

MERGERS AND ACQUISITIONS

Whether or not we conclude that substituting nonstructural safeguards for structural separation is in the public interest, we may be faced with a somewhat different question if the BOCs begin to acquire large enhanced services competitors on the same scale that they have acquired out-of-region cellular telephone companies.[1] Would the benefits of integration still outweigh the risks to ratepayers and competitors in the enhanced services market? I would like to see comments on this question, and on whether the Commission should develop standards for reviewing such acquisitions.

AN OPEN MIND

Even as I raise these questions, I want to emphasize that I am fully prepared to approve substituting nonstructural for structural safeguards if the record demonstrates that the benefits of integration (which are undoubtedly substantial) do indeed outweigh the risks of lifting structural separation. I hope that the record developed in this proceeding will present convincing evidence on the efficiencies of joint operations. I would find particularly persuasive any evidence that particular services will be withheld unless the BOCs are allowed to offer them on an integrated basis. Evidence that services can be more efficiently provided through physical integration of network facilities--- for example, through switch software modifications--- will also carry weight.

My goal in this proceeding is that the Commission conduct its balancing of costs and benefits with its eyes open, not filled with stars. Potential safeguards, after all, do not necessarily constitute real safeguards; mere hopes of public benefits do not necessarily constitute actual benefits. As the possibility of widespread BOC participation in the enhanced services industry increases, it is crucial that our safeguards be effective--- both in permitting BOC entry and in guarding against anticompetitive activity.

FOOTNOTE FOR STATEMENT

[1] I assume the near-term removal or further relaxation of the information services restriction contained in the MFJ.

FCC 90-424
38094

In Re Application of)
)
WWOR-TV, Inc.) BTCCT-901127KE
)
For Transfer of Control of)
Station WWOR-TV, Channel 9)
Secaucus, New Jersey)

MEMORANDUM OPINION AND ORDER

Adopted: December 21, 1990 Released: December 26, 1990

By Commission:

1. The application set out in the caption seeks our approval to transfer control of station WWOR-TV (channel 9, Ind.), Secaucus, New Jersey, from its ultimate parent, MCA, Inc. (MCA), directly to its shareholders. Garden State Broadcasting Limited Partnership (Garden State), Whitely Communications (Whitely) and Michael Krauss (Krauss) oppose the grant of the application, by pleadings filed November 29, December 13 and December 17, 1990, respectively. We consider here the application, the oppositions, and related pleadings. [1]

Background

2. WWOR-TV, Inc., is a wholly owned subsidiary of MCA Broadcasting, Inc., which in turn is wholly owned by MCA. MCA's Board has approved a tender offer for all of its shares from a subsidiary of Matsushita Electrical Industrial Company, Ltd. (Matsushita), a firm organized under the laws of Japan. MCA

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[1] The related pleadings are: an Opposition to Garden State's pleading filed by MCA on December 5, 1990; Garden State's Reply of December 11, 1990; and MCA's Opposition to Krauss' Objection filed December 19, 1990. MCA elected not to respond to Whitely's pleading. Whitely, however, subsequently filed a Petition for Stay of the transfer on December 13, 1990, a Petition to Revoke the WWOR-TV license on December 14, 1990, and a further letter on December 19, 1990. MCA responded to the revocation petition on December 19, 1990. Krauss filed a reply on December 20, 1990, to which MCA responded by letter of the same date.

shareholders will receive $66 per share, if they decide to tender their stock. The tender offer provides, however, that Matsushita will not acquire MCA's broadcast assets. Instead, if more than 50 percent of the MCA stock is tendered, MCA proposes to transfer its shares in MCA Broadcasting to a newly created company, Newco, Inc. The shares of Newco will then be distributed to MCA's existing shareholders on a proportional basis before Matsushita purchases the MCA shares. Specifically, MCA shareholders will receive one share of Newco for every five shares of MCA they tender. Matsushita is not a party to the distribution agreement. MCA will survive the tender offer, minus the broadcast assets, but as a wholly owned subsidiary of Matsushita.

3. In 1987, Garden State and Whitely filed timely competing applications for construction permits for a new television station to operate on channel 9, Secaucus, which were mutually exclusive with the application for renewal of station WWOR-TV's license.[2] A comparative hearing is pending, although WWOR-TV, Inc., and Garden State have filed a settlement agreement. One point should be clear. We shall act on the transfer application before us. MCA will then be obligated by section 1.65 of the Rules to amend its renewal application to report this action to the Administrative Law Judge presiding over the comparative hearing. The effect, if any, on the comparative hearing or the settlement agreement is for him to decide in the first instance. Our action here does not prejudice any decision he may make.

4. This case raises two broad questions.[3] First, Garden State and Whitely

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[2] The presiding Administrative Law Judge later dismissed Whitely's application. WWOR-TV, Inc., FCC 89M-2206, released Sept. 6, 1989, aff'd, 4 F.C.C. Rcd. 8127 (Rev. Bd. 1989), aff'd, 5 F.C.C. Rcd. 3768 (1990), reconsideration denied, FCC 90-369, released Nov. 16, 1990. Whitely has filed a Notice of Appeal with The United States Court of Appeals for The District of Columbia Circuit.

[3] Krauss raises a third issue that can be addressed briefly. Krauss filed a law suit in the federal courts in which, among other things, he asserts that WWOR-TV, Inc., engaged in coercive reciprocal trade practices in violation of the antitrust laws. WWOR-TV, Inc., denies wrongdoing and has also filed a counterclaim against Krauss. Krauss contends that the matters under consideration in that pending case are similar to the reciprocal trade practices considered by the Commission in RKO General, Inc., 78 F.C.C.2d 1 (1980), rev'd on other ground, 670 F.2d 215 (D.C. Cir. 1981), cert. denied, 456 U.S. 927 (1982). Although we did consider reciprocal trade practices in RKO, we issued our decision in that case before our ruling in Character Qualifications, 102 F.C.C.2d 1179 (1976), on recon denied, F.C.C. Rcd. 421 (1986), appeal dismissed sub nom. National Association for Better Broadcasting v. F.C.C., No. 86-1179 (D.C. Cir. June 11, 1987). There, we changed our policies with regard to pending court cases, including those dealing with antitrust or anticompetitive matters. We stated that "we do not believe it appropriate or necessary to engage in the initial investigation or enforcement of the antitrust laws." Id. at 1202. Henceforth, we concluded, "consideration should be given only to adjudications involving antitrust or anticompetitive violations from a court of competent jurisdiction, the Federal Trade

observe that the application used is FCC Form 316, commonly referred to as the short form. Unlike long-form transactions (FCC Forms 314 and 315), transfers eligible to use the short form are not subject to a statutory 30-day waiting period or to formal petitions to deny. Garden State and Whitely assert that the transaction before us is not eligible for short-form processing. Second, all three objectors contend for a variety of reasons that MCA has not shown that, if the tender offer is successful, Newco will comply with section 310(b) of the Communications Act of 1934, as amended (the Act), 47 U.S.C. § 310(b), concerning alien ownership control of, or influence over, United States broadcast stations. We turn to those questions now.

Use of the Short Form

5. The challenges to the use of the short form do not require extended discussion. Section 309(c)(2)(B) of the Act permits the use of summary procedures in assignment or transfer cases that do not involve a "substantial change in ownership or control." Section 73.3540(f) provides examples [4] of transactions that qualify under the statute. Subsection 73.3540(f)(5) specifically permits short-form procedures "where there is an assignment from a corporation to a corporation owned or controlled by the assignor stockholders without substantial change in their interests...." There is no apparent reason why the rationale underlying that rule would not also apply to transfers of control, as well as to assignments. We consider that subsection, therefore, to establish the proposition that the use of the short form is generally appropriate in the circumstances presented here. [5]

Commission, or other governmental unit charged with the responsibility of policing such activity." Id., footnote omitted. There has been no such adjudication in this case, no violations have yet been found, and thus the foundation is missing for Krauss' assertion that violations might continue under Newco's stewardship. Further, we also believe that our action here should lessen Krauss' concern for the potential for anticompetitive practices that it believes flow from commonly owned television stations and programming production companies. MCA now owns WWOR-TV, Inc., and, if the tender offer is successful, MCA will become only one program supplier to the station and must compete with other such suppliers. Finally, there is no indication as to how maintenance of the status quo would provide Krauss with any relief relating to its litigation. Accordingly, there is no reason to condition our grant on the outcome of the court proceeding, as requested by Krauss.

[4] The rule only illustrates the kinds of transactions that qualify for short-form procedures. The fact that a particular transaction might differ from those examples is not dispositive. The touchstone is the statutory requirement that the transaction constitutes an insubstantial change in ownership or control. See Storer Communications, Inc., 101 F.C.C.2d 434, 444, aff'd, 763 F.2d 436 (D.C. Cir. 1985).

[5] We also note that subsection 73.3540(f)(4) permits the use of short-form procedures for corporate reorganizations. We believe that the proposal before us also qualifies as a corporate reorganization.

6. Garden State raises specific challenges to the use of the short form in this case. In support of its use of the short form, MCA referred to an earlier action in which the staff approved the spin-off on a short form of the broadcast stations owned by LIN Broadcasting Corporation, in which LIN used essentially the same procedure that MCA proposes here. Garden State contends that the LIN case does not govern here because, in LIN, there was a continuity in the membership of the Board of Directors of the new company. Here, in contrast, Garden State alleges that only one of Newco's proposed Directors was reported in the 1987 application pursuant to which MCA acquired station WWOR-TV (then WOR-TV). Under the Commission's decision in the Storer proceeding, cited above, the entire Board of Directors can be changed at one time if our approval is obtained in advance on a short form. Accordingly, the use of the short form would be permissible if, as alleged, only one Director were carried over to Newco.[6] Garden State seeks to distinguish Storer on the ground that the case involved a proxy contest and that the shareholders of the company had an opportunity to approve the transaction. Here, Garden State argues, only the Directors have approved the tender offer, not the shareholders. Garden State overlooks the fact that under the securities laws the shareholders have been provided with substantial information about the tender offer, including the spin-off of station WWOR-TV. If they tender their shares, they will be approving the transaction, including the creation of Newco.[7] Moreover, all shareholders are entitled to the tender price, including those who do not initially tender their shares. Contrary to Garden State's assertion, therefore, those who do not initially tender their shares do not do so at the risk of economic loss.[8] Accordingly, we conclude that the shareholders have

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[6] Gradual changes in the composition of the Board of Directors are reported in the annual Ownership Reports submitted by all licenses. Four of the proposed Directors of Newco were previously reported in MCA's 1987 renewal application and more recently in its January, 1990 Ownership Report.

[7] We take official notice of the material filed with the Securities and Exchange Commission (SEC) regarding the tender offer. MCA is incorporated in Delaware. According to the Schedule 14(d)-1 submitted to the SEC, if less than 90 percent of the MCA shares are tendered, shareholders will be asked to vote on the overall transaction (including the spin-off of WWOR-TV), under the Delaware General Corporation Law.

[8] Whitely correctly observes that as a result of the five-to-one MCA/Newco stock distribution ratio, the tender offer provides that shareholders whose interests are not evenly divisible by five will receive cash for their "odd" shares. Further, those whose total holdings are less than five MCA shares, such as Whitely, will receive cash, but no Newco stock. Thus, Whitely notes Newco shareholders will not be identical to MCA's existing shareholders. Section 73.3540(f)(5), however, refers to transfers not involving a "substantial change" in the interests of shareholders. The minute changes noted by Whitely are not decisionally significant. In addition, we do not believe that the conversion rights discussed below in paragraph 10, even if all

the opportunity to approve or disapprove the transaction by tendering or not tendering their shares.

7. MCA's shareholders hold ultimate control of the corporation, although they have delegated authority with regard to many matters to its Board, as would be expected with a widely held, publicly traded company. Newco's shareholders will be substantially the same as those of MCA. The licensee's representations to us (for example, its EEO program) remain unchanged and the licensee remains accountable for its representations. Garden State and Whitely have failed to allege any facts to establish that MCA differs in any decisionally significant way from the corporate organization considered by the Commission in the Storer case, which also involved a widely held, publicly traded company. [9] Accordingly, as in Storer, we believe that the transaction described above does not involve a "substantial change in ownership or control," within the meaning of section 309(c)(2)(B) of the Act. Approval of the transaction on short form and the use of summary procedures are therefore permitted. [10] Because we find this transaction consistent with the Act, we do not believe that we should defer action based on Krauss' speculation that additional parties might file pleadings.

Alleged Impermissible Alien Ownership or Influence

8. Compliance with the 25-percent Alien Ownership Guideline. In its pending renewal application, MCA reported that it had conducted a thorough survey of its stockholders in 1986 and determined that aliens owned 8.76 percent of its stock. It further represented that an update of the 1986 survey was underway to assure continued compliance with section 310(b). Garden State, however,

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were exercised, would remove the proposed transaction from the provisions of subsection 73.3540(f)(5) of the Rules. The percentages involved are still relatively small (less than 16 percent), and only Mr. Geffen's interest after conversion appears to be attributable.

[9] Garden State appears to suggest that MCA needs to establish affirmatively that it is a typically organized corporation to justify its use of a short form. We reject that suggestion as being burdensome and without apparent benefit.

[10] Under the Act, formal petitions to deny do not lie against applications that qualify for short-form procedures. Consequently, Garden State's and Whitely's pleadings must be dismissed. In our discretion, however, and in view of the public interest questions raised, we shall consider those pleadings as informal objections, along with Krauss' objection, pursuant to section 73.3587 of the Commission's Rules. Because Garden State and Whitely seek to dismiss or deny the application, however, we review their pleadings to determine whether it has alleged properly supported specific facts that, if true, would establish a substantial and material question of fact that a grant of the application would be inconsistent with the public interest.

asserts that the widely publicized Matsushita sale "has likely resulted in substantial stock activity that clearly requires that a current survey be taken ...." Emphasis added. A statement that certain matters are "likely" clearly does not constitute a specific allegation of fact. It also appears to us, in the absence of information to the contrary, that whatever activity in the stock that has occurred could just as likely be expected to track the percentage of alien ownership already extant.

9. In the typical case, Garden State's failure to allege specific facts would be dispositive. Nevertheless, we are concerned about compliance with section 310(b), and a few additional words are in order. A licensee's obligation to comply with section 310(b) is continuous, but we have never imposed on publicly traded corporate licensees the costly requirement of conducting on-going surveys to assure compliance with the statute. That would be especially burdensome where, as here, the last survey showed alien-ownership levels far below the applicable 25-percent guideline. In its pleading, MCA disclaims any knowledge of any evidence to suggest any significant increase in alien ownership. In the normal course of events, MCA would not be required to recertify compliance with section 310(b) until it filed its next renewal application in 1992. In the absence of a well-founded question as to compliance with the Act, we would not require submission of the results of an alien-ownership survey with a pro forma application for transfer of control. Moreover, the most likely purchaser of a large block of MCA stock in recent years would be Matsushita. Nevertheless, the Schedule 14D-1 submitted to the SEC states that that Matsushita, its subsidiaries, officers, directors and associates do not beneficially own or have the right to acquire any MCA equities other than through the tender offer.[11]

10. Whitely notes that it raised the question of a possible violation of section 310(b) in the pending comparative hearing for channel 9, Secaucus. Whitely's motion, which encompassed a wide variety of matters, was dismissed by the presiding Administrative Law Judge as repetitive or speculative. WWOR-TV, Inc., FCC 89M-2225, released September 7, 1989. Whitely returns to that issue here, and observes that MCA issued two series of subordinated debentures, one convertible to MCA common stock at $69.625 each (the series was sold for a total of $300 million), and the other convertible at $76.625 each (the series was sold for total of $200 million). All the debentures were sold overseas. The degree of alien ownership would increase if, as Whitely surmises, all the debentures are converted to MCA common stock. When the debentures were issued, MCA set aside 6,918,911 common shares to issue if all debenture owners elected to convert. Assuming that all such stock is owned by aliens and that all

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[11] At the time MCA and Matsushita executed the merger agreement, MCA also granted Matsushita an option to buy about 18 percent of its shares, triggered by the MCA Board changing its mind as to the sale or the appearance of another bidder for MCA. Options are not counted until exercised, the triggering events have not occurred, and, in any event, the option agreement specifies that the option is not exercisable to the extent that it might place MCA in violation of the Communications Act. Thus, the option is not of concern. See, e.g., Data Transmission Co., 52 F.C.C.2d 439 (1975).

debentures will be converted before the tender offer is closed, the percentage of MCA's stock held by aliens would increase by about 7.73 percent.[12] MCA, however, notes that only common stockholders are eligible for Newco shares, and that the holders of the debentures have economic incentives not to convert their holdings to common stock. In the case of the $300 million issue, MCA states that an antidilution upward adjustment will be made in the conversion rate as a result of the spin-off, providing an incentive to hold the debentures at least until after the spin-off. In the case of the $200 million issue, the incentive flows from the right to put the shares at a specified price. In MCA's view, "given the profile of this type of investor, taking advantage of a certain pricing advantage is highly predictable behavior." In sum, MCA takes the position that there would be no appreciable change in alien ownership due to the existence of the convertible debentures.

11. Whitely also states that MCA undertook to acquire a Canadian corporation, with the purchase "funded in part by MCA common stock." Whitely does not identify the Canadian company, nor does it indicate what portion of the purchase was paid in stock. Such nebulous statements are not specific allegations of fact. Nevertheless, the only recent purchase of which we are aware is MCA's acquisition of GRP Records, Inc., with MCA stock reportedly worth about $40 million. MCA announced that transaction on February 28, 1990. At then-current stock prices, $40 million would amount to less than about 750,000 MCA shares, or less than about 0.86 percent of the total shares outstanding.

12. Assuming the facts most favorable to Whitely, therefore, we add the figure from MCA's last survey, 8.76 percent, plus the worst possible case (7.73 percent) based on maximum debenture conversion, plus about 0.86 percent for the unidentified Canadian company, which totals about 17.35 percent alien ownership, well under the 25-percent guideline. In sum, there is no known basis for concluding that there is a substantial and material question of fact that MCA now violates the 25-percent guidelines specified in section 310(b), or that Newco will violate that provision.

13. Alleged Impermissible Alien Control or Influence. Some prefatory observations are appropriate to place the contentions in context. We note that, while section 310(b) of the Act does not permit alien control of United States broadcast stations, a limited degree of influence is permissible. That

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[12] The percentages indicated are based on the total number of MCA shares, as set out in the Schedule 14(d)-1, that would be relevant in evaluating Whitely's hypotheses. MCA has issued 75,315,794 common shares. All of its Series B Preferred Convertible Stock is owned by Mr. David Geffen, a principal of an MCA subsidiary. Mr. Geffen has agreed to convert and tender 80 percent of those shares, which will result in the issuance of 7,316,598 additional MCA shares. Further, conversion of all of the debentures, as conjectured by Whitely, would result in the issuance of 6,918,911 more MCA shares. Finally, an antidilution provision in the debentures could result in issuing up to 700,000 additional MCA common shares. Thus, making Whitely's assumptions, there would be a total of 89,551,303 common shares outstanding on a diluted basis.

conclusion is implicit in the statutory provisions that permit aliens to hold up to 25 percent of the stock of the parent of a licensee and to hold up to 25 percent of the seats on its Board of Directors. Thus, an argument that aliens might have a limited degree of influence over the parent of a licensee is not by itself dispositive. Rather, the questions under the statute are: whether aliens are in de facto or de jure control of a broadcaster; whether the interests held by aliens or representatives of aliens are within the statutory guidelines; and whether the degree of influence of an alien or alien company exceeds that which would ordinarily be associated with a party that nominally falls within those guidelines.

14. We also note that, in the context of a corporate spin-off, this is not the first time that we have confronted allegations that the new company would still be impermissibly controlled by its former owners. In Columbia Pictures Industries, Inc., 30 F.C.C.2d 9 (1971), for example, we approved the spin-off of the program syndication business and the cable television systems owned by CBS to a newly created company, Viacom International, Inc. (Viacom). Most of Viacom's officers and employees would perform the same roles they had performed for CBS. A majority of the Viacom Board (six of nine) had not been previously associated with CBS. Moreover, there was a continuing business relationship between Viacom and CBS with regard to syndicated programming. Despite those past and continuing relationships, the Commission concluded that Viacom would constitute a separately controlled company for the purposes of section 76.501 (then section 74.1131) of the Rules (which prohibits common ownership of cable television systems by major broadcast television networks) and section 73.658(j) (which places limits on the syndication of television programs by television networks).[13]

15. Also relevant here is our action in Spanish International Communications Corp., 2 F.C.C. Rcd. 3962 (1987), aff'd, 3 F.C.C. Rcd. 4319 (1989), remanded sub nom. Coalition for the Preservation of Hispanic Broadcasting v. FCC, 893 F.2d 1349 (D.C. Cir. 1990), motion for reh'g en banc granted March 27, 1990. There, an Administrative Law Judge had ruled that Spanish International Communications Corp. (Spanish International), a United States corporation, was under the control of Spanish International Television Network, a foreign company, or the principals of that network. The Commission approved a settlement in which Spanish International agreed to sell its stations, and the Commission later approved a sale to a subsidiary of Hallmark Cards, Inc. Hallmark agreed to retain the station managers and the affiliation with the foreign network for two years. The staff and the Commission on review rejected a petitioner's claim that the stations would continue to be under an unlawful alien influence because of those relationships. The Commission observed that the petitioners had failed to present any supported factual allegations to

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[13] In that decision, we required CBS principals to divest over time their stock in Viacom. In this case, all voting stock will be acquired by Matsushita, so MCA officials will be divested of that interest. Three current MCA principals will acquire nonvoting, preferred stock in MCA's immediate parent, however. No reason is alleged or apparent for requiring the divestiture of such nonvoting stock in this case.

negate the buyer's assertion that it would be in control. The Commission concluded that the absence of such facts was fatal to the petitioner's position. Id., 3 F.C.C. Rcd. at 4321.[14]

16. For the purposes of our discussion here, these cases can be said to stand for two propositions. First, when a company is spun off, Commission requirements can still be met upon a review of all relevant facts, despite "carryover" employees, common directors and even on-going business relationships. Second, petitioners that wish to challenge such spin-offs as inconsistent with our requirements must allege specific facts to establish a substantial and material question as to whether the required degree of segregation would not be established or that the parties would not reasonably be expected to conduct themselves as represented. Speculation is not enough. With that backdrop, we turn to the questions presented.

17. Garden State and Krauss contend that because of continuing relationships after the tender offer between Newco and a foreign-owned MCA, careful review is required. Otherwise, in Garden State's opinion, "a situation could arise such as that in Spanish International Communications Corp., 2 F.C.C. Rcd. 3336 (1987)...." In that case, as noted previously, the presiding Administrative Law Judge had found a violation of section 310(b) of the Act.[15] While we certainly support the position that we carefully review matters before us, we must observe that it is at least theoretically possible (but fortunately rare) that any applicant might not abide by its representations to us or not comply with Commission requirements in the future. It does not follow, however, from the fact that one licensee might violate a law or rule that all other subsequent applicants would similarly disregard our requirements. We have previously stated with regard to petitioners alleging possible prospective violations that "in the absence of information to the contrary," the Commission would not assume that an applicant "will not faithfully carry our its representations or that [the applicant] will be operated or controlled in a manner that differs from the [sales] agreement under consideration." News International, PLC, 97 F.C.C.2d 349, 356 (1984). In this case, as well, we do not infer improper future conduct, "in the absence of information to the contrary."

18. We must address, therefore, the nature of Newco's corporate organization and the continuing relationships between Newco and MCA after the tender offer. Garden State and Whitely note the composition of Newco's Board, whose eight members are all United States citizens. Of these, the applicants propose two

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[14] The court later remanded the case to us for further proceedings, but only with respect to the application of the Jefferson Radio policy. 893 F.2d at 1362. It did not disturb our conclusions with regard to alien control.

[15] Among other things, the facts in Spanish International disclosed long-term family relationships between aliens and the Chief Executive Officer of the U.S. licensee, and considerable financial dependence by the licensee's principals on those aliens. Those facts are completely absent in this case.

members who will remain associated with MCA,[16] two who will be former MCA officers, but who will sever all ties with MCA,[17] and four who will be jointly nominated by MCA (before its acquisition by Matsushita) and Newco principals, but who have not been Officers, Directors or employees of MCA.[18] Thus, negative control of the Board will be in the hands of those who have not been Officers, Directors or employees of MCA, and six of the eight Directors will have no connection with MCA after the proposed tender offer. Applying here what we stated in the Viacom spin-off case, the Directors of Newco "should have every incentive, as well as the clear fiduciary duty", to serve Newco's interests. Columbia Pictures Industries, Inc., 30 F.C.C.2d at 16. That conclusion "applies to those officers and directors of [Newco] with previous [MCA] affiliation as well as to those lacking any such affiliation." Id.[19] Further, the applicants state that Newco and MCA will have no common employees.

19. There is nothing in the record with regard to the post-transaction positions of three other MCA officials. Richard Baker, Vice President and Controller of MCA, also serves now as the Chief Financial Officer and Director of MCA Broadcasting, and as Treasurer and Director of WWOR-TV, Inc. Further, George Smith is an MCA Vice President, and also serves as a Vice President and Director of both MCA Broadcasting and WWOR-TV, Inc. Finally, Michael Samuel is a Vice President and Secretary of MCA. He also serves as Vice President and Director of MCA Broadcasting, and Secretary of WWOR-TV, Inc. MCA may have intended these individuals to fall under its representation that Newco and MCA would have no common employees. We do not ordinarily consider directors to be employees, however, and believe there should be no uncertainty on this point. In order to limit the degree of influence of MCA in Newco and to assure arm's-length transactions between the two companies, we believe that these three individuals should sever their relationships with either MCA, or with MCA

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[16] These are Thomas Wertheimer, who is Executive Vice President and a Director of MCA and Robert D. Hadl, an MCA Vice President and General Counsel.

[17] These are Lawrence Fraiberg and Michael Alexander. Fraiberg is now President of both MCA Broadcasting and WWOR-TV, Inc. Alexander is Executive Vice President of MCA Broadcasting and WWOR-TV, Inc., and the station's General Manager. They will be responsible for the day-to-day operation of the station under Newco's stewardship.

[18] One of these four, however, has served as communications counsel for MCA in the past.

[19] Garden State finds questionable MCA's role in nominating the proposed Newco Board. As a practical matter, we do not see how it could not have a role, because it is creating Newco as a means to eliminating the alien ownership problem. That same factor was an element in Columbia Pictures Industries. We did not find that factor inconsistent with separation there, and we see no need to reach a different conclusion here.

Broadcasting and WWOR-TV, Inc. Requiring immediate replacement, however, could be unduly disruptive. Accordingly, we believe it appropriate to condition our grant on their removal within 90 days after the proposed transaction is closed. Accordingly, subject to that condition, and applying the rationale of our analogous decisions involving the CBS-Viacom and Spanish International-Hallmark transactions, discussed above in paragraphs 14 and 15, [20] we are satisfied that the corporate organization of Newco will permit it to operate independently from MCA.

20. Garden State and Krauss refer to section 5.03 of the stock distribution agreement, which permits Newco and MCA to continue existing contracts for the provision of products and services or to enter into new such contracts. MCA responds that the station has continuing programming relationships with many program suppliers, including MCA, and that in order to compete in the market it must rely on a variety of sources. It states further that after the spin-off, Newco will have to negotiate at arm's length with MCA, as it will with any other program supplier. In the circumstances presented here, we see no benefit in requiring Newco to abrogate existing contracts with MCA, which is one of several program syndicators providing programming to the station, or in banning Newco from a source of programming available to every other television licensee. As long as future negotiations are at arm's length, no injury to the public results. Because Garden State and Krauss have presented nothing but speculation on this point, we conclude there is no basis for questioning the

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[20] When compared to the case before us, there are some differences in the contexts in which we reviewed the Columbia Pictures and Spanish International cases. In Columbia Pictures, the Commission discussed whether a proposed corporate structure would comply with newly enacted prohibitions on common ownership or control of, or holding attributable interests in, specified media activities; for example, national television networks and cable television systems. Attributable interests in corporate licensees are now generally defined as officers, directors and, generally, five-percent or greater shareholders. Attributable of Ownership Interests, 97 F.C.C.2d. 997 (1984), reconsidered in part, 58 R.R.2d 604 (1985), further reconsidered, 1 F.C.C. Rcd. 802 (1986). In the case before us, there is no ban on common ownership of companies producing television programming and operating television stations, as attested by MCA's existing ownership of program production companies and a television licensee. The limit on ownership and influence in this case is defined only by section 310(b), which would permit up to 25-percent alien ownership of Newco's stock and up to 25 percent of its Directors to be alien individuals. Thus, the degree of influence that would be permissible is greater in the case of before us than in Columbia Pictures. (As noted, all Newco Directors are United States citizens and the degree of alien ownership falls considerably under the 25-percent guideline.) Finally, we are not dealing here with a case such as Spanish International Communications Corp., 2 F.C.C. Rcd. 2336 (1987), where we assumed for the purposes of the ruling the existence of a violation of section 310(b). Requiring complete ownership divestiture is entirely appropriate to remedy an existing violation in order to expunge any sources of corporate tolerance for wrongdoing. No such violation exists in the case before us.

provisions of section 5.03 of the agreement.

21. Garden State also points to a variety of other provisions that indicate, at least at the outset, relationships between Newco and MCA. These include a trademark license agreement to permit Newco to continue use of the "Universal 9" trademark, leases of office space and a limited duration interim service agreement. There is nothing in the record, however, to dispute MCA's characterization of these provisions as "arm's-length administrative arrangements necessary in connection with the divestment of a major broadcast asset" that permit continued operation of an on-going concern. For example, the licensee now leases office space from its parent. There is no apparent reason why Newco should be forced to find new space immediately. The agreement does not dictate that those relationships continue, and Newco is free to engage in arm's-length negotiations with MCA or others in the future. An immediate severance of such relationships would be highly disruptive and contrary to the public interest. Garden State also refers to a "poison pill" plan to be adopted by Newco. Such plans are commonplace. We do not understand how it would prevent the election of new Directors in the normal course of events, nor why Newco should be barred from adopting a "poison pill" generally. Certainly, Garden State has failed to provide any indication as to why a poison pill plan would "entrench" Newco's management in a manner that differs from any other company. To the extent that entrenchment is a concern, however, we note that six of the eight Newco Directors will not have any connection with MCA. With the initial Board of Newco so constituted, we fail to see how the plan would serve to perpetuate MCA's alleged control of Newco. With regard to finances, Newco intends to acquire a line of credit from an independent financial institution to provide initial working capital. If that line of credit is not promptly available by the time of closing, however, MCA has agreed to provide working capital for up to 90 days. A loan for such a limited time to provide the necessary bridge capital does not constitute control or undue influence, and in fact aids in a smooth transition to independence.[21] Because we have determined that the Newco Board, as constituted, is sufficiently separated from MCA to permit arm's-length transactions, no action on these matters is warranted.

22. We have reviewed the application and the pleadings in this case carefully. We believe that Newco will be controlled as indicated in the application. Garden State, Whitely and Krauss have failed to submit properly supported facts making a prima facie case that, after the proposed tender offer, MCA would be able to dominate the management of Newco or its subsidiaries, or control its programming, personnel practices or finances. Nor does it appear that MCA will be able to nominate or elect any Newco Board members after the proposed tender

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[21] Garden State also asserts that the Commission should know what Newco stockholders will have continuing relationships with MCA. Our concern however, focuses on attributable interests. Only Mr. Wasserman, MCA's current Chief Executive Officer, will have an attributable ownership interest in Newco (about seven percent), but will not be an Officer, Director or employee of Newco or its subsidiaries. It is not apparent, therefore, how Newco would be "effectively controlled" by MCA stockholders, as speculated by Garden State.

offer. Thus, there is no basis for concluding that there is a prima facie case that Newco would be under the de facto control of MCA. Benjamin L. Dubb, 16 F.C.C. 274, 289 (1951); Stereo Broadcasters, Inc., 87 F.C.C.2d 87 93 (1981); William S. Paley, 1 F.C.C. Rcd. 1025 (1986), reconsideration denied, 2 F.C.C. Rcd. 2274 (1987), aff'd per curiam sub nom. Fairness in Media v. FCC, 851 F.2d 1500 (D.C. Cir. 1988). Further, our review of the application and the factors discussed above, individually and cumulatively, does not disclose a substantial and material question of fact suggesting an impermissible degree of alien influence over the operation of Newco and its subsidiaries.[22]

Motion for Stay

23. Whitely's Motion for Stay requires little discussion. Its arguments on the merits have been discussed above and found wanting. The likelihood of success on the merits of an appeal has thus not been established. Whitely's alleged irreparable injury is premised on the possibility that the court would reverse the decisions of the Administrative Law Judge, the Review Board and the Commission and order Whitely's reinstatement as a party to the Secaucus comparative hearing. In that event, Whitely claims that a grant of the transfer application would deny it "the opportunity of securing channel 9 as it will be transferred to other parties." This is a non sequitur and wrong. Our action here does not terminate the comparative hearing or extinguish whatever rights Whitely might still retain. Whitely asserts that a grant of the stay would not injure any other parties. In our view, however, a stay would injure the applicants and MCA's shareholders, because they would not be able to consider a legal tender offer and receive any benefits that might flow from it. Finally, there is a public benefit in expeditious Commission processes, and in permitting the operation of other laws regulating the activities of corporations. Thus, Whitely has failed to establish all four of the elements needed to support the extraordinary relief of a stay. See e.g., Virginia Petroleum Jobbers Ass'n v. FPC, 259 F.2d 921 (D.C. Cir. 1958); MMM Holding, Inc, 4 F.C.C. Rcd. 8243, 8249 (1989). Whitely's Motion for Stay, therefore, will be denied.

Petition to Revoke

24. Whitely's Petition to Revoke [23] alleges misrepresentations to the Commission and abandonment of station WWOR-TV's obligation to be responsive to

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[22] In the unlikely event that Newco does not operate as represented, we have ample enforcement powers to cure violations.

[23] Petitions to revoke are treated as informal requests for Commission action under section 1.41 of the Commission's rules. See MCI Telecommunications Corp., 3 F.C.C. Rcd. 509 at n. 1, supplemented, 4 F.C.C. Rcd. 7299 (1988), dismissed by judgment sub nom. TeleStar, Inc. v. F.C.C., No. 88-1153 (D.C. Cir. May 1, 1990). Initiation of revocation proceedings under section 312(a) "is, of course, wholly subject to our discretion," id. 3 F.C.C. Rcd. at 513, citing Tulsa Cable Television, 68 F.C.C. 2d 869, 877 (1978). In any event, even if section 309(d)(1) applied, no prima facie case based on specific factual allegations, has been made.

the issues confronting Secaucus and northern New Jersey. Whitely states that counsel for MCA made a material misrepresentation in a letter of December 5, 1990. That letter states, among other things, that the shareholders of record of MCA would continue to hold total uninterrupted control over the station after the spin-off to Newco. That position contains a material misrepresentation, in Whitely's view, because: (1) current shareholders with fewer than five MCA shares, because of the five-to-one conversion ratio, will not receive Newco stock, but will instead receive cash; (2) MCA debenture holders may convert their debentures to MCA common stock, which would introduce new shareholders; and (3) Matsushita holds an option to buy MCA shares if certain events occur, which would introduce another substantial shareholder. These subjects are discussed above in footnotes 8 and 11. We are disinclined to find misrepresentations in a page and one-half letter that describes a transaction whose contracts and offerings are more easily described in inches of thickness than in pages. A short letter cannot possible contain all of the qualifications that are a necessary part of such a substantial transaction. In any event, we have repeatedly stated that a necessary element of a misrepresentation to the Commission is an intent to deceive. See, e.g., Fox River Broadcasting, Inc., 93 F.C.C.2d 127 (1983). We do not infer an intent to deceive when an applicant has disclosed information on the public record, here at the SEC, particularly where: (1) the applicant made specific reference to that material in its filings with us; (2) it would be correctly assumed that the material would be available to us; and (3) the material referred to does not affect our decision. We conclude that Whitely has failed to allege facts, that, on their face, establish a misrepresentation to us.

25. The alleged abandonment of the station's New Jersey programming obligation is evidenced, in Whitely's opinion, by a shift to the use of promotional names of "Universal 9" and "Universal," and an alleged abandonment of references to Secaucus. These allegations are not supported by an affidavit from a person with first-hand knowledge of the facts. In addition, we have addressed a similar allegation at the time MCA acquired station WWOR-TV. RKO General, Inc., 1 F.C.C. Rcd. 1081 (1986). We discussed in detail the standard to be applied to the station's programming obligations to Secaucus and northern New Jersey. Id. at 1086-88. At the heart of a petitioner's showing is an obligation to demonstrate that a station is failing to address issues facing the community, based on the licensee's issues/programs list, which is placed in the station's public inspection file on a quarterly basis. Id. at 1087. Here, Whitely has made no reference to the issues/programs list and has identified no issues whatsoever that it believes that the station should have addressed. Whitely has not, therefore, alleged facts relevant to our determination in this regard, and we shall deny its Petition to Revoke.

Conclusion

26. We find that the applicants are fully qualified and that a grant of the application would serve the public interest. Our action, however, is only permissive and does not compel the transaction to go forward. It is the MCA shareholders who will ultimately evaluate the benefits and detriments of the proposed tender offer and approve or disapprove the transaction by tendering or withholding their shares.

27. Accordingly, IT IS ORDERED That the petitions of Garden State Broadcasting Limited Partnership and Whitely Communications ARE DISMISSED and, when considered as informal objections, ARE DENIED.

28. IT IS FURTHER ORDERED, That the informal objection of Michael Krauss IS DENIED.

29. IT IS FURTHER ORDERED, That the Petition for Stay filed by Whitely Communications IS DENIED.

30. IT IS FURTHER ORDERED, That the Petition to Revoke filed by Whitely Communications IS DENIED.

31. IT IS FURTHER ORDERED, That the application (BTCCT-901127KE) of MCA, Inc., to transfer control of MCA Broadcasting, Inc. to Newco, Inc., IS GRANTED subject to the condition that Messrs. Baker, Samuel and Smith either resign their positions with MCA, Inc., or with MCA Broadcasting, Inc., and WWOR-TV, Inc., within 90 days of the date of closing of the transfer of control.

32. The staff of the Mass Media Bureau is directed to send copies of this decision to the parties to this proceeding by certified mail, return receipt requested.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

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FEDERAL COMMUNICATIONS COMMISSION

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Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-4

In the Matter of

Reexamination of the Effective
Competition Standard for the
Regulation of Cable Television
Basic Service Rates

FURTHER NOTICE OF PROPOSED RULE MAKING

Adopted: December 13, 1990; Released: December 31, 1990

By the Commission: Commissioners Quello and Duggan issuing separate statements.

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I. INTRODUCTION

1. In the *Notice of Proposed Rule Making* (*Notice*) that opened this proceeding, the Commission indicated its belief that changed circumstances in the video marketplace warranted reexamination of the "three signal standard" for determining whether a cable system was subject to effective competition and thus exempt from local franchising authority rate regulation.[1] The *Notice* sought comment on a wide variety of options for a revised definition of effective competition and rate regulation standards. The resulting record leads us to believe that an effective competition standard based on three over-the-air broadcast signals is no longer valid. Thus, this *Further Notice of Proposed Rule Making* (*Further Notice*) proposes alternative tests for effective competition, and seeks comment on specific aspects of the proposals for changing the effective competition standard and standards for rate regulation.

II. BACKGROUND

2. The Cable Communications Policy Act of 1984 (Cable Act) set forth a national policy to encourage the growth and development of cable television services.[2] To further this policy, Section 623 of the Cable Act permits, but does not require, local franchising authorities to regulate basic service rates only in those situations where the cable system is not subject to "effective competition." [3] The Cable Act directed the Commission to define the circumstances in which a cable system is not subject to effective competition and to establish standards for the regulation of basic cable rates by local franchising authorities in such cases.[4]

3. Under existing Commission rules, promulgated in 1985 and amended in 1988, a cable system is deemed subject to effective competition if at least three unduplicated broadcast television signals are available over the entire cable community.[5] The existing standard counts a broadcast signal as available based on predicted Grade B coverage or "significantly viewed" status in the cable community.[6] The Commission also has established procedural requirements for those franchising authorities that choose to regulate basic cable rates, although the specific rate-setting methodology used to set the basic service rate is left to the local franchising authorities.

4. Section 623 of the Cable Act also requires that the Commission periodically review its regulations, taking into account developments in technology.[7] On January 11, 1990, the Commission initiated this proceeding to undertake such a review in light of changed circumstances in the video marketplace since the three signal standard was adopted. The *Notice* sought comment on whether the three signal standard remains valid, and, if not, what would constitute a more appropriate standard. It also requested comment on proposals to amend the standards for rate regulation by local franchising authorities in cable communities not subject to effective competition.[8]

III. DISCUSSION

A. Effective Competition

5. In the *Notice*, we indicated our belief that the three signal standard may no longer be an appropriate measure of effective competition because changes in the cable industry appeared to have altered the nature of basic cable service.[9] The fundamental change we observed was that the basic service tier, which consisted mainly of retransmitted local broadcast television signals when we adopted the effective competition standard, now includes a full range of programming services, including distant broadcast signals, cable networks, superstations and locally originated programming, beyond local broadcast stations.[10] Thus, while over-the-air broadcast signals once may have been a good substitute for basic cable service, this may not be the case today given the expanded basic tier offerings.[11] As further evidence of the possible need to revise the definition of effective competition, we noted in

the *Notice* that, under the existing standard, rates for basic cable service have increased while subscribership has also increased, a result that might suggest that competitive alternatives to basic service are limited. Moreover, an update of the staff study that was used in part to develop the three signal standard appeared to indicate that with changes in viewing patterns the current standard is no longer appropriate for determining when a cable operator is subject to effective competition. [12]

6. The *Notice* requested comment on whether the three signal standard remains valid, or whether some alternate standard would provide a more accurate determination of effective competition. Commenters favoring a revised standard were asked to consider a number of alternatives including:

> (1) an increased complement of over-the-air signals; (2) the availability of a second competitive cable system or alternative video delivery provider, such as multichannel, multipoint distribution systems (MMDS),[13] satellite master antenna systems (SMATVs), direct broadcast satellite systems (DBS) or home satellite dishes (HSDs); (3) a measure of cable penetration; (4) the offering of cable services on a per-channel or unbundled basis; and (5) some combination of factors.

1. Three Signal Standard

7. *Comments*. There is a consensus among commenters, including government parties and cable interests, that the three signal standard is no longer a viable measure of effective competition because it does not reflect today's video marketplace.[14] While the National Telecommunications and Information Administration (NTIA) and cable interests generally argue that the existing three signal standard has performed as intended,[15] they concede that an increased number of signals are now needed to constitute effective competition in today's marketplace. Rejecting our belief set forth in the *Notice* that basic cable service has fundamentally changed over this period, they argue that cable service remains a combination of local broadcast signals, regional and distant signals and a variety of cable programming services. They observe that in 1985 the Commission considered comments that indicated that basic service consisted of a mixture of local over-the-air signals and other services and rejected a standard based on nonbroadcast cable services.

8. NTIA believes that broadcast signals can exert a limiting influence on a cable system's ability to set excessive basic cable rates.[16] Cable interests state that broadcast television remains the fundamental component of basic cable service and the dominant competition to cable service, as indicated by the fact that even in cable homes the highest proportion of viewing is of local television stations.[17]

9. The National Association of Broadcasters (NAB), Association of Independent Television Stations (INTV) and commenters representing franchising authorities and alternative video delivery systems support revision of the definition of effective competition. They contend that the Cable Act was intended to maintain basic service rates at reasonable levels, either through competition or rate regulation.[18] They argue that the existing three signal standard has failed to restrain cable rates, even in areas with more than three signals.[19] NAB, INTV and commenters representing franchising authorities attribute these rate increases to a lack of competition.[20] They also contend that basic cable rates have risen at a time when penetration rates continue to grow because there are no good substitutes for cable service, which offers subscribers an array of programming and services (*i.e.*, local and distant broadcast stations, locally originated programming, satellite-delivered services and specialty channels) in one convenient package.

10. *Analysis*. We believe that our initial determination regarding the need to redefine effective competition is correct because the three over-the-air signal standard no longer provides a correct measure of effective competition to the full range of cable service. The evidence indicates that consumers subscribe to basic cable service for the large number and wide variety of programming services it delivers directly to the home. Since 1985, the number of channels included in basic service has increased.[21] Based upon the FCC/GAO data, we also find that the most widely subscribed-to tier of service on average has expanded to include significant amounts of programming beyond the retransmission of local broadcast signals.[22] Moreover, audience statistics indicate that nonbroadcast cable programming has attracted an increasing share of the audience in cable homes. For example, during the 1985/1986 television season, basic cable programming attracted a 19 share of all day audience in cable homes. During the 1988/1989 season, the all day audience share for basic cable programming rose to 28.[23]

11. Furthermore, an analysis of the services provided by cable television systems indicates that such services can be divided into four general categories and that different media, to varying degrees, provide competition for different components of cable service.[24] First, because cable can offer a high level of signal quality, it serves as an "antenna service," delivering quality reception of retransmitted local broadcast signals. The availability of comparable off-air broadcast television service is a good substitute for cable's "antenna service" function. Second, cable offers "premium" programming, such as recent movies, usually without commercial interruption. The substantial penetration of VCRs and the ubiquity of tape rental stores provides a good substitute for commercial-free movie channels.[25] Third, cable offers general interest channels, such as USA Network and Turner Network Television (TNT). Broadcast signals offer some degree of competition to these (typically basic tier) channels which offer programmming often similar to that of independent broadcast stations.[26] The wide array of specialized cable services like CNN, ESPN, MTV, Nickelodeon, BET and C-SPAN,[27] constitutes the fourth service category.[28] Although much of such programming is available on broadcast television to some extent, especially in markets with large numbers of stations,[29] such programming is not available over-the-air on a full-time basis as it tends to be on cable (*e.g.*, CNN Headline News offers a national newscast, similar to the broadcast networks nightly news, every half hour, 24 hours per day).[30] In fact, cable offers such a unique cluster of a wide array of programming services that a small number of broadcast signals alone generally cannot deliver comparable service. In sum, it is clear that the three signal standard no longer reflects effective competition to the full range of cable television service.

2. Alternative Effective Competition Standards

12. *Comments.* Commenters unanimously supported a revised effective competition standard and addressed the various alternatives proposed in the *Notice*. The first alternative on which we sought comment in the *Notice* is whether a larger complement of over-the-air broadcast signals would be a better measure of effective competition than the existing three signal standard. The National Cable Television Association (NCTA) proposes a five signal standard that is supported by many cable operators.[31] NCTA states that a five signal standard now may be appropriate because there have been changes in the relative attractiveness to consumers of the services carried on basic tiers vis-a-vis broadcast programming. NTIA believes that a six signal standard would be appropriate[32] in order "to ensure basic cable rates remain at reasonable, if not fully competitive, levels."[33]

13. NAB, INTV, franchising authorities and competing media providers support a revised effective competition standard based on the availability of an independently owned and operated competing multichannel video program service that offers consumers comparable programming at a price comparable to that of the incumbent cable company. Specifically, several parties believe that the standard should include criteria to indicate when the alternative will be considered truly a competitor. Some commenters support the proposal NYC/NLC submitted in MM Docket No. 89-600 to define effective competition as the availability to 80 percent of the cable community of another multichannel video system that has a 30 percent penetration rate. Other commenters recommend that the competing system be required to provide a minimum number of channels and the same broad categories of programming service as the existing cable system at a comparable price.

14. The *Notice* also asked whether cable penetration might be a measure of effective competition. Parties representing cable interests addressing this matter argue that high penetration resulting from market power cannot be distinguished from that achieved by provision of highly desired services in a competitive market. Cable operators contend that cable penetration depends upon a number of factors, including quality of over-the-air signals, attractiveness of cable programming, marketing skills of the cable operator, overall quality of cable service and its price. On the other hand, a few commenters representing franchising interests believe that at some level cable penetration may indicate market power and that it should be a component of the effective competition standard.

15. In the *Notice*, we asked whether we should find that effective competition exists if all subscribers in a cable community can purchase cable service on a per-channel or unbundled basis. While a few commenters indicate that there would be benefits, such as increased consumer choice, if cable programming were offered in an unbundled manner, no commenter believed that an unbundled service offering would constitute effective competition. Parties contend that "a la carte" or unbundled cable service offerings are simply a repackaging of programming. Cable interests indicate that such a requirement is technically infeasible and, to the extent it is possible, would cost a prohibitive amount.[34] They also claim that unbundling would cost the consumer more because the fixed costs of providing cable to each customer are essentially the same whether subscribers choose a single channel or a package.

16. We also sought comment on whether we should adopt an effective competition standard that combines two or more alternatives, including proposals originally submitted in 1985 by the Department of Justice (DOJ) and the National League of Cities. Cable interests generally opposed a combination standard. They assert that consideration of multiple factors within the cable community would be complicated and that Congress specifically directed the Commission to choose a standard that is simple and easily applicable on a community-by-community basis.[35]

17. Franchising authorities generally support a standard that includes a measure of the availability of alternative delivery systems and a market share test based on cable penetration. In this regard, NYC/NLC presents a specific proposal that effective competition be defined as existing only where (1) the local cable system has a penetration rate of less than 30 percent, or (2) at least two non-affiliated providers of comparable multichannel video programming are present in the community, each of which (a) offers service to at least 80 percent of households in the franchise area and (b) actually provides service to at least 30 percent of households in the area.[36] Other commenters propose multiple-part definitions of effective competition that include factors for the number of over-the-air broadcast signals, the availability of alternative video providers and penetration rate.

18. In reply comments, the Department of Justice (DOJ) proposes a multipart effective competition standard. In DOJ's view, a measure of effective competition should take into account a variety of factors including the number and nature of local over-the-air broadcast signals, the quality of broadcast reception and the number and nature of nonbroadcast services offered as part of the basic service tier. Specifically, DOJ proposes that effective competition be presumed to exist when all or the majority of the following criteria are met: (1) a significant number of broadcast signals can be received in the area; (2) the ratio of the number of channels on the cable system's basic tier to the number of over-the-air broadcast signals is below a specified number; and (3) the number of subscribers purchasing only basic service comprise less than a specified percentage of the total number of subscribers.[37]

19. *Analysis.* After reviewing the record in this proceeding, we believe that there are a number of ways to measure effective competition and that no one factor, taken in isolation, can necessarily measure the existence or lack of effective competition. As explained above, cable market power may be derived from a variety of sources whose influence varies because of different local circumstances.[38] Thus, we believe that a revised standard must set forth a number of alternative conditions, any one of which can be presumed to indicate the presence of effective competition.[39] In order to minimize unnecessary regulatory constraints upon cable operators that have not abused their market power, moreover, we propose among these a behavioral test for effective competition. Accordingly, we propose that effective competition would be presumed to exist if any of the following conditions are met: 1) six unduplicated over-the-air broadcast television signals are available in the cable community and cable penetration is below 50 percent; 2) an independently owned, competing multichannel video delivery system is available to 50 percent of the homes passed by the incumbent cable system and subscribed to by at least 10 percent of the homes passed; or, 3) a behavioral test which would find a

cable system subject to effective competition if it (a) offers a basic tier of service at a rate, and perhaps in a quantity, comparable to that offered in other communities where effective competition is found to exist or where rates otherwise appear to have been held to a reasonable competitive level, and (b) meets specified customer service standards.[40]

20. The goal of this proposed standard is to strike an optimal balance between our desire to minimize regulation and our concern that cable systems may be able to exert undue market power in the absence of substitutable services. We believe that this multiple-option test for effective competition is superior to any single criterion because it would consider the source and extent of a cable system's market power, which may vary from market to market, as well as the components of cable service described above. For this reason, we propose the alternative structural conditions (numbers one and two above) which we believe reflect effective competition to a cable system. Moreover, to account for the cumulative price disciplining effect of competitive factors not captured within those structural standards, we propose a behavioral test whereby cable systems offering a competitively priced basic service will be presumed to be subject to effective competition. While comments in this proceeding discuss major aspects of the proposed revised standard, we believe that it is necessary to seek further comment on the specific details of our proposed standard.

21. *Six Signal, Under 50 Percent Penetration Test.* The first alternative criterion would require that at least six unduplicated over-the-air broadcast signals be available in the cable community in combination with a cable penetration of less than 50 percent.[41] We seek the presence of a number of over-the-air signals adequate to ensure that competitive choices are present and sufficient in quantity, diversity and price to force cable system operators to function in a competitive manner. As the number of "*free*" broadcast signals in a market increases, these signals may increasingly become an effective consumer alternative to the diversity of service available from cable on a *paid* basis.[42]

22. Moreover, the evidence before us indicates that some number of broadcast signals exerts a downward pressure on cable rates, although the precise "right" number cannot be precisely identified on the basis of the studies submitted into the record of this proceeding.[43] Our selection of six over-the-air signals is based on NTIA's analysis and estimate[44] and is intended to be conservative enough to ensure a complement of signals clearly adequate to provide effective competition to the range of services offered by cable television service.

23. We are aware that consumers with individual antennas may not in fact enjoy good reception from the signals that are "technically" available in some communities (*e.g.*, Manhattan, New York). Thus, we believe that an effective competition standard based solely on the number of off-air signals may not adequately address the "antenna service" source of cable market power in such cities. Therefore, we believe it is appropriate to consider signal availability in conjunction with low cable penetration in the franchise area. This second criterion will provide evidence that consumers can actually receive those over-the-air signals and will support the inference that, by and large, these signals provide adequate substitutes for the more specialized cable services. At the same time, however, we request comment on whether it might be appropriate to consider a six signal standard *without* the additional requirement that there be low cable penetration in the market. While there is no definitive cable penetration number that can ensure the existence of effective competition, we believe that cable market power is likely to be restrained in markets where six or more over-the-air signals exist and cable penetration is less than 50 percent.[45] In a market where a majority of the homes passed by cable choose not to subscribe to the service (*i.e.*, cable penetration is less than 50 percent), it would appear that there are sufficient alternatives to the antenna function and programming services provided by the cable operator. Moreover, by using a penetration test of below a low benchmark as opposed to above a high benchmark, it is unlikely that perverse incentives will cause cable systems to hold penetration down just to escape regulation, given the economic advantages to the cable system of increasing penetration. We ask commenters to consider whether the 50 percent criterion is approporiate for this penetration test or whether some alternative measure, higher or lower, would provide a better indication that substitutes to cable are available.[46]

24. We propose to retain the existing procedures for determining whether a broadcast television signal is available over-the-air in a cable community. Thus, under our proposed standard, the entire cable community would have to be served by at least six unduplicated broadcast signals and a signal would be counted on the basis of its predicted Grade B contour, or its being significantly viewed in the cable community.[47] We will define cable penetration as the number of subscribers divided by the number of homes passed and then expressed as a percentage.[48] We propose that parties be allowed to use the data available from publicly available sources, obtained from the cable operator directly, or from specifically undertaken audits of cable subscribers to determine the cable penetration of the local cable system.[49]

25. *Multichannel Competitor Test.* Another alternative condition under which we believe that effective competition will be found to exist is if a competing, independently owned,[50] multichannel video delivery service operates in the cable community. We must determine if a rival is, in fact, a "competing multichannel video service" and if it is sufficiently "available" to the community. This alternative will require that at least 50 percent of the homes passed by the incumbent cable system be capable of receiving the alternative services. We believe that an availability criterion of at least 50 percent is sufficient to indicate that an alternative really exists in the cable community and will result in pro-consumer competitive responses by incumbent cable operators. We also believe that a penetration criterion set at 10 percent or more demonstrates that an alternative video provider offers service that consumers view as a substitute for the incumbent cable television system.[51]

26. A number of different video delivery services, including a second competitive cable system, wireless cable, SMATVs, home satellite dish service (HSDs) and, in the future, DBS may provide alternatives to the incumbent cable operator. For a second cable system, we propose that its availability be determined by calculating the percentage of homes passed by the incumbent cable system that are also passed by the second competitive cable system.[52] The penetration of a second competitive cable system would be defined by dividing the number of subscribers to that system by the number of homes it passes

and expressed as a percentage. We propose that parties obtain data for the availability and penetration of the alternative video delivery services from publicly available sources, from the operator directly or from specifically undertaken audits. The availability and penetration figures for other multichannel distribution systems would be calculated similarly.[53]

27. Moreover, within a given franchise area, the cable system may compete with one or more rivals. When this is the case, to determine the availability of competing video services, we propose that the number of homes passed by one or more of these systems be added together to calculate the proportion of the incumbent cable system's service area that are served by all competing services combined. Similarly, we propose that the penetration of such video delivery services be determined by combining the number of subscribers to all available services and calculating the penetration on the basis of home passed by all the competing systems combined.[54]

28. Under these criteria, segments of the cable franchise area, including up to 50 percent of the households, could be without a multichannel alternative and yet not be subject to protection by local regulation. In such a case, the cable operator might consider reducing its prices only in the area where it faced competition. However, under Section 623(f) of the Cable Act, a franchising authority may prohibit "discrimination among customers of basic cable service," even when it has no authority to regulate rates. Since local authorities have the power to prevent such discrimination by requiring geographically uniform rates, we believe that the proposed availability criteria would not leave unprotected those cable customers unable to subscribe to the other service.

29. *Competitive Behavior Test.* We recognize that our structural tests for effective competition may not capture or reflect all competitive forces that, taken together, have a price disciplining effect on cable services. While we seek to restrain the pricing of basic cable service where effective competition is not apparent, we also are intent on minimizing unnecessary regulatory burdens on cable systems. Therefore, we believe that consumer interests in receiving cable service at reasonable rates can be protected without direct rate regulation by using a behavioral test for effective competition in addition to the structural tests identified above. This behavioral standard would test whether the cable operator provides a basic service tier at a competitive price level as well as a minimum level of customer service. Thus, we would ensure that unnecessary regulation is avoided in those situations where cable system rates are in fact demonstrably restrained by a combination of market conditions not identified by either of our structural standards. In addition, we propose requiring cable systems to certify to their local franchising authorities that they meet certain customer service standards to qualify under this test. This latter requirement recognizes that competition is likely to result in improved customer service since unsatisfactory service drives subscribers to competitive alternatives. It will also provide evidence that the cable system is not degrading the quality of service to its subscribers in order to reduce its rates.[55] We particularly request that commenters address this behavioral test, as it was not previously presented in this proceeding.

30. Under the first part of this behavioral test, a cable system would be deemed to be subject to effective competition, whatever the source, if it offered a basic tier of service corresponding in rates, and perhaps in quantity, to those in communities where effective competition is readily apparent. In order to implement this proposal, we must specify the relevant pricing and, perhaps, complement of signals. If we were to establish national standards, we believe that the most appropriate benchmarks for this competitive tier should be determined by analyzing basic cable service in communities subject to effective competition under our new structural tests.[56] As this information will not be available until some time after the new standard becomes effective, however, we propose alternative transitional behavioral standards.

31. One possible method for determining transitional benchmarks would be to specify a minimum number of channels and a maximum aggregate price for the basic tier. This would ensure that cable subscribers receive a reasonable amount of programming at a competitive price. One approach would be to base this standard on each cable system's pre-deregulation number of channels and pre-deregulation price adjusted to reflect inflation.[57] Alternatively, we might establish a single national benchmark for this competitive package. For example, these benchmarks could be based on the number of basic service channels and the price of basic service offered by the median cable system in the sample of the FCC/GAO rate study. Thus, based on the December 31, 1989, data from the FCC/GAO survey, a cable system offering 23 or more separate channels at or below $16.45 would be considered to provide a competitive package of basic service.[58] Alternatively, we could base the transitional benchmark on the average number of channels on the lowest price basic tier on November 30, 1986, the eve of deregulation (*i.e.*, 18 channels),[59] or 80 percent of channel capacity, whichever is lower.[60] Under this proposal, the benchmark price would be based on the average per-channel basic service rate of the lowest price basic tier rate on November 30, 1986 (*i.e.*, $0.57) adjusted to reflect the inflation that has occurred in the past four years. The adjustment factor could be the statutorily permitted five percent annual rate increase[61] or some measure of the rate of general inflation, such as the Consumer Price Index (CPI).[62] For example, if we applied the CPI to the base per-channel rate of $0.57,[63] then the adjusted per-channel rate from November 30, 1986, would be $0.64 in November 1989.[64] Thus, a cable system that offered a "competitive package" of at least 18 separate channels at or below $11.52 (*i.e.*, 18 x $0.64) in November 1989 would have been presumed to face effective competition.[65]

32. A second general approach for a transitional standard would be to set a maximum per channel price for the basic cable service without specifying any minimum number of channels that cable operators must include in their basic service. This proposal would minimize interference with the cable operator's flexibility to offer the type of basic service, whether a very large tier or a smaller, more "universal service"-type tier, that best meets the consumer demand in its local community. Thus, this proposal would not constrain a cable operator's tiering decisions in a way that could artificially increase the price of basic service where consumers might want a small, "universal service" option. As in the proposal above, the average price per channel could be based either on the median system's 1989 price adjusted for inflation or on each system's pre-deregulation average price per channel adjusted for inflation.

33. We also seek comment on possible modifications to our second general approach that would specify more than simply a maximum per-channel price. For example, in order to ensure that basic cable service is available to consumers at a reasonable price, we could specify in addition a maximum aggregate price that would exclude operators offering a basic tier with so many channels that, while reasonable on a price-per-channel basis, would cost more than subscribers could be reasonably expected to pay for such service.[66] We could also consider a basic tier service floor to ensure that a system meeting our behavioral standard carries, even if not an average number of basic channels, at least a minimum level set at, *e.g.*, 10 channels. Alternatively, a similar approach would be to identify a range, or band, of the number of channels to be provided in order to eliminate the need for annual floor and/or ceiling price adjustments. While placing some constraints on the cable operator's ability to establish a basic service tier, this proposal provides more flexibility than a proposal setting specific benchmarks for the number of channels and price of basic service.

34. Under any of our behavioral standard approaches, we would propose to permit cable operators to raise the price of their basic tier each year by an amount not to exceed five percent or, if greater, the annual CPI. As a general matter, we also seek comment on the appropriateness of the CPI as a reliable measure of cable industry costs or whether, instead, an alternative index would be more accurate.

35. We are concerned that any of our behavioral options could create an incentive for cable operators to carry large numbers of low-cost or revenue producing channels (*e.g.*, home shopping channels) resulting in a skewing of the basic tier package. We therefore seek comment on whether this might indeed be a problem and, if so, how we could mitigate its effect.

36. Under the second part of this behavioral test, the cable system would have to certify to the local franchising authority, on an annual basis, that it has fully complied with specific customer service standards. We propose using NCTA's voluntary customer service standards, set forth in Appendix D, [67] as the basis for this requirement and thus seek comment on the appropriateness of each of these guidelines. These standards establish a minimum level of customer service in three main areas: office and telephone availability; installations, outages and service calls; and communications, bills and refunds. We view this certification process as an additional verification of the competitive checks faced by the cable system and, thus, as a way to ensure that cable systems are not merely lowering their rates at the expense of providing adequate service to its customers. Moreover, this requirement may help to rectify two problems we identified in our recent Cable *Report*: that a general pattern of problems with customer service has emerged since passage of the Cable Act, and that at present franchising authorities may lack adequate enforcement mechanisms to compel cable operators to ensure reasonable service to the public.[68]

B. Standards for Rate Regulation

37. The Cable Act also requires the Commission to establish standards for the regulation of basic cable service rates by local franchising authorities whenever the cable system does not face effective competition.[69] The current rules impose procedural requirements upon franchising authorities exercising their right to regulate basic rates. Franchising authorities must give: (1) formal notice to the public; (2) opportunities for interested parties to make their views known; and (3) a formal statement to the public, including a summary explanation, when a decision on a rate matter is made.[70] In the *Notice*, we proposed to retain these procedural requirements. We seek comment on whether additional procedural requirements are warranted.

38. At the present time, the Commission has no established substantive standards to guide local franchising authorities in their regulation of basic cable rates.[71] In the *Notice*, we requested comment on a number of proposals related to the regulation of rates. In particular, we requested comment on the possibility of adopting a specific rate-setting methodology, such as price caps, to be used by local franchising authorities for setting basic service rates.

39. *Comments*. Commenters representing franchising authorities generally favor our continuing to allow each franchising authority to determine regulated rates. They contend that it was Congress' intent that such decisions be left to local authorities who are in the best position to assess local circumstances. Parties also concur with the Commission's conclusions that rate of return regulation is administratively cumbersome and would not assure that subscribers are charged reasonable rates. Moreover, they oppose price cap regulation because it cannot easily respond to unusual or changing local circumstances and does not necessarily assure reasonable rates. However, commenters would welcome FCC guidance to assist local authorities in regulating rates.

40. The Department of Justice, in its reply comments in MM Docket No. 89-600, observes that cable systems serving different local markets vary greatly and that uniform national policies may have clear disadvantages. DOJ comments that the costs imposed on the cable industry by differing local policies do not necessarily affect cable systems in other localities.[72]

41. Cable interests allege that franchising authorities have abused their rate regulation authority in the past by not approving justified rate increases in an attempt to keep prices low, by basing decisions on local political considerations, by delaying decisions and by using rate regulation to obtain unrelated concessions from cable operators. These parties also contend that many communities lack the expertise and resources needed to regulate rates in a reasonable manner. While most of these commenters support the adoption of rate-making standards, they also concur with the Commission's conclusion regarding rate of return regulation. With respect to price caps, several cable commenters argue that such methodology does not fit easily into the cable environment and would pose administrative difficulties for franchising authorities.

42. Several cable commenters argue that the Commission lacks the authority to impose rate of return regulation or incentive based rate-setting standards, such as price caps. These commenters assert that Section 623(a) of the Cable Act limits the Commission's authority to impose standards that directly regulate the amount of the rate increase.[73] A number of commenters contend that rate of return regulation also is precluded by Section 621(c) of the Cable Act, which prohibits regulation of a cable system as a common carrier or utility by reason of providing cable service.[74] Some commenters also believe that this prohibition may apply, on due process grounds, to price caps if its application were confiscatory in nature.

43. NTIA, the principal proponent of price caps, believes that a flexible application of this methodology to the cable industry would be within the Commission's authority to regulate cable rates. NTIA recommends use of a simplified price cap scheme by non-federal authorities for regulating basic cable service rates. Under this approach, the initial (or base) rate would be the price for basic service on January 22, 1990, the release date of the *Notice*. Subsequently, cable operators would be able to adjust regulated basic rates annually to reflect changes in an index (the cost index) tied to the cost of providing service. In cases where the cable system restructures its basic service offering, NTIA further proposes to permit the local franchising authorities to set the initial rate to avoid subscriber rates that are based on services other than those actually being provided.

44. *Analysis*. The Cable Act gives the Commission considerable flexibility in setting substantive standards for use by local franchising authorities in their regulation of basic cable service rates. We believe it appropriate and consistent with prevailing precedent in this area that, in setting or approving rates, franchising authorities take into account costs including direct capital costs, programming, labor, and ancillary costs attributable to obtaining and transmitting signals carried on the basic tier, increases in such costs, and the cost of any franchise-imposed requirements not directly related to the provision of cable service, as well as a reasonable profit. At the same time, because each cable system operates under its own franchise agreement and is subject to different costs depending, in part, on the provisions of that franchise agreement, we believe an approach that relies generally on municipalities to determine or approve specific rates is appropriate. Therefore, we seek comment on our proposed standard whereby franchising authorities, in regulating basic cable rates in the absence of effective competition, shall allow a fair return taking into account, at a minimum, the specific factors set forth above.[75] To the extent disputes arise with respect to whether the franchising authority has appropriately applied the standard, our preference is that such disputes should be resolved in the courts. We seek comment on whether such disputes should or can be resolved in the courts. *See, e.g.*, 47 U.S.C. § 555.

45. We also note that cable operators are permitted to alter their program offerings. Section 625(c), relating to the modification of franchising agreements, permits a cable operator to rearrange, replace or remove a particular cable service it has agreed in its franchise agreement to carry only if the service becomes unavailable or is available only at substantially higher copyright fees for which the operator has not been compensated. Section 625(d) states that "a cable operator may take such actions to rearrange a particular service from one service tier to another, or otherwise offer the service, if the rates for all of the service tiers involved in such action are not subject to regulation under section 623." Moreover, the legislative history of subsection (d) suggests that, in the context of modifying franchise requirements, a cable operator may "move a cable service from one tier to another if neither tier is subject to rate regulation under this Act." *See House Report* at 72. Thus, we believe that the Cable Act permits cable operators to move a service from one tier to another if: 1) the service is not required in their franchise agreement; or 2) even if the service is required by the franchise agreement, the tiers involved are not subject to rate regulation.

C. Implementation of the Rules

46. We also seek comment on issues relating to the implementation of the proposed effective competition standard. In the *Notice*, we proposed that franchising authorities be delegated in the first instance the authority to determine whether a cable system meets the new effective competition standard adopted as a result of this proceeding. We also stated that if we modified the existing effective competition standard, it may not always be readily apparent whether a cable system is subject to effective competition. We sought comment on a proposal to retain Section 76.33(c) of the rules, which permits any party seeking to establish either the presence or absence of effective competition to petition the Commission in accordance with the provisions and procedures set forth in Section 76.7 on special relief.[76] We now seek additional comment on the implementation of rate regulation in situations where changes in market conditions affect the status of a cable system with respect to the effective competition standard. On the basis of the record before us and our analysis, we have tentatively determined the manner in which a revised effective competition standard should be implemented and seek comment on the proposals specified below.

47. *Comments*. Most commenters, representing a variety of interests, generally support procedures that would permit the initial determination of effective competition to reside with the local franchising authority, with either the cable operator or the franchising authority having the opportunity to request Commission review of the decision. They state that it is efficient to allow the franchising authority to make the initial decision, and the right of appeal would allow due process and ensure fairness. On the other hand, Navy Broadcasting Service recommends that it be assumed that effective competition does not exist in any market and that the burden of proof be placed on the cable operator, the party with the most to gain, to demonstrate its existence.

48. *Analysis*. We note the general support of most commenting parties, including cable operators and franchising authorities, for the proposal to delegate to the franchising authority the responsibility for the initial determination of whether the effective competition standard is met in its community. We find that this is a logical approach to deciding when cable rate regulation is permitted in a community. Under the Cable Act, franchising authorities have the option of regulating rates when effective competition does not exist. Thus, if a franchising authority chooses not to regulate basic service rates, there is no need to determine whether effective competition exists. Where a franchising authority is interested in regulating rates, then it would appear appropriate for this body to determine whether the cable system meets the effective competition standard. Accordingly, we continue to believe that, as proposed in the *Notice*, the local franchising authority should be delegated the responsibility for the initial determination regarding the existence or absence of effective competition. Parties, however, may wish to provide additional comments on this issue.

49. Once a franchising authority applying the proposed effective competition standard determines that the cable system in its community does not face effective competi-

tion, we foresee several possible outcomes: (1) the cable operator agrees with the franchising authority and the rate regulation process is set in motion; (2) a cable system which does not meet any of the structural alternatives of the proposed standard modifies its service offering to meet the "behavioral standard" alternative; or (3) the matter cannot be resolved at the local level and Commission review is necessary.

50. Where the cable operator and the franchising authority cannot agree whether the system is subject to effective competition, the provisions of Section 76.33(c) of the rules and the existing special relief procedures specified in Section 76.7 would permit the parties to bring the dispute before the Commission. We have found these procedures workable, and commenters agree with this assessment. Therefore, we believe that the existing procedures for resolving such disputes between cable systems and franchising authorities should be retained.

51. The Commission previously set forth standards for waivers of the *prima facie* showing of the existence of broadcast signals required under the effective competition standard.[77] We propose to retain these requirements for waiver showings where the number of over-the-air broadcast signals is a component of the effective competition criterion at issue. We request comment on this proposal.

52. A franchising authority seeking to rebut the cable penetration estimate may submit to the Commission counter evidence based on a survey of cable households passed and cable subscribers. Cable operators may refute penetration figures indicated in publicly available sources by submitting more recent data. Franchising authorities or cable operators disputing the availability or penetration information provided by the alternative media providers may submit additional information for our review.[78]

53. We now seek comment regarding procedures to govern the application of any revised rules in situations where changes in market conditions after the initial determination affect whether a cable system is subject to effective competition. When a system, initially subject to effective competition, no longer faces effective competition, we propose to allow a transition period of six months.[79] Under this proposal, a cable system would not be subject to rate regulation during the first six months following a change in market (*i.e.*, structural) conditions that would cause it to no longer face effective competition.[80] However, when a cable system that is deemed subject to effective competition on the basis of the behavioral test changes its basic service offering such that it no longer meets that standard, we propose no transition period since the changed circumstance is at the discretion of the cable operator. Alternatively, where a cable system initially does not face effective competition and its basic cable service rates are regulated, we propose that such rate regulation should cease immediately upon discovery that changed circumstances cause the system to meet one of the conditions of the effective competition standard. We further propose that in instances where the cable system and franchising authority disagree regarding the changed situation, the *status quo* be maintained until the matter is resolved either by the parties or the Commission. We seek comment on these proposals and the specific terms by which they could be implemented.

D. Others Matters

54. We also solicit comment on the relationship, if any, between the rules governing effective competition and the absence of signal carriage regulations. The existing regulatory environment was created at a time when signal carriage obligations were in place. Thus, signal carriage requirements are referenced in certain provisions of the Cable Act. For example, the Cable Act defines the basic tier as "any service tier which includes the retransmission of local television broadcast signals." 47 U.S.C. § 522(2). In addition, Congress assumed the existence of signal carriage obligations in the definition of the basic tier:

> "Basic cable service" means any service tier which includes the retransmission of local television broadcast signals, as currently required under the Commission's "must carry" rules, 47 CFR 76.51 *et seq*. or, if such regulation change, local television broadcast signals comparable to those now specified by such regulations in the FCC must carry rules.

See House Report at 40. Moreover, Section 624(f) of the Cable Act implicitly recognized the existence of basic signal carriage obligations. 47 U.S.C. 544(f). Accordingly, we solicit comment on whether signal carriage obligations should be included as part of our effective competition standard and, if so, how.

IV. CONCLUSION

55. We believe that the existing three signal effective competition standard no longer reflects the realities of today's cable industry or video marketplace. We believe that the standard should be modified to take into consideration the possible sources of cable market power. We propose that a cable system be found to face effective competition if it meets any one of several alternative tests. We propose alternative structural standards for determining whether a cable system faces effective competition in its local franchise area. We also propose a behavioral test that will indicate whether a cable operator offers a package of basic tier services corresponding to those in communities where competition is readily apparent and whether its service meets specific customer service standards. We seek comment on the proposed effective competition standard which, in our view, balances our desire to minimize unnecessary regulatory burdens against the concern that local cable systems can exert undue market power to the detriment of consumers. Finally, we propose a standard for rate regulation, in the absence of effective competition, pursuant to which franchising authorities shall allow cable operators a fair return taking into account appropriate costs. Therefore, we seek comment on the proposals set forth in this *Further Notice of Proposed Rule Making*.

V. ADMINISTRATIVE MATTERS

56. As required by Section 603 of the Regulatory Flexibility Act, the FCC has prepared an initial regulatory flexibility analysis (IRFA) of the expected impact of these proposed policies and rules on small entities. The IRFA is set forth in the Appendix B. Written public comments are requested on the IRFA. These comments must be filed in accordance with the same filing deadlines as comments on

the rest of the *Further Notice*, but they must have a separate and distinct heading designating them as responses to the regulatory flexibility analysis. The Secretary shall cause a copy of this *Further Notice*, including the initial regulatory flexibility analysis, to be sent to the Chief Counsel for Advocacy of the Small Business Administration in accordance with Section 603(a) of the Regulatory Flexibility Act, Pub. L. No. 96-354, 94 Stat. 1164, 5 U.S.C. Section 601 *et seq.* (1981).

57. The proposals contained herein have been analyzed with respect to the Paperwork Reduction Act of 1980 and found to impose a new or modified requirement or burden upon the public. Implementation of any new or modified requirement or burden will be subject to approval by the Office of Management and Budget as prescribed by the Act.

58. For purposes of this non-restricted notice and comment rule making proceeding, members of the public are advised that *ex parte* presentations are permitted except during the Sunshine Agenda period. *See generally* Section 1.1206(a). The Sunshine Agenda period is the period of time which commences with the release of a public notice that a matter has been placed on the Sunshine Agenda and terminates when the Commission (1) releases the text of a decision or order in the matter; (2) issues a public notice stating that the matter has been deleted from the Sunshine Agenda; or (3) issues a public notice stating that the matter has been returned to the staff for further consideration, whichever occurs first. Section 1.1202(f). During the Sunshine Agenda period, no presentations, *ex parte* or otherwise, are permitted unless specifically requested by the Commission or staff for the clarification or adduction of evidence or the resolution of issues in the proceeding. Section 1.1203.

59. In general, an *ex parte* presentation is any presentation directed to the merits or outcome of the proceeding made to decision-making personnel which (1) if written, is not served on the parties to the proceeding, or (2), if oral, is made without advance notice to the parties to the proceeding and without opportunity for them to be present. Section 1.1202(b). Any person who makes or submits a written *ex parte* presentation shall provide on the same day it is submitted two copies of same under separate cover to the Commission's Secretary for inclusion in the public record. The presentation (as well as any transmittal letter) must clearly indicate on its face the docket number of the particular proceeding(s) to which it relates and the fact that two copies of it have been submitted to the Secretary, and must be labeled or captioned as an *ex parte* presentation.

60. Any person who in making an oral *ex parte* presentation presents data or arguments not already reflected in that person's written comments, memoranda, or other previous filings in that proceeding shall provide on the day of the oral presentation an original and one copy of a written memorandum to the Secretary (with a copy to the Commissioner or staff member involved) which summarizes the data and arguments. The memorandum (as well as any transmittal letter) must clearly indicate on its face the docket number of the particular proceeding and the fact that an original and one copy of it have been submitted to the Secretary, and must be labeled or captioned as an *ex parte* presentation, Section 1.1206.

61. Pursuant to applicable procedures set forth in 1.415 and 1.419 of the Commission's Rules, interested parties may file comments on or before January 31, 1991, and reply comments on or before February 15, 1991. Extensions of these dates are not contemplated. All relevant and timely comments will be considered by the Commission before final action is taken in this proceeding. To file formally in this proceeding, participants must file an original and four copies of all comments, reply comments, and supporting comments. If participants want each Commissioner to receive a personal copy of their comments, an original plus nine copies must be filed. Comments and reply comments should be sent to Office of the Secretary, Federal Communications Commission, 1919 M Street, N.W., Washington, D.C. 20554. Comments and reply comments will be available for public inspection during regular business hours in the Dockets Reference Room (Room 239) of the Federal Communications Commission, 1919 M Street, N.W., Washington, D.C. 20554.

62. Authority for this action is contained in Sections 4(i), 303 and 543(b)(3) of the Communications Act of 1934, as amended.

63. For further information on this proceeding, contact Marcia Glauberman, Policy and Rules Division, Mass Media Bureau, (202) 632-6302.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX A

LIST OF COMMENTERS

Initial Comments

1. CMI Research, Inc.
2. Pacific West Cable Television
3. InterMedia Partners and InterMedia Partners II, L.P.
4. VideoProbeIndex, Inc.
5. ESPN, Inc.
6. Flat Rock Cable Communications Commission
7. Contra Costa County
8. Competitive Cable Association
9. Time Warner Inc.
10. National Association of Broadcasters
11. Consumer Federation of America and Telecommunications Research and Action Center
12. Association of Independent Television Stations, Inc.
13. Alliance of Small Cable System Operators
14. Continental Cablevision, Inc.

15. Tele-Communications, Inc.
16. Adelphia Communications Corporation, Arizona Cable Television Association, Coaxial Communications, Falcon Cable TV, Hauser Communications, Inc., National Cable Communications, Inc., Pennsylvania Cable Television Association, Prestige Cable TV, Inc., Star Cable Company, Tele-Media Corporation, Whitcom Investment Company
17. Southwest Missouri Cable TV, Inc.
18. National Satellite Programming Network, Inc., Beach Communications, Inc., Mid-Atlantic Communications, Inc., Stellar Communications, Inc., Telecom Satellite Systems Corp., Telesat Cablevision, Inc., and 21st Century Technology Group, Inc.
19. Community Antenna Television Association, Inc.
20. Turner Broadcasting System, Inc.
21. USA Network
22. Mid-America Cable Television Association, Inc.
23. National Private Cable Association, Beach Communications, Inc., Dorn Communications, Inc., Maxtel Cablevision, Millisat Incorporated, NuMarket Cable Systems, Inc., Pacific Cablevision, Western Cable Communications, Inc.
24. Heritage Communications, Inc.
25. North Coast Cable
26. Arkansas Public Service Commission
27. New York State Consumer Protection Board
28. Public Service Commission of the District of Columbia
29. City of Dubuque, Iowa, Montgomery County, Maryland, and the City of St. Louis, Missouri
30. City of New York, The National League of Cities, and the United States Conference of Mayors
31. City of Ithaca, New York
32. State of Hawaii
33. Village of New Paltz, New York
34. Northwest Municipal Cable Council
35. Cablevision Systems Corporation
36. Newhouse Broadcasting Corporation
37. National Telecommunications and Information Administration
38. United States Catholic Conference
39. City of El Paso, Texas
40. City of Tucson, Arizona
41. Richard S. Leghorn
42. Massachusetts Community Antenna Television Commission
43. B.F. Investments, Inc.
44. Cablevision Industries Corporation, Comcast Corporation, Cox Cable Communications, Providence Journal Company, Sammons Communications, Inc., Summit Communications Group, Inc.
45. Multi-Micro, Inc.
46. National Rural Telecommunication Cooperative
47. Armstrong Utilities, Inc.
48. National Cable Television Association, Inc.
49. USA Cablesystems Inc.
50. Cable Television Operators and Associations
51. Motion Picture Association of America, Inc.
52. Channel America LPTV Holdings, Inc.
53. BellSouth Corporation, Southern Bell Telephone and Telegraph Company and South Central Bell Telephone Company
54. Wireless Cable Association, Inc.
55. Carol L. Bennefield
56. WXON-TV Inc.
57. Navy Broadcasting Service
58. City of Beverly Hills, California

Reply Comments

1. City of Boston
2. Richard S. Leghorn
3. Tele-Communications, Inc.
4. National Telecommunications and Information Administration
5. Cable Television Operators and Associations
6. Association of Independent Television Stations, Inc.
7. National Association of Broadcasters
8. Scientific-Atlanta
9. United States Department of Justice
10. Mission Cable Company, L.P.
11. Montgomery County, Maryland
12. United States Telephone Association
13. City of New York, the National League of Cities and the United States Conference of Mayors
14. Mid-America Cable Television Association, Inc.
15. United Cable Television of Mid-Michigan, Inc.
16. USA Cablesystems Inc.
17. National Cable Television Association, Inc.
18. Ramsey/Washington Counties Suburban Cable Commission
19. National Private Cable Association, Beach Communications, Inc., Dorn Communications, Inc., Maxtel Cablevision, Millisat Incorporated, NuMarket Cable Systems, Inc., Pacific Cablevision and Western Cable Communications, Inc.
20. Consumer Federation of America and Telecommunications Research Action Center
21. GTE Telephone Companies
22. BellSouth Corporation, Southern Bell Telephone and Telegraph Company and South Central Bell Telephone Company
23. Cablevision Systems Corporation
24. Family Entertainment, Inc.
25. Time Warner Inc.

26. Cox Enterprises, Inc.
27. General Instrument Corporation
28. USA Network and the Nashville Network
29. National Telephone Cooperative Association
30. The Weather Channel and Black Entertainment Television
31. Susquehanna Cable Co.
32. Westfield News Advertiser, Inc.
33. New York State Commission on Cable Television
34. C-TEC Cable Systems
35. Arts & Entertainment Cable Network
36. National Telephone Cooperative Association

APPENDIX B

Initial Regulatory Flexibility Act Analysis

Pursuant to the Regulatory Flexibility Act of 1980, the Commission finds:

I. *Reason for action.* The Cable Communications Policy Act of 1984 requires the Commission to periodically review its rules regarding the regulation of basic cable service rates. An analysis of changes in the video marketplace since these rules were adopted in 1985 led us to adopt the *Notice of Proposed Rule Making* (*Notice)* in this proceeding in order to reexamine the "effective competition" standard and standards for rate regulation and to consider revisions to them. The *Notice* raised a wide variety of alternatives for the regulation of basic service rates. Based on the comments receive in response to the *Notice*, we now seek comment on more specific proposals.

II. *Objectives.* To consider alternative definitions for "effective competition" and modifications to the standards for rate regulation to ensure that local franchising authorities are permitted to regulate basic cable rates in situations where a cable system has significant market power. We also desire to adopt rules that will be easily interpreted and readily applicable and, whenever possible, minimize any unnecessary regulatory burden on affected parties.

III. *Legal basis.* Action as proposed for this rule making is contained in Sections 4(i), 303 and 543(b)(3) of the Communications Act of 1934, as amended.

IV. *Description, potential impact and number of small entities affected.* The proposed effective competition standard is likely to subject additional cable television systems to rate regulation of their basic cable service by their franchising authorities. However, as these cable systems may or may not be rate regulated, at the discretion of the franchising authority, we are unable to estimate the number of cable systems that would be affected by any of the proposals discussed in the *Further Notice of Proposed Rule Making*.

V. *Reporting, record keeping and other compliance requirements:* The proposals under consideration in this *Further Notice of Proposed Rule Making* include the possibility of new reporting and record keeping requirements for cable systems.

VI. *Federal rules which overlap, duplicate or conflict with this rule*: None.

VII. *Any significant alternatives minimizing impact on small entities and consistent with stated objectives*: In response to the initial regulatory flexibility analysis included in the *Notice*, Southwest Missouri Cable TV, the only commenter to directly address the Initial Regulatory Flexibility Act analysis, and a number of other small cable operators requested that any new standards exempt small cable systems (*e.g.*, less than 1000 subscribers) from rate regulation even when effective competition does not exist. Before adopting any new rules, we will evaluate the impact on small systems and give due consideration to this proposal.

APPENDIX C

Proposed Rules

Part 76 of Chapter I of Title 47 of the Code of Federal Regulations is proposed to be amended to read as follows:

1. Section 76.33 is proposed to be amended by revising paragraph (a) to read as follows:

§ 76.33 Standards for rate regulation.

(a) Effective _______, a franchising authority may regulate the rates of a cable system subject to the following conditions (cable systems that were subject to rate regulation prior to this date will remain subject to that regulation pending demonstration that they may not be regulated pursuant to this section):

(1) Only basic cable service as defined in § 76.5(ii) may be regulated;

(2) Only cable systems that are not subject to effective competition may be rate regulated. A cable system will be determined to be subject to effective competition whenever any one of the following conditions are met:

(i) 100 percent of the cable community receives service from at least six unduplicated broadcast television signals and cable penetration in the cable community is less than 50 percent. It is not necessary that the same six signals provide service to the entire community. Signals shall be counted on the basis of their predicted Grade B contour (as defined in § 73.683 of the rules) or whether they are significantly viewed within the cable community, as defined in Section 76.54(b) and (c) of the rules. A signal that is significantly viewed shall be considered to be available to 100 percent of the cable community. A translator station authorized to serve the cable community is to be counted in the same manner as a full-service station, except that its coverage area shall be based on its protected contour as specified in Section 74.707 of the rules, provided that the translator is not used to retransmit a station already providing a Grade B contour or significantly viewed signal within the cable community. Cable penetration must be determined as the number of households that subscribe to cable service divided by the number of homes passed by the cable system, expressed as a percentage. Homes passed is defined as the number of homes to which cable service is available without a line extension.

Note: For purposes of this section, "unduplicated broadcast television signal" is defined as one which does not duplicate more than 50 percent of another signal's prime time schedule pursuant to the definition of "prime time" provided in Section 76.5(n).

(ii) an independently owned, multichannel video delivery service is available to 50 percent of the homes passed by the cable system, and at least 10 percent of those homes actually subscribe to the service. Video delivery services that may be counted include, but are not necessarily limited to, a competing cable system, "wireless cable", satellite master antenna television (SMATV), home satellite dishes (HSD), and direct broadcast satellites (DBS). It is not necessary that the same multichannel video delivery service be available throughout the area. Availability of a competing cable system will be determined by comparing the number of homes passed by such system with the number of homes passed by the incumbent cable system. This competing cable system penetration will be determined as specified in Section 76.33(a)(2)(i). Availability and penetration information for the other multichannel video delivery services may be obtained from publicly available sources, from the operator directly, or from specifically undertaken audits. DBS will be considered to be available to the entire United States when any one such service becomes operational.

Note: For purposes of this section, "independently owned" is defined as ________.

(iii) the cable system meets the Commission's behavioral test for effective competition.

(3) The Commission may grant waivers of the effective competition standard where the filing party submits one or more of the following showings, as appropriate:

(i) the availability of broadcast signal(s) with engineering studies in accordance with § 73.686 of the Commission's rules or by other showings that such Grade B level signals are (or are not) in fact available within the community. In performing the engineering studies noted above, cluster measurements, as provided in § 73.686(b)(2)(viii), may be taken in place of mobile runs as provided in § 73.686(b)(2)(v)). Responsibility for the cost of engineering studies undertaken to refute the predicted availability of Grade B service will fall on the party that loses in the waiver proceeding. Any party intending to obtain this study must first inform the other party and provide it an opportunity to negotiate a resolution. Parties not taking this first step will be assigned full responsibility for the study costs.

(ii) the penetration of a cable system, incumbent or competing, based on a survey of cable households passed and cable subscribers, if the filing party is a franchising authority, or more recent data if the filing party is a cable system;

(iii) the availability or penetration of alternative video delivery technologies with additional information.

(4) A cable system, once determined to be subject to effective competition after the effective date of this section, shall not be subject to regulation for six months after any change in market conditions which would cause it to be determined not to be subject to effective competition. When a cable system not subject to effective competition becomes subject to effective competition due to any change in market conditions, the right of the local franchising authority to regulate the basic cable service rates of such cable system shall terminate immediately. In instances where disputes arise between a cable system and a franchising authority regarding the changed circumstances, the status quo shall be maintained until the matter is resolved either by the parties or the Commission.

(5) Franchising authorities setting regulated basic cable service rates pursuant to this section shall allow a fair return taking into account appropriate costs, including, but not necessarily limited to, direct capital costs, programming, labor, and ancillary costs attributable to obtaining and transmitting signals carried on the basic tier, increases in such costs, and the cost of any franchise-imposed requirements not directly related to the provision of cable service, as well as a reasonable profit.

* * * * *

2. Section 76.54 is proposed to be amended by revising paragraph (c) to read as follows:

§ 76.54 Significantly viewed signals; method to be followed for special showings.

* * * * *

(c) Notice of a survey to be made pursuant to paragraph (b) of this section shall be served on all licensees or permittees of television broadcast stations within whose predicted Grade B contour the cable community or communities are located, in whole or in part, and on all other system community units, franchisees, and franchise applicants in the cable community or communities at least (30) days prior to the initial survey period. Furthermore, if a survey is undertaken pursuant to the provisions of Section 76.33(a)(2)(i) of the rules, notice shall also be served on the franchising authority. Such notice shall include the name of the survey organization and a description of the procedures to be used. Objections to survey organizations or procedures shall be served on the party sponsoring the survey within twenty (20) days after receipt of such notice.

* * * * *

APPENDIX D

RECOMMENDED CABLE INDUSTRY CUSTOMER SERVICE STANDARDS

February 14, 1990

The cable industry is dedicated to providing our customers a consistently high level of service. We are committed to ensuring that our customers receive a variety of quality programming: reliable, clear signals; and prompt service. To that end, we, as an industry, have voluntarily adopted the following Standards for Customer Service.

Each community and each cable system are different and a reasonable flexibility should be employed in applying these standards; rigidity will hamper rather than help good customer service. We are confident, however, hat the cable industry as a whole will implement these voluntary standards by July 1991, and recommend them for overall operational use by that date.

1. Office and Telephone Availability

A. Knowledgeable, qualified company representatives will be available to respond to customer telephone inquires Monday through Friday during normal business hours. Additionally, based on community needs, cable systems will staff telephones for supplemental hours on weekdays and/or weekends.

B. Under normal operating conditions, telephone answer time by a customer service representative, including wait time, and the time required to transfer the call, shall not exceed 30 seconds.

Those systems which utilize automated answering and distributing equipment will limit the number of routine rings to four or fewer. Systems not utilizing automated equipment shall make every effort to answer incoming calls as promptly as the automated systems.

This standard shall be met no less than ninety percent of the time measured on an annual basis.*

C. Under normal operating conditions, the customer will receive a busy signal less than three percent of the total time that the cable office is open for business.

D. Customer service center and bill payment locations will be open for transactions Monday through Friday during normal business hours. Additionally, based on community needs, cable systems will schedule supplemental hours on weekdays and/or weekends during which these centers will be open.

2. Installations, Outages and Service Calls

Under normal operating conditions, each of the following four standards will be met no less than 95% of the time measured on an annual basis.

A. Standard installations will be performed within seven business days after an order has been placed. "Standard" installations are up to 125 feet from the existing distribution system.

B. Excluding those situations beyond the control of the cable operator, the cable operator will respond to service interruptions promptly and in no event later than 24 hours. Other service problems will be responded to within 36 hours during the normal work week.

C. The appointment window alternatives for installations, service calls, and other installation activities will be (a) morning, (b) afternoon, or (c) all day during normal business hours. Additionally, based on community needs, cable systems will schedule supplemental hours during which appointments can be set.

D. If, at any time an installer or technician is running late, an attempt to contact the customer will be made and the appointment rescheduled as necessary at a time which is convenient for the customer.

3. Communications, Bills and Refunds

A. The cable company will provide written information in each of the following areas at the time of installation and at any future time upon request:

. products and services offered

. prices and service options

. installation and service policies

. how to use the cable service

B. Bills will be clear, concise and understandable.

C. Refund checks will be issued promptly, but no later than the earlier of 45 days or the customers's next billing cycle following the resolution of the request, and the return of the equipment supplied by the cable company if service is terminated.

D. Customers will be notified a minimum of 30 days in advance of any rate or channel change, provided the change is within the control of the cable operator.

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* In certain smaller cable systems with fewer than 10,000 subscribers, systematic measurement of compliance with some of these standards (*e.g.* telephone answering time) will not be cost effective and should not be expected.

FOOTNOTES

[1] *Notice of Proposed Rule Making* in MM Docket No. 90-4, 5 FCC Rcd 259 (1990).

[2] Cable Communications Policy Act of 1984, Pub.L. No. 98-549, § 1 *et seq*., 98 Stat. 2779 (1984).

[3] 47 U.S.C. § 543.

[4] 47 U.S.C. § 543(b)(2)(A) and (b)(2)(B).

[5] 47 CFR § 76.33(a)(2). *See Report and Order* in MM Docket No. 84-1296, 50 FR 18637 (1985), *Memorandum Opinion and Order* in MM Docket No. 84-1296, 51 FR 21770 (1986). In response to the decision of the U.S. Court of Appeals for the District of Columbia Circuit in *American Civil Liberties Union v. FCC (ACLU)*, 823 F.2d 1554 (D.C. Cir. 1987), *cert. denied*, 108 S.Ct. 1220 (1988) that found, in part, that the standard for measuring signal availability was arbitrary and capricious, the Commission modified the manner in which signal availability was measured. *See Second Report and Order* in MM Docket No. 84-1296, 3 FCC Rcd 2617 (1988). Two petitions for reconsider-

ation of this action were filed and one was subsequently withdrawn. The remaining petition, filed by Dubuque, Iowa, on June 15, 1988, concerns changes they propose that the Commission make in the measurement methods used to determine whether a signal is available in the cable community and will be addressed separately.

[6] *See* 47 CFR § 76.33(a)(2).

[7] 47 U.S.C. § 543(b)(3).

[8] In response to the *Notice*, the Commission received 58 initial comments and 36 reply comments. Appendix A lists parties filing comments in this proceeding. The Commission considered related matters in MM Docket No. 89-600 which culminated in the Report to Congress required under Section 623(h) of the Cable Act. Information submitted in that docket has been incorporated, as appropriate, into this proceeding. *See Report* in MM Docket No. 89-600, 5 FCC Rcd 4962 (1990).

[9] The Cable Act defines "basic cable service" as "any service tier which includes the retransmission of local television broadcast signals." 47 U.S.C. § 522(2). The Commission is bound by the statutory definition which it may not vary and the provision of the Cable Act which, in the absence of effective competition, permits rate regulation of *only* that tier of service which includes local broadcast signals. *See* 47 U.S.C. § 543(b)(1). *See also ACLU supra* at 1565.

[10] As we noted in the *Notice*, the shifting of non-broadcast programming to or from the basic tier does not alter the statutory definition of basic cable service.

[11] *See Report* in MM Docket No. 89-600, 5 FCC Rcd at 5003.

[12] FCC Staff Study, *Alternative Criteria for Defining Effective Competition : A Statistical Analysis of Small Cable Markets* (1985, updated 1988). This study is included in the record of this proceeding.

[13] MMDS is also referred to as "wireless cable," although not for any statutory or regulatory purpose.

[14] Indeed, no commenter proposed to retain the three signal standard.

[15] For example, cable interests contend that the three signal standard conforms to the congressional directive to establish a readily applicable national standard and that deregulation of rates has fostered the development of cable.

[16] NTIA believes that the best way to serve television viewers in the long run is to expand opportunities for competitive alternatives. A number of other commenters, including BellSouth, the Motion Picture Association of America and the National Private Cable Association, support Commission and congressional actions that would increase competitive alternatives, such as competing cable systems and alternative video delivery technologies, including, for some, local telephone company video distribution. In this regard, the Commission has made several recommendations to Congress which include prohibiting vertically integrated cable programming services from unreasonably refusing to deal with multichannel competitors to cable and removing certain obstacles in the cable franchise process that discourage competing cable systems. *See Report* in MM Docket No. 89-600 *supra*. Also, the Commission has recently acted to ease restrictions on wireless cable operators and thereby facilitate their development as viable competitors to cable. *See Report and Order* in Gen. Docket No. 90-54, 55 FR 46006 (October 31, 1990) and *Further Notice of Proposed Rule Making* in Gen. Docket No. 80-113, 55 FR 46017 (October 31, 1990). The issue of local telephone company video distribution is addressed in CC Docket No. 87-266 (telephone-cable company cross-ownership).

[17] According to Continental Cablevision, statistics provided by the Cable Advertising Bureau indicate that two thirds of the viewing in cable homes is to broadcast stations. We note that the data do not distinguish between local and distant independents and that the actual viewing share for local signals would be somewhat lower than the reported figure.

[18] Moreover, several commenters argue that Congress intended the Commission to determine when a cable system is subject to effective competition for all tiers of service, and to consider the number and nature of competitive alternatives for its entire service package. *See* House Committee on Energy and Commerce, H.R. Rep. No. 934, 98th Cong., 2nd Sess. (1984) (*House Report)* at 66. Thus, they view a standard based on broadcast signals as inadequate.

[19] As evidence that the three signal standard does not reflect effective competition, NAB cites the joint comments filed by the City of New York, the National League of Cities and the United States Conference of Mayors (NYC/NLC) in MM Docket No. 89-600, which state that in communities with competitive cable systems the price for basic service averaged 19 percent below the national average. *See* Comments of NYC/NLC in MM Docket No. 89-600 at 47.

[20] In particular, a study by Richard V. Ducey and Austin J. McLean of the NAB staff, entitled "The Impact of Off-the-air Signals on Cable Pricing," claims that there is no statistical relationship between the change in basic service price and the number of over-the-air signals. However, we do not believe that the authors adequately explain why a relationship between changes in rates and broadcast signal availability should be expected. *See Report* in MM Docket No. 89-600, 5 FCC Rcd at 5081. Further, a study by Paul W. MacAvoy for the United States Telephone Association presents an econometric model based on the q ratio, an economic measure of market power, suggests that approximately 60 broadcast signals would be needed to bring cable market values to competitive levels. Because this figure is far outside the signal availability range in his sample and measurement problems, we view the 60 signal finding skeptically. *See Report* in MM Docket No. 89-600, 5 FCC Rcd at 5082.

[21] While some cable operators have reportedly undertaken retiering of their service offerings in the past year or more, our analysis of the FCC/GAO Survey data shows that the lowest basic service tier increased from an average of 16 channels on December 31, 1984, prior to the adoption of the three signal standard, to 23 channels on December 31, 1989. We note that, on the average system, the difference in signals over this period was accounted for by an increase in the number of cable networks from 7 to 14. *See Broadcasting*, May 21, 1990, at 35.

[22] The FCC, in conjunction with the United States General Accounting Office, recently conducted a survey of cable television rates and services (FCC/GAO Survey). The analysis of the FCC/GAO Survey results indicates that the average number of channels on the most popular service tier increased from 18 channels on December 31, 1984, to 27 on December 31, 1989. That is, the tier of service to which most households on each system subscribe has expanded 50 percent.

[23] All day audience share is defined as the percent of all viewers tuned to the specified signal or signals at any time during the broadcast day. Basic cable programming includes cable networks, such as CNN, ESPN, C-SPAN, MTV and SuperStation TBS. Other satellite distributed television stations are not included in this group. *Cable TV Facts 90*, Cabletelevision Advertising Bureau, Inc., at 8.

[24] *See Report* in MM Docket No. 89-600, 5 FCC Rcd at 4995-4997.

[25] The two services do differ, of course, with movie channels offering some first-run and sports programming, plus added convenience, and tape rental offering time flexibility, selection and the ability to pay only for programs one specifically chooses to view.

[26] In fact, distant broadcast signals represent a significant portion of basic cable viewing.

[27] CNN is a 24-hour news service, ESPN is a national sports channel, Nickelodeon is a children's service, BET is a service designed to showcase programming from the perspective of Blacks and C-SPAN carries Congressional proceedings.

[28] Cable systems are able to provide these categories of service because of two key characteristics: (1) multiple channel capacity (which permits the provision of a wide range of programming); and (2) the ability to charge viewers for the specific service or groups of services.

[29] It is well established that as the number of broadcast signals in a market increases, more and more specialized programming is offered. For a discussion of the mechanics of this process, see Wildman and Owen, *Program Competition, Diversity, and Multichannel Bundling in the New Video Industry*, in *Video Media Competition : Regulation, Economics, and Technology* at 250-255 (Noam ed. 1985).

[30] Moreover, there are certain live events, sports in particular, for which there are no exact substitutes.

[31] NCTA submitted a study prepared by James N. Dertouzos and Steven S. Wildman, entitled "Competitive Effects of Broadcast Signals on Cable," that indicates that broadcast signals have a significant competitive effect on cable system behavior, and that five over-the-air signals are now necessary to maximize that effect. NCTA also included this study in its comments in MM Docket No. 89-600. A study by Robert W. Crandall, "Regulation, Competition and Cable Performance," included in the comments of Tele-Communications, Inc. (TCI), supports NCTA's results that cable systems' basic service rates are affected by competition from broadcast signals.

[32] NTIA's conclusion is based on an econometric model of the relationship between the availability of off-air signals and basic cable rates. That model demonstrates that the availability of broadcast signals exerts downward pressure on cable rates. NTIA states that, although the model does not identify a specific number of signals that will assure minimum rates, its study does show that additional signals appear to have a continuing, though diminishing negative effect on basic rates.

[33] NTIA estimates that a six signal standard would subject about 40% of all systems, serving 9% of all subscribers, to regulation based on the sample of 216 systems used for its econometric model. In reply comments, NTIA indicates that a second sample of 238 systems suggests that approximately 52 percent of all cable systems, serving about 18 percent of all subscribers, would be subject to basic service rate regulation under a six signal standard. Based on the sample of 340 systems submitted by NCTA, however, we project that 55% of all systems (34% of subscribers) would be subject to rate regulation under a six signal standard.

[34] For example, Continental estimates that it would cost approximately $6-8 billion to provide service on an unbundled basis on all cable systems.

[35] Commenters cite *House Report* at 66.

[36] This proposal differs from the one submitted by the National League of Cities in 1985. *See Notice* at 263.

[37] While each element of this standard is the same as those proposed by DOJ in 1985, DOJ submitted specific values for determining the existence of effective competition in its earlier proposal. *See Notice* at 263.

[38] *See Report* in MM Docket No. 89-600, 5 FCC Rcd at 4995-4997.

[39] *See Report* in MM Docket No. 89-600, 5 FCC Rcd at 5053-5054.

[40] Proposed rules appear in Appendix C.

[41] For purposes of this alternative, an "unduplicated" signal would be one which does not duplicate more than 50 percent of another signal's prime time schedule pursuant to the definition of "prime time" provided in Section 76.5(n). *See* 47 CFR § 76.5(n).

[42] For example, we observe that in markets with large numbers of television signals there are often broadcast stations affiliated with the specialized programming services that are also distributed as cable programming networks (*e.g.*, Univision, Home Shopping Network).

[43] The Dertouzos-Wildman study submitted by NCTA and the NTIA staff econometric analysis estimate that five and six signals, respectively, are sufficient to restrain cable rates.

[44] As we stated in the *Report* in MM Docket No. 89-600, the conclusion of the Dertouzos and Wildman study that the maximum effect of broadcast signals on cable rates is reached at five signals may not be correct because, unlike the NTIA staff study, it did not report the separate effects of greater numbers of channels. *See Report* in MM Docket No. 89-600, 5 FCC Rcd at 5080.

[45] A recent estimate of the national average penetration of homes passed is just over 60 percent. *See* Paul Kagan Associates, Inc., *Marketing New Media* at 5 (June 18, 1990).

[46] For this purpose, we do not believe that it is necessary to distinguish between mature cable systems (*e.g.*, those in operation for at least five years) and newer systems that are still under construction because the penetration is to be calculated based on homes passed and not homes in the franchise area. However, we seek comment on whether the penetration criterion should make such a distinction and, if so, how a "mature" system should be defined. Further, we request comment on whether our overall revisions of the effective competition standard require additional modifications to encourage the wiring of not yet wired communities.

[47] *See* 47 CFR § 76.33(a)(2).

[48] "Homes passed" is defined as the number of homes to which cable service is available without a line extension.

[49] We also note that it is industry practice to adjust subscriber counts for bulk rate subscribers (*e. g.*, if a basic service tier is $10 and a 200-unit apartment is billed $500, then it would count as 50 subscribers regardless of how may individual apartments receive cable service). We request comment on the appropriate method for determining cable penetration under such circumstances.

[50] We are aware that the development of some of the multichannel video alternatives to cable (*e.g.*, DBS) may be dependent on the participation of cable companies in such ventures. However, we are concerned that cable interests could possibly exert anticompetitive influence over the provision of video service by alternative delivery technologies. Thus, we request comment on the appropriate definition of an "independently owned" entity. In particular, we seek comment on whether the existing Commission rules regarding attribution of

ownership (*e.g.*, the cable attribution rules set forth in Section 76.501) should be applied without change or instead recast for purposes of defining "independently owned" in this context.

[51] We believe that a low penetration rate is sufficient to confirm that such service actually provides a competitive check on the incumbent cable system. We seek comment on whether 10 percent is the correct value or whether some other number (*e.g.*, 5, 15, 20 percent) is a preferable measure.

[52] The comparison would be computed as the number of homes passed by the second competitive cable system within the area served by the incumbent system divided by the number of homes passed by the incumbent cable system and expressed as a percent using the data sources described in para. 24 *supra*.

[53] Once a DBS service is launched, we will presume that it is available to the entire United States. Parties need only provide local penetration figures obtained from the operator.

[54] We invite comment on how this proposal might be modified to account as well for the potential competitive check of multichannel video providers which serve any unwired portions of the incumbent cable system's franchise area (or even outside but adjacent to that franchise area) and are thus well positioned to expand into the service area of an overpriced incumbent.

[55] As we stated in the Cable *Report*, we believe that competition will lead to improved customer service. We also find that local franchising authorities are best positioned to determine when such standards are met in order to account for conditions specific to the local community. *See Report* in MM Docket No. 89-600, 5 FCC Rcd at 5059-5060.

[56] We intend to allow a reasonable time period (*e.g.*, one year to 18 months) for the marketplace to adapt to our revised structural effective competition standard. Subsequent to that point, we will initiate a rule making proceeding to establish more empirically based behavioral standards reflecting the price and, as appropriate, channel characteristics of those systems meeting either of the two structural conditions supporting a finding of effective competition. We anticipate completion of this proceeding within two years of adoption of our revised effective competition standard.

[57] For any cable system not already in existence on the eve of rate deregulation, we would propose to rely on the figures for the median cable system at that time (as set forth in the subsequent text above).

[58] This price would be adjusted forward to reflect inflation through the date of our Report and Order in this proceeding to the extent possible.

[59] *See Report* in MM Docket 89-600, Appendix F, Table 1A, 5 FCC Rcd at 5085.

[60] This will not place cable systems with smaller channel capacities at a disadvantage because they would have to dedicate only a portion of their channels to basic service.

[61] The Cable Act explicitly provides for a five percent annual increase in basic service rates. *See* 47 U.S.C. § 543(d).

[62] In either case, the rate might subsequently be adjusted for productivity changes and/or factors reflecting local cost differences.

[63] The CPI increased 3.6 percent, 4.1 percent and 4.8 percent for 1987, 1988 and 1989, respectively.

[64] We note that the actual average per-channel basic service rate on December 31, 1989, was $0.61. The 1990 CPI data are not yet available. However, if the permitted five percent annual rate increase under the Cable Act is used as the inflation adjustment, then the 1991 competitive package benchmark price would be $12.42 (18 x $0.69).

[65] Our analysis of the FCC/GAO Survey data determined average rates and services per cable system. The GAO analysis of the survey results examined this information on a per suscriber basis. Using their analysis, the average basic tier included 24 channels at a price of $0.47 per-channel on November 30, 1986. Adjusting these data upward by the annual CPI to the present, the "competitive package" would be a 24 channel basic tier offered at $12.72.

[66] We seek comment on formulas that would identify a price reflecting an upper limit of a zone of reasonableness.

[67] *See* "NCTA Recommended Cable Industry Customer Service Standards," February 14, 1990.

[68] *See Report* in MM Docket No. 89-600, 5 FCC Rcd at 5060. With respect to enforcement of these standards, we expect that franchising authorities would be able to penalize any systems falsely certifying its compliance. Cable systems could also be required to establish and maintain public files which would enable the public and franchising authorities to ascertain whether the customer service standards have been met. We seek comment on whether this requirement is warranted.

[69] *See* 47 U.S.C. § 543(a).

[70] *See* 47 CFR § 76.33(b). In addition, under the Cable Act, any rate request upon which the franchising authority fails to act within a 180-day period is deemed granted unless the time period is extended by mutual agreement. 47 U.S.C. § 543(d).

[71] The Cable Act also provides that a cable system subject to rate regulation may increase its basic service rates up to 5 percent per year without franchising authority approval. 47 U.S.C. § 543(e)(1). In 1985, the Commission adopted a pass-through provision that allowed cable operators to increase their rates to recoup identifiable costs in addition to the 5 percent annual rate increase permitted under the Cable Act. The court in *ACLU* found that the specific provision adopted by the Commission violated the Cable Act. *See ACLU* at 1570.

[72] DOJ adds that a policy that permits local governments to choose the form of regulation of local cable services they deem most beneficial to their individual situations would not be inconsistent with federal antitrust policy.

[73] *See ACLU* at 1554, 1571.

[74] TCI and others note that the legislative history of the Cable Act specifically rejected rate of return regulation for cable. *See House Report* at 60.

[75] While our own experience demonstrates that incentive-based regulation is superior to traditional rate of return constraints in meeting public policy goals, (*see generally Policy and Rules Concerning Rates for Dominant Carriers* (Second Report and Order), FCC 90-314, released Oct. 4, 1990, *pets. for recon. pending),* we do not now propose requiring local franchising authorities to use any particular method of implementing this proposed standard.

[76] We did not seek comment in the *Notice*, however, on the standards needed to rebut a *prima facie* showing of the existence or absence of effective competition. We discuss this issue below.

[77] *See* 47 CFR § 76.33(a)(3). *See also Second Report and Order* in MM Docket No. 84-1296 *supra*.

[78] With respect to the competitive package alternative, we believe that it would take a substantial showing to rebut the *prima facie* showing that a cable system is offering at least the specified number of channels at or below the specified price.

[79] Section 76.33(a)(4) of the existing rules permits a one year transition period in such situations. However, we believe that a six month transition period should be sufficient to implement

rate regulation when market conditions change and a cable system no longer faces effective competition. *See* 47 CFR § 76.33(a)(4).

[80] This section of the rules does not apply when a cable system becomes subject to regulation because the Commission modifies the effective competition standard. Subject to OMB approval, any revised rules and standards adopted in this proceeding will become effective ninety days after Commission release of the Report and Order.

SEPARATE STATEMENT OF COMMISSIONER JAMES H. QUELLO

In the Matter of Reexamination of the Effective Competition Standard for the Regulation of Cable Television Basic Service Rates, MM Docket No. 90-4.

As the only Commissioner who was here when the three signal standard was adopted, I welcome today's decision to further review the appropriate test for effective competition for cable television. I reluctantly voted for the three signal test in 1985, when must carry rules were still in effect, and my doubts about its viability have increased during the intervening years.

Based on this experience, I am skeptical that any standard predicated on the availability of over-the-air broadcasting signals adequately represents "effective competition" with cable television. As the *Further Notice* makes clear, a broadcast station is an adequate substitute for only certain aspects of the unique cluster of services that a cable television provides. Moreover, the instant review is premised on changed circumstances in the video marketplace. It is a safe bet that the process of change will continue in the future, and I am not confident that time will be kinder to a six signal standard than it has been to the current test.

I am convinced that the only true competition to cable television is another viable multichannel provider. Until such competition exists, however, I support the concept of establishing alternative conditions as indicators of effective competition and look forward to reading the comments in this proceeding. I am particularly hopeful that some form of "good actor" test or a standard based on multichannel competition can be fashioned that will balance the complex interests at stake.

SEPARATE STATEMENT OF COMMISSIONER ERVIN S. DUGGAN

In Re: Reexamination of the Effective Competition Standard for the Regulation of Cable Television Basic Service Rates

I'm happy to see the Commission's progress, in this item, toward a revised effective competition definition under the Cable Act---and toward an act of government that is sensitive, flexible and responsive to reality rather than merely a blunt instrument.

I seem to have achieved a reputation as a "dove" when it comes to the possible reregulation of cable television---a label that I'm inclined to reject. But to the extent that I have been disinclined to impose draconian, intrusive reregulation upon the cable industry, it is for this reason: I believe that complaints about cable rates and service can be traced, ultimately, to a failure that occurred during the original local franchising process, when de facto monopolies were countenanced. To the extent that Congress ratified those de facto monopolies in the 1984 Cable Act, and the FCC adopted a three signal standard, they may have compounded the original error. It seems to me rather futile, at this late date, to imagine that sudden, drastic, intrusive legislative or regulatory intervention is the right way to correct the problem. Such a regulatory or legislative spasm might prove a cure worse than the disease. For this reason, I have favored encouraging emerging competition as the ultimate, and preferable, remedy.

When I got into the cable debate here at the FCC, I was struck by a paradoxical phenomenon: some cable operators, despite enjoying what appeared to be monopoly status, and despite having the incentive to act like monopolists, behaved rather well. They charged fair prices and offered good service. I was struck by the danger--- and the injustice--- that we would create if our definition of effective competition ensnared the innocent in a net designed for the guilty. And so I became the champion of what has come to be called the "good actor" standard: a standard designed to reward those who, even in the absence of direct competition, behave in ways that suggest the presence of competition. The item we vote upon today puts forward for comment such a behavioral, or good-actor, standard. I endorse the concept. And I'm grateful to all on the FCC staff--- notably Robert Pepper, who heads our Office of Plans and Policy--- for giving it weight and substance.

If such advocacy on my part has made me seem a "dove" on cable, so be it; we live in a city that is given to caricatures and the broad brush. My desire as a regulator, however, is to be not a dove or a hawk, but an owl. The owl is marked by several desirable traits. The owl has large, wide-open eyes. The owl is famous for its wisdom, and for vision acute enough to penetrate even murky darkness. And the owl has another attribute: sharp talons.

Lest anyone mistake my reasonable restraint for naivete, I want to make something clear as we proceed toward a new definition of effective competition under the Cable Act: I will be watching, with owl-like intensity, to see whether operators in the cable television industry are truly good actors, offering superior service at reasonable rates. To the extent that they presume upon my restraint and good will--- and to the extent that complaints about exorbitant rates and shoddy service persists and increase--- this owl will not hesitate to employ his regulatory talons.

Before the
Federal Communications Commission
Washington, D.C. 20554

Application of

WKLX, INC. No. BLH-880506KB

For License to Cover Construction
Permit for WKLX(FM), Rochester
New York

MEMORANDUM OPINION AND ORDER

Adopted: January 2, 1991; Released: January 14, 1991

By the Commission:

1. The Commission has under consideration: (1) a "Petition for Reconsideration of Grant of License to WKLX(FM)" ("Petition"), filed on December 16, 1988, by Stoner Broadcasting System, Inc. ("Stoner"), licensee of WCMF(FM), Rochester, New York, against the November 7, 1988 grant of the license application for WKLX(FM), Rochester, New York, filed by WKLX, Inc. ("WKLX"), licensee of WKLX(FM); and (2) responsive pleadings.[1]

2. Stoner claims that objectionable interference is being caused to WCMF(FM) by the operation of WKLX(FM) in implementing program test authority ("PTA") under BMPH-880314IG (granted April 11, 1988). Specifically, Stoner claims that WCMF(FM) has been receiving interference as a result of Receiver Induced Third Order Intermodulation Effect ("RITOIE") since WKLX(FM)'s move to a new transmitter site pursuant to BMPH-880314IG.[2] On this basis, Stoner filed, on September 9, 1988, an "Informal Objection" to WKLX's September 1, 1988 letter in which WKLX requested that it be granted standard PTA and that its pending Form 302 license application be granted. [3] Stoner objected to the grant on the grounds that: (1) contrary to the claims of WKLX(FM), WCMF(FM) continues to suffer interference as a result of WKLX(FM)'s recent site move; (2) nothing has been done about complaints involving mobile receivers; and (3) many of the "fixes" are likely to be undone by listeners if they want to receive stations other than WCMF(FM). In response, by letter dated September 29, 1989, WKLX stated that it had clearly documented that WKLX has resolved " *every* verified complaint . . . it received about reception on non-mobile radios of WCMF's signal." In a letter dated November 7, 1988, the Chief, Audio Services Division, Mass Media Bureau ("Bureau"), found that while WKLX(FM)'s move to its new site had initially resulted in RITOIE-based service disruptions, its efforts to resolve the problem were sufficient to fully discharge its responsibility in this matter. In so ruling, the Bureau upheld WKLX's exclusion of mobile and battery-powered receivers from the scope of its RITOIE resolution efforts. Accordingly, the Bureau granted WKLX's license application and denied Stoner's September 9, 1988 Informal Objection, finding that Stoner had failed to state a claim on which relief can be granted.

3. Stoner requests reconsideration of the grant of the license on the grounds that: (1) WKLX made a material misrepresentation in its application by claiming that no receiver-induced intermodulation interference would result from the proposed move; (2) the grant of WKLX(FM)'s license constitutes a modification of WCMF(FM)'s license without notice and opportunity to be heard in violation of Section 316 of the Communications Act; (3) the Bureau erred in finding that WKLX's interference resolution efforts were sufficient to fully discharge its responsibility in this matter; and (4) the Bureau's decision to exclude mobile and battery-powered receivers from the scope of RITOIE resolution violates Commission precedent and lacks the reasoned decision making required by the Administrative Procedure Act. Stoner further requests that the Commission: (1) designate the WKLX(FM) license for hearing on the misrepresentation issue and to determine whether the modification of the WCMF(FM) license would be in the public interest; and (2) in the meantime, suspend program test authority for WKLX(FM) and compel it to return to its former transmitter site or, at a minimum, bear the cost of remedying all aspects of the interference.

4. In its opposition, WKLX argues that Stoner's Petition should be dismissed or denied as procedurally defective under Section 1.106 of the Rules, or as moot because Stoner filed an application (BPH-881209ID) to relocate its transmitter to the WKLX(FM) site to eliminate the RITOIE. Alternatively, WKLX contends that Stoner's Petition should be denied for lack of substantive merit on the grounds that: (1) WKLX's applications and amendments contain no misrepresentations or lack of candor; (2) WKLX(FM)'s grant does not modify Stoner's license in violation of Section 316 of the Communications Act; (3) WKLX's complaint resolution program fully discharges its interference resolution responsibility; and (4) WKLX is not required to resolve mobile or battery-powered receiver complaints. WKLX also requests that, pursuant to Section 1.106(a)(1) of the Commission's Rules, Stoner's Petition be referred to the Commission and treated as an application for review of the Bureau's letter instead of as a petition for reconsideration.

5. In its reply, Stoner: (1) contends that its Petition is procedurally proper, and is not moot because it has requested the withdrawal of its relocation application;[4] and (2) reiterates the four arguments it advanced in its Petition.

6. *Procedural Issue*. WKLX has requested that Stoner's Petition be treated as an application for review and referred to the Commission. Treating the Petition in this manner should assist in expeditiously resolving the matters at issue in this proceeding and the Petition will accordingly be treated as an application for review. As such, and notwithstanding the procedural concerns raised by WKLX referenced in paragraph 4 above, we find it to be procedurally acceptable under Section 1.115 of the Rules.

7. *License Modification*. Stoner argues that WCMF(FM)'s license was modified without notice and opportunity to be heard in violation of Section 316 of the Communications Act, which provides that a license "modification" shall not become final until the licensee is notified in writing and given a reasonable opportunity to protest. 47 U.S.C. § 316(a)(1). Specifically, Stoner contends that the grant of the WKLX(FM) license constitutes an "indirect modification" of WCMF(FM)'s license which

presents a "substantial and material question of fact" requiring a hearing under Section 316. 47 U.S.C. §§ 316(a)(3) and 309(d)(2). Stoner claims this indirect license modification is caused by the RITOIE that results from the interaction of the operating frequencies of newly collocated WKLX(FM) and WRMM(FM), which generates within many receivers a signal on the same frequency as WCMF(FM) and results in WCMF(FM)'s signal not being receivable on many receivers within its protected service contour.

8. In response, WKLX argues that RITOIE is not the type of interference cognizable as a matter of law or fact under Section 316 as an indirect license modification, because implicit in the Section 316 license modification concept is: (1) a permanent loss of radio service which listeners are accustomed to receiving; and (2) which is directly caused by another licensed broadcast facility, citing in support *Pike - Mo Broadcasting Co.*, 2 FCC 2d 207, 208-09 (1965). WKLX claims that Stoner has not met this evidentiary standard because RITOIE is both *receiver*-generated and *receiver*-specific and thus, as a technical engineering matter, is neither: (1) a persistent or consistent interference problem; nor (2) "WKLX-caused." Additionally, WKLX argues that there does not now exist a consistent or persistent interference problem amounting to a permanent loss of radio service because all verifiable non-mobile service disruption complaints have been resolved.

9. Stoner counters that the two-part test laid out by WKLX is met in this case because: (1) listeners previously accustomed to receiving WCMF(FM) have now permanently lost that service; and (2) notwithstanding the fact that receiver-induced interference is generated in the receiver and is receiver-specific, it is still caused by WKLX(FM) because "but for WKLX's operation at its new transmitter site, the receiver induced interference would not exist."

10. We have examined the arguments and find that Stoner is not entitled to a hearing under Section 316. Disruption of service created as the result of the transmission of undesired signals, where not dependent upon receiver characteristics, may create a Section 316 right if uncorrected. *See, e.g., Western Broadcasting Co. v. FCC*, 674 F.2d 44 (D.C. Cir. 1982); *FCC v. National Broadcasting Company (KOA)*, 319 U.S. 239 (1943); and *Pike - Mo, supra*. In the case of RITOIE, the transmitted signals fully comply with all of our emission standards and requirements but nonetheless, because of the particular characteristics of certain receivers, result in service disruption within those receivers, and not others. We do not believe that service disruption to particular receivers because of their particular characteristics establishes a *prima facie* case of license modification.[5] However, where such reception problems occur after a station begins operation, the Commission may find it in the public interest to require resolution of individual complaints. In the present case, the applicant has taken appropriate measures. As the Bureau stated in its November 7, 1988 letter: (1) WKLX's technical and educational efforts are sufficient to "fully discharge" its responsibility in this matter; and (2) Stoner "submitted no supporting documentation" with its September 9, 1988 Informal Objection demonstrating the existence of any new unresolved non-mobile service disruption complaints.

11. *Service Disruption: Non - Mobile Receivers.* Stoner claims that under the Commission's longstanding "newcomer" policy, WKLX is required to eliminate objectionable interference to existing licensees such as WCMF(FM), citing in support *Midnight Sun Broadcasting Co. v. FCC*, 11 FCC 1119 (1947) and *Sudbrink Broadcasting of Georgia, Inc. v. FCC*, 65 FCC 2d 691 (1977). Stoner argues that the Bureau erred in ruling that WKLX's efforts were "sufficient to fully discharge" its responsibilities in this matter because "WKLX should be responsible for a solution that eliminates the interference, not just addresses some reported cases of it." Stoner contends that in order to eliminate the RITOIE disruption the Commission should: (1) deny WKLX(FM)'s license application and require it to return to its old site; or (2) permit WCMF(FM) to relocate its facilities to the same tower from which WKLX(FM) transmits[6]; and (3) require WKLX to be fully responsible, financially and otherwise, for effectuating either of these two solutions.

12. WKLX counters that while *Midnight Sun* and *Sudbrink* require elimination of objectionable interference, they do not: (1) require WKLX to resolve the interference beyond addressing the reported cases; or (2) impose any moral or financial responsibility to undertake and pay for a solution that permanently eliminates the interference. WKLX asserts that *Midnight Sun* "holds only that the 'newcomer' station would be obligated 'to satisfy any *complaints* of interaction [interference],'" 11 FCC at 1120 (emphasis added); and that *Sudbrink*, while recognizing a station's financial responsibility to resolve interaction between transmitting facilities, also emphasizes that it is appropriate for the paying licensee "to assure that excessive and needless costs are not being incurred," 65 FCC 2d at 693. WKLX claims that since it satisfied the interference complaints in compliance with *Midnight Sun*, thereby eliminating any cognizable interference problem, Stoner's desire to effect a permanent solution by relocating its transmitter is the "very kind of 'excessive and needless costs' that *Sudbrink* holds are voluntary." Thus, WKLX argues that the Bureau was correct in deciding that WKLX had "fully discharge[d]" its interference resolution responsibilities by addressing individual complaints and that WKLX thus would not be held financially responsible for any further actions WCMF(FM) might wish to take.

13. In reply, Stoner contends that WKLX's efforts have not discharged its responsibilities.[7] and states that while *Sudbrink* permits the reimbursing station's engineers "to participate to the extent necessary to assure that excessive and needless costs are not being incurred" in the elimination of the interference, 65 FCC 2d at 693, this "has never been held to require only a second-rate solution."

14. The Commission has consistently found it to be in the public interest to require a "newcomer" to make reasonable efforts to alleviate RITOIE-based service disruptions to reception of an existing FM licensee where actual listener complaints have been received. Further, it has also been established policy to permit RITOIE resolution on a "complaint-by-complaint" basis and, consistent with *Sudbrink*, at minimum cost to the paying licensee. *See, e.g., Letter to Bible Broadcasting Network, Inc. and WCMS Radio Norfolk, Inc.*, reference 8920-DEB/GRM (Chief, FM Branch, April 11, 1986). In accordance with these policies, WKLX was ordered to resolve the RITOIE complaints. Subsequently, WKLX submitted documented reports detailing the corrective action taken and, in a

letter dated September 29, 1988, stated that it had resolved "every verified complaint" it had received about reception of WCMF(FM)'s signal on non-mobile radios. By letter dated November 7, 1988, the Bureau: (1) accepted this showing; (2) found that WKLX's efforts were sufficient to fully discharge its responsibility in this matter; and (3) held that WKLX would thus not be held financially responsible for any further action WCMF(FM) might wish to take. Upon review of Stoner's Petition, we find no reason to modify this decision. Accordingly, we affirm that WKLX has satisfactorily cured the service disruption to WCMF(FM)'s signal with respect to non-mobile receivers.

15. *Service Disruption: Mobile and Battery - Powered Receivers*. Stoner contends that the Bureau erred in excluding mobile and battery-powered receivers from the scope of the complaints WKLX was required to address under its RITOIE resolution program. Stoner alleges that the Bureau's exclusion of mobile receivers, by relying on a Commission ruling excluding mobile receivers from consideration when dealing with FM blanketing interference, is erroneous because RITOIE and blanketing are significantly different and thus should not be treated similarly, a fact Stoner claims the Commission itself acknowledged when it declined to address RITOIE in the blanketing interference Rule Making. *See FM Broadcast Station Blanketing Interference* (" *FM Blanketing* "), 57 RR 2d 126, 130 (1984). Stoner claims this incorrect application of the policy in *FM Blanketing* violates the duty imposed by the Administrative Procedure Act (APA) to proceed with reasoned decisions supported by substantial evidence and to explain fully all departures from earlier rules. Stoner also contends that the Bureau erred in accepting, without stating any reasoned basis therefor, WKLX's assertion that battery-powered receivers fall within the definition of mobile receivers. Stoner claims that mobile receivers are those "contained in a vehicle" and that the inclusion of battery-powered receivers in this category is without precedent.

16. WKLX contends that the Bureau's explanation of its decision to exclude mobile and battery-powered receivers from the scope of WKLX's interference resolution responsibility fully meets the requirements of the APA and Commission precedent. In support, WKLX argues that: (1) neither exclusion constitutes a new policy decision; (2) the Bureau's reliance on *FM Blanketing* to exclude mobile receivers from RITOIE consideration is justified; (3) it has been the Bureau's past practice to exclude mobile receivers in RITOIE cases; and (4) battery-powered receivers are as mobile and transient as car radios and thus warrant similar treatment. Nonetheless, WKLX notes that it has voluntarily undertaken to rectify interference problems of home portable radios where their locations are reasonably constant.

17. We have reviewed the matter and find that the decision to exclude mobile and battery-powered receivers from the scope of RITOIE resolution is not a departure from precedent and is not in violation of the APA. It has been past Commission policy to exclude mobile receivers from consideration with respect to blanketing interference. *See* FM *Blanketing* at 130, para. 25. The Bureau's reliance on the principles set forth in *FM Blanketing* in support of its decision in this case regarding RITOIE is justified. The Commission decided not to include RITOIE under the scope of the blanketing Rule Making because it was not within the definition of blanketing interference in the *Notice of Proposed Rule Making* in that proceeding.[8] *See FM Blanketing* at 130, para. 29. The Commission defined blanketing as interference that occurs when "an FM station's signal strength or signal power density is of such magnitude that it causes receivers near the transmitting antenna to be partially or completely blocked from receiving other broadcast stations." *Notice* at para. 2; *FM Blanketing* at 126, para. 2. In contrast, RITOIE occurs when the signals of two stations interact within a receiver to generate a third signal which disrupts the reception of any station operating on the same frequency as the receiver-generated signal. In other words, RITOIE "is similar in its effects to blanketing but different in origin." *FM Blanketing* at 127, para. 7. Given this difference in origin, the Commission's decision not to include RITOIE under the scope of the blanketing Rule Making was an acknowledgment only that notice had not been given with regard to RITOIE. It did not, however, preclude similar treatment of RITOIE where similar treatment is warranted.[9] The Commission has the discretion to proceed by adjudication rather than Rule Making here, *see SEC v. Chenery Corp.*, 332 U.S. 194 (1947), and nothing in the APA or elsewhere precludes us from using the principles set forth in a Rule Making decision to decide an adjudication on a similar issue not precisely covered by the Rule Making. With respect to mobile receivers, the basis for their exclusion from blanketing considerations is their "inherent transient nature." *FM Blanketing* at 130, para 25. This factor is equally salient with respect to RITOIE because, as is the case with FM blanketing, a mobile receiver moving through the potential interference area will encounter constantly varying propagation paths and signal strengths from the pertinent stations, resulting in a continuously varying potential for interference (ranging from a high likelihood to none at all) depending on the particular receiver's susceptibility to RITOIE. Accordingly, similar treatment of mobile receivers with respect to both blanketing and RITOIE is warranted. Further, battery-powered receivers are also characterized by an "inherent transient nature." Accordingly, excluding them from the scope of both blanketing and RITOIE resolution efforts is equally justified. Thus, we uphold the Bureau's exclusion of both mobile and battery-powered receivers from RITOIE resolution requirements.

18. *Misrepresentation*. Stoner also argues that WKLX, in its July 1987 amendment to its pending modification application (BMPH-860714IB), "misrepresented to the Commission by its answer to [Item 14, Section V-B, FCC Form 301 (October 1986)[10]], that there were not any authorized FM transmitters within 10 kilometers of the proposed antenna which may produce receiver induced intermodulation interference." Stoner charges that: (1) this misrepresentation was "reckless, if not intentional"; (2) WKLX "must have known of the possibility" of RITOIE, yet nevertheless "gave a misleadingly incomplete answer [to Item 14], with no mention of receiver induced interference"; (3) WKLX "knew, or ought to have known" that collocation was "likely to cause interference"; (4) the "possibility of RITOIE interference would be apparent to any responsible engineer" and is mathematically calculable; (5) WKLX "did not disclose" the problem prior to construction; (6) WKLX "concealed" the interference problem; and (7) the "principals of WKLX have publicly admitted that they 'anticipated' interference problems."

19. WKLX claims that Stoner's charges are procedurally defective because they are not supported by any declaration or affidavit by someone with personal knowledge of the facts in violation of the general pleading requirements of Section 309(d) of the Communications Act and Section 1.229(d) of the Commission's Rules for designation of hearing issues. WKLX also charges that Stoner's allegations are "plainly incorrect as a matter of fact and law" because: (1) WKLX's July 1987 application amendment, which first proposed collocation with WRMM(FM), answered "Yes" to Item 14's inquiry regarding the existence of "transmitters which may produce receiver-induced intermodulation interference"; (2) Exhibit E-1 of the amendment referenced (without call signs) ten FM and five TV stations that were located within 10 kilometers of the proposed site; (3) "neither WKLX nor its consulting engineers had any *actual* knowledge that there would be any interference at any time throughout the filing and application processing period leading to grant of the construction permit"; and (4) WKLX "had no reason to specifically anticipate a RITOIE problem" in this case because "as of July 7, 1987, there had only been three RITOIE cases known to have been reported to the Commission out of the hundreds of collocated facilities in the United States." WKLX argues that, "[i]n light of these indisputable facts[,] . . . it provided as much interference 'notice' in its filings as the engineering state-of-the-art and the requirements of Commission Krules and policies dictated and warranted."

20. In response, Stoner contends that: (1) its misrepresentation claim is procedurally proper because the evidence on which it is based is all a matter of public record for which no affidavit is required; and (2) notwithstanding the answer of "Yes" to Item 14, WKLX did not comply with Item 14's instructions to provide "a description of any expected, undesired effects of operations and remedial steps to be pursued if necessary, and a statement accepting full responsibility for the elimination of any objectionable interference (including that caused by receiver induced or other types of modulation)." Stoner argues that WKLX: (1) "made not a single mention of receiver-induced or 'RITOIE' interference" in its amendment application; (2) did not describe any remedial steps to be pursued; and (3) promised only to rectify all complaints of interference pursuant to Section 73.318 which deals solely with blanketing interference.

21. With respect to the procedural aspect of this issue, we will consider Stoner's allegations only to the extent that they are based on facts of which official notice may be taken. As for the arguments on the merits, we disagree with Stoner's claim that WKLX's answer to Item 14 indicates that "there were not any authorized FM transmitters within 10 kilometers of the proposed antenna which may produce receiver induced intermodulation interference." WKLX complied with the Commission's reporting requirements through its affirmative answer to Item 14, which put others on notice of the possibility of interference, including service disruption caused by receiver-induced intermodulation. As to WKLX's failure to provide a description of any expected interference and remedial steps it would take, Stoner has provided no factual basis to suggest that at the time WKLX filed its application it "expected" any such interference and therefore in some way intended to deceive the Commission by its silence, which traditionally has been the *sine qua non* of a misrepresentation issue. *CBS, Inc.*, 49 FCC 2d 1214, 1223 (1974), *cited in Leflore Broadcasting Co., Inc. v. FCC*, 636 F.2d 454, 461 (1980). Accordingly, we find that Stoner has not made a *prima facie* showing under Section 309(d) that WKLX engaged in misrepresentation. In any event, in light of WKLX's sworn statements that it in fact had no knowledge of any expected interference, and given that RITOIE is a rare occurrence, we believe no substantial and material questions of fact exist regarding possible misrepresentation.

22. In conclusion, the Bureau's letter articulated positions which we believe are sound. Thus, having given full and detailed consideration to the Petition, we find that Stoner has failed to state a claim on which relief can be granted. Accordingly, Stoner's Petition for Reconsideration IS DENIED. Additionally, the license grant of WKLX(FM) to WKLX, Inc., File No. BLH-880506KB, IS AFFIRMED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] These include the January 10, 1989 "Opposition to Petition for Reconsideration" filed by WKLX and the January 24, 1989 "Reply of Stoner Broadcasting System, Inc." filed by Stoner.

[2] RITOIE occurs when strong signals from two stations interact within a receiver to generate a signal on a third frequency. This receiver-generated signal will disrupt reception of any station operating on this third frequency. RITOIE arises in the instant case because the carriers of WKLX(FM) (98.9 MHz) and WRMM(FM) (101.3 MHz), which operate from the same transmitter site, enter into a two-frequency third order intermodulation product (98.9 x 2 - 101.3 = 96.5 MHz) that is co-channel with WCMF(FM).

[3] Prior to the filing of its Informal Objection, Stoner complained to the Commission on April 29, 1988. The Field Operations Bureau verified the service disruption on April 29 and May 3, 1988. Accordingly, the Commission suspended PTA on May 3, 1988 and granted limited PTA on May 6, 1988 to enable WKLX to resolve the complaints. On May 18, June 2 (supplemented June 3), and August 31, 1988, WKLX submitted reports detailing the corrective action taken. We note that the Commission has not received any additional complaints of interference since that time. By letter dated September 1, 1988, WKLX stated that its August 31 report clearly demonstrated that all documented complaints to WCMF(FM) stemming from the WKLX(FM) tower move have been resolved and that no further problem exists, and requested that WKLX(FM) be immediately granted standard PTA and that its pending Form 302 license application (filed May 6, 1988) be promptly granted.

[4] The application was subsequently dismissed on February 10, 1989.

[5] Even if such service disruption did constitute a *prima facie* case of license modification, because Stoner's objection includes no documentation of any unresolved non-mobile disruption complaints, no substantial and material questions of fact would remain with regard to non-mobile service disruption. Each of the 164 verified non-mobile complaints received as of June 1,

1988 (the date of WKLX' "Final Report" to the Commission on resolution of the complaints) has been resolved to the satisfaction of the Commission.

[6] On December 9, 1988, Stoner filed an application for construction permit (BPH-881209ID) to relocate WCMF(FM)'s transmitter to WKLX(FM)'s present site. On January 24, 1989, Stoner requested that its application be dismissed. *See* "Reply of Stoner Broadcasting System, Inc.," Attachment A, January 24, 1989. The application was dismissed on February 10, 1989.

[7] Stoner claims that WKLX "did not treat 15 percent of the complaints simply because it was unable to contact the listener or because it arbitrarily determined that the listener lived too far away." Additionally, Stoner noted that mobile and battery-powered receivers, which constitute 57 percent of the complaints, were not treated at all.

[8] *Notice of Proposed Rule Making* (*Notice)* in BC Docket No. 82-186, 47 Fed. Reg. 18,936 (1982).

[9] *Cf. New Orleans Channel 20, Inc. v. FCC,* 830 F.2d 361 (D.C. Cir. 1987) (similar circumstances require similar treatment; the Commission has the expertise to determine when circumstances are similar).

[10] Item 14 asks: "Are there . . . within ten (10) kilometers of the proposed antenna, any proposed or authorized FM or TV transmitters which may produce receiver-induced intermodulation interference?"

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

PACIFIC TELECOM TRANSMISSION SERVICES, INC.

File Nos. CSG-90-101-P/L
CGS-90-101-P/L(A)

Application for authority to construct and operate international earth station facilities at Moores Valley, Oregon for provision of INTELSAT multipurpose services in the Pacific Ocean Region

Application for authority to establish channels of communication between the Moores Valley, Oregon earth station and INTELSAT Pacific Ocean Region satellites for provision of restoration services.

File No. I-T-C-91-008

ORDER AND AUTHORIZATION

Adopted: December 28, 1990; Released: January 14, 1991

By the Chief, International Facilities Division:

1. The captioned applications, filed by Pacific Telecom Transmission Services, Inc. (PTTS), request authority pursuant to Section 214 and Title III of the Communications Act of 1934, as amended, and Sections 201(c)(4), (c)(6) and (c)(7) of the Communications Satellite Act of 1962, as amended, to construct and operate international multipurpose earth station facilities at Moores Valley, Oregon, and to use these facilities to establish channels of communications between the earth station and INTELSAT Pacific Ocean Region (POR) satellites to provide restoration capacity for the North Pacific Cable System (NPC). The applications were placed on public notice on August 22, October 18 and November 15, 1990. No comments were received.

2. The proposed earth station will consist of an 18.3-meter antenna which shall meet INTELSAT Revised Standard A technical parameters and will communicate with INTELSAT POR satellites in the 5925-6425 MHz transmitting frequency band and the 3700-4200 MHz receiving frequency band. The facilities will be located at PTTS's fiber optic cable repeater station at Moores Valley, Oregon, and will be used to provide emergency restoration for the NPC system presently being installed by PTTS.

3. In its Report and Order in the *Earth Station Ownership Proceeding*, CC Docket No. 82-540, the Commission established a more open and flexible earth station ownership policy which allowed entities other than the Earth Station Ownership Committee (ESOC) to own and operate international earth stations that access the INTELSAT system.[1] The Order permitted the joint carrier owners of ESOC earth stations to decide among themselves the future of ESOC.[2] The Commission also concluded that when reviewing applications for these international earth stations, it would distinguish between earth stations dedicated to providing IBS and/or television services and multipurpose stations. IBS and/or television earth stations, the Commission found, do not have the same potential for revenue diversion and significant impact on system efficiency as multipurpose earth stations. Consequently, the Commission concluded that it would consider only the minimal legal, financial and technical qualifications of the applicant as required by Sections 308 and 319 of the Communications Act of 1934, as amended, when reviewing applications for IBS and/or television earth stations. Absent special problems, the Commission stated that it would treat these applications as routine and process them expeditiously.

4. With respect to multipurpose stations, the Commission stated that it would continue close scrutiny of applications for construction and operation of these facilities since they tend to raise more complex economic, technical and operational issues that may affect the variety, quality and price of service offered to users. In determining whether the grant of an application for a multipurpose earth station will serve the public interest, the Commission indicated it would conduct an analysis by balancing the possible benefits (*e.g.*, shorter terrestrial hauls, increased user options, lower charges to users, and increased customer base for INTELSAT services) against the possible detriments (*e.g.*, reduced technical efficiency, harmful revenue diversion, service deterioration and higher charges to users) which a particular application may present. [3] However, with the dissolution of ESOC earth station ownership arrangements and the transition to a competitive environment, the issue of harmful revenue diversion from existing ESOC earth stations is no longer a concern.

5. Upon consideration of the applications, we conclude that authorization of the requested services and facilities will serve the public interest. PTTS's legal, technical and financial qualifications to construct and operate the proposed international earth station are well-established. The proposed earth station shall comply with INTELSAT performance criteria for Revised Standard A stations. PTTS has also completed the necessary frequency coordination. Further, we find that the proposed multipurpose earth station will not adversely affect INTELSAT, since it will be used specifically to restore service in case of outage of the NPC system and not for general multipurpose service in the Pacific Ocean Region.

6. IT IS HEREBY CERTIFIED that the present and future public convenience and necessity require the provision of multipurpose satellite services by PTTS for restoration purposes.

7. Accordingly, IT IS ORDERED that applications File Nos. CSG-90-101-P/L, CGS-90-101-P/L(A) and I-T-C-91-008 ARE GRANTED, and PTTS is authorized to:

a. construct and operate the proposed 18.3-meter earth station facilities at Moores Valley, Oregon;

b. establish channels of communications between the subject earth station and INTELSAT POR satellites; and

c. utilize these facilities to provide restoration capacity for the NPC system to points in the Pacific Ocean Region.[4]

8. IT IS FURTHER ORDERED that before completion of equipment installation and facility activation, the applicant shall provide the Commission with a summary of equipment which was actually installed.

9. This order is issued under Section 0.291 of the Commission's rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's rules may be filed within 30 days of the date of public notice of this order (*See* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

FOOTNOTES

[1] *Earth Station Ownership*, 100 FCC 2d 250 (1984).

[2] The joint carrier owners decided to dissolve ESOC.

[3] *Earth Station Ownership*, 100 FCC 2d at 284.

[4] This authorization is not to be construed as permitting the provision of any service between earth stations located within the U.S.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

TELECOMMUNICATIONS SERVICES, INC. File No. I-T-C-91-004

Application for authority to operate as an international resale carrier.

FEEK'S TELECOMMUNICATIONS, INC. File No. I-T-C-91-005

Application for authority to operate as an international resale carrier.

LONG DISTANCE NETWORK, INC. File No. I-T-C-91-014

Application for authority to operate as an international resale carrier.

AMERICAN LONG DISTANCE OPERATOR SERVICES, INC. File No. I-T-C-91-018

Application for authority to operate as an international resale carrier.

ORDER, AUTHORIZATION AND CERTIFICATE

Adopted: December 28, 1990; Released: January 14, 1991

By the Chief, International Facilities Division:

1. The captioned applications, filed by Telecommunications Services, Inc. (TSI), Feek's Telecommunications, Inc. (Feek's), Long Distance Network, Inc. (LDN) and American Long Distance Operator Services, Inc. (ALDOS), request authority pursuant to Section 214 of the Communications Act of 1934, as amended, to resell the swtiched message telephone services of existing common carriers to provide international switched voice service between the U.S. and various overseas points. The applications were placed on public notice on October 18 and 24, 1990. No comments were received.

2. TSI and Feek's are start-up companies. LDN and ALDOS are domestic resale carriers. All four applicants propose to resell international switched voice services in competition with other common carriers already providing resale of such services. In authorizations of new entrants over the past decade, the Commission has recognized that increased competition in international markets is beneficial.[1] We find that the market will support additional carriers and that the added competition will be in the public interest.[2]

3. For the foregoing reasons, IT IS CERTIFIED that the present and future public convenience and necessity require the provision of international switched voice services to the general public by TSI, Feek's, LDN and ALDOS.

4. Accordingly, IT IS ORDERED that applications File Nos. I-T-C-91-004, I-T-C-91-005, I-T-C-91-014 and I-T-C-91-018 ARE GRANTED; and

> a. TSI is authorized to provide international switched voice services by the resale of the international switched voice services set forth in AT&T's Tariffs FCC Nos. 1 and 2 between the U.S. and the pointes listed in those tariffs;
>
> b. Feek's is authorized to provide international switched voice services by the resale of the international switched voice services set forth in U.S. Sprint's Tariff FCC No. 1 between the U.S. and the overseas points listed in that tariff;
>
> c. LDN is authorized to provide international switched voice services by the resale of the international switched voice services set forth in AT&T's Tariff FCC No. 1, MCI's Tariff FCC No. 1 and US Sprint's Tariff FCC No. 1 between the U.S. and the overseas points listed in those tariffs; and
>
> d. ALDOS is authorized to provide international switched voice services by the resale of the international switched voice services set forth in AT&T's Tariffs FCC Nos. 1 and 2, MCI's Tariff FCC No. 1 and US Sprint's Tariffs FCC Nos. 1 and 2 between the U.S. and the overseas points listed in those tariffs.

5. Copies of any operating agreements entered into between the applicants and their correspondents shall be filed with the Commission within 30 days of their execution.

6. IT IS FURTHER ORDERED that the applicants shall file tariffs pursuant to Section 203 of the Communications Act, 47 U.S.C. Section 203, and Part 61 of the Commission's Rules, 47 C.F.R. Part 61, for the services authorized in this Order.

7. IT IS FURTHER ORDERED that the applicants shall file the annual reports of overseas telecommunications traffic required by Section 43.61 of the Commission's Rules, 47 C.F.R. §43.61 (October 1, 1989).

8. This order is issued under Section 0.291 of the Commission's Rules and is effective upon release. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

FOOTNOTES

[1] *See, e.g.*, the cases cited in *Teltec Saving Communications Co.*, File No. I-T-C-86-062, Mimeo No. 3548 (released April 4, 1986) at n.2.

[2] *FCC v. RCA Communications, Inc.*, 346 U.S. 86 (1953); *Mackay Radio and Telegraph Co.*, 28 FCC 231 (1960).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

AMERICAN TELEPHONE & TELEGRAPH CO.

File No. CSG-90-051-P/L
File No. CSG-90-052-P/L

Applications for authority
to construct and operate
two identical 18.3-meter
C-band INTELSAT Revised Standard A
multipurpose earth stations at Salt
Creek, California.

ORDER AND AUTHORIZATION

Adopted: December 31, 1990; Released: January 14, 1991

By the Chief, International Facilities Division:

1. The above-captioned applications, filed on March 27, 1990 by the American Telephone & Telegraph Company (AT&T), request authority pursuant to Title III of the Communications Act of 1934, as amended, and Section 201(c)(7) of the Communications Satellite Act of 1962, as amended, to construct and operate two identical 18.3-meter C-band international multipurpose INTELSAT Revised Standard A earth stations at Salt Creek, California for the provision of international telecommunication services. The applications were placed on public notice on May 2, 1990. No comments were received.

2. The proposed earth stations will consist of two identical 18.3-meter antennas which shall meet INTELSAT Revised Standard A technical parameters and communicate with INTELSAT satellites in the Pacific Ocean Region (POR). The proposed earth stations will operate in the 5925-6425 MHz transmitting frequency band and the 3700-4200 MHz receiving frequency band.

3. In its Report and Order in the *Earth Station Ownership Proceeding*, CC Docket No. 82-540, the Commission established a more open and flexible earth station policy which allows entities other than the Earth Station Ownership Committee (ESOC) to own and operate international earth stations that access the INTELSAT system. The Order permitted the joint carrier owners of ESOC earth stations to decide among themselves the future of ESOC.[1] The Commission also concluded that when reviewing applications for these international earth stations, it would distinguish between earth stations dedicated to providing IBS and/or television services and multipurpose stations. IBS and/or television earth stations, the Commission found, do not have the same potential for revenue diversion and significant impact on system efficiency as multipurpose earth stations. Consequently, the Commission concluded that it would consider only the minimal legal, financial and technical qualifications of the applicant as required by Sections 308 and 319 of the Communications Act of 1934, as amended, when reviewing applications for IBS and/or television earth stations. Absent special problems, the Commission stated that it would treat these applications as routine and process them expeditiously.

4. With respect to multipurpose stations, the Commission stated that it would continue close scrutiny of applications for construction and operation of these facilities since they tend to raise more complex economic, technical and operational issues that may affect the variety, quality and price of service offered to users. In determining whether the grant of an application for a multipurpose earth station will serve the public interest, the Commission indicated it would conduct an analysis by balancing the possible benefits (*e.g.*, shorter terrestrial hauls, increased user options, lower charges to users, and increased customer base for INTELSAT services) against the possible detriments (*e.g.*, reduced technical efficiency, harmful revenue diversion, service deterioration and higher charges to users) which a particular application may present.[2] However, with the dissolution of ESOC earth station ownership arrangements and the transition to a competitive environment, the issue of harmful revenue diversion from existing ESOC earth stations is no longer a concern.

5. AT&T's legal, technical and financial qualifications to construct and operate the proposed earth stations are established. AT&T provides many different types of domestic and international services, including the operation of several multipurpose earth stations. The proposed earth stations shall conform with INTELSAT performance criteria for Revised Standard A earth stations. AT&T has completed the necessary frequency coordination.

6. Upon consideration of the applications, we find that authorization of the requested facilities is required by the public convenience and necessity.

7. Accordingly, IT IS ORDERED that applications File Nos. CSG-90-051-P/L and CSG-90-052-P/L ARE GRANTED, and AT&T is authorized to construct and operate the proposed INTELSAT Revised Standard A earth stations at Salt Creek, California for the provision of international communication services. [3]

8. IT IS FURTHER ORDERED that before completion of equipment installation and facility activation, the applicant shall provide the Commission with a summary of equipment which was actually installed.

9. IT IS FURTHER ORDERED that no service shall be provided via the subject Salt Creek, California earth stations prior to grant of authority for such service pursuant to Section 214 of the Communications Act.

10. The Commission retains jurisdiction over this matter to reallocate circuits in the satellite system among the various international common carriers and other authorized users as required to ensure nondiscriminatory use of, and equitable access to, the communications satellite system.

11. No material changes inconsistent with this or any other relevant Commission order shall be made before final execution of operating agreements between AT&T and its correspondents, and copies of the agreements shall be filed with the Commission within 30 days of their execution.

12. This order is issued under Section 0.291 of the Commission's Rules and is effective upon release. Petitions for reconsideration under Section 1.106 or applica-

tions for review under Section 1.115 of the Commission's Rules may be filed within 30 days of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

FOOTNOTES

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[1] *Earth Station Ownership*, 100 FCC 2d 250 (1984).

[2] *Id.* at 284.

[3] This authorization is not to be construed as permitting the provision of any service between earth stations located within the United States.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

CABLE &
WIRELESS
COMMUNICATIONS,
INC.

Application for authority
to lease and operate
terrestrial facilities for
the provision of private line
service between the United States
and Canada.

File No. I-T-C-90-102

ORDER, AUTHORIZATION AND CERTIFICATE

Adopted: December 31, 1990; Released: January 14, 1991

By the Chief, International Facilities Division:

1. The above-captioned application filed on April 13, 1990, by Cable & Wireless Communications, Inc. (C&W) and supplemented by letters of April 19, July 30, and December 24, 1990, requests authority pursuant to Section 214 of the Communications Act of 1934, as amended, to lease and operate terrestrial facilities for the provision of private line service between the United States and Canada. The application was placed on public notice on May 16, 1990. No comments were received.

2. C&W is a wholly-owned subsidiary of Cable & Wireless, PLC, a public limited company organized under the laws of the United Kingdom which provides telecommunications services. As a result, C&W is a foreign-owned carrier under the Commission's *International Competitive Carrier* policies[1] and is dominant in its provision of all international common carrier services between the United States and all other countries, including Canada. Thus, C&W remains subject to traditional entry and rate regulation. C&W is currently authorized to provide switched voice services by resale between the United States and 161 countries. C&W also is currently authorized to provide switched voice services to Canada through participation in the International Communications Group.[2] In addition, C&W has authority to provide direct switched services, including voice, data, telex and facsimile service, between the United States and Canada over its own facilities.[3] C&W now seeks authority to provide private line service between the United States and Canada over its own facilities. The application is a result of successful negotiations with Canadian Pacific Telecommunications, Inc. (CNCP). By its December 24, 1990 letter, C&W requests that the Commission act on the instant application only to the extent of granting authority for private line service solely between the United States and Canada and without interconnection with the public switched telephone network.

3. Our review of the record demonstrates that grant of the application will serve the public interest by increasing competition in the provision of facilities-based services to Canada. In authorizations of new entrants over the past decade, the Commission has recognized that increased competition in international markets is beneficial.[4] However, we shall limit the grant of authority for use of the facilities authorized herein to the provision of United States-Canada private line services only -- that is, private lines that originate in the United States and terminate in Canada or private lines that originate in Canada and terminate in the United States. We shall also prohibit the interconnection of the private lines provided pursuant to this authorization with the public switched telephone network. We will defer for future determination the questions of use of the facilities authorized herein for the provision of private line services beyond the United States and Canada and interconnection of such private lines with the public switched telephone network.

4. Upon consideration of the subject application, IT IS HEREBY CERTIFIED that the present and future public convenience and necessity require the acquisition of the requested facilities for C&W's provision of private line service between the United States and Canada.

5. Accordingly, IT IS ORDERED that application File No. I-T-C-90-102 IS GRANTED IN PART, and C&W is authorized to:

a. lease and operate the following facilities between the United States and Canada:

State/Province	Crossing Point	No. of Circuits
Washington-British Columbia	Blaine	4-T-1 Circuits
Michigan-Ontario	Detroit	7-T-1 Circuits
New York-Ontario	Buffalo-Peace Bridge	3-T-1 Circuits
New York-Quebec	Mooers Forks	2-T-1 Circuits

b. use the facilities in a. above to provide private line service between the United States and Canada.

6. IT IS FURTHER ORDERED that the authority to use the facilities authorized herein is limited to the provision of United States-Canada private line service only -- that is, private lines which originate in the United States and terminate in Canada or which originate in Canada and terminate in the United States and such private lines shall not be interconnected with the public switched telephone network.

7. IT IS FURTHER ORDERED that the questions of use of the facilities authorized herein for the provision of private line services beyond the United States and Canada and interconnection of such private lines with the public switched telephone network ARE DEFERRED until further order.

8. IT IS FURTHER ORDERED that grant of application File No. I-T-C-90-102 is subject to the condition that C&W will be classified as dominant in the provision of private line service between the United States and Canada absent an express determination by the Commission that C&W is non-dominant.

9. IT IS FURTHER ORDERED that C&W shall file quarterly reports of revenue, number of messages, and number of minutes of both originating and terminating traffic for all international services within 90 days from the end of each calendar quarter.

10. IT IS FURTHER ORDERED that C&W shall comply with any current and future Commission policies and requirements concerning international accounting and settlement rates and shall file copies of any operating agreement for Canada entered into by it within 30 days of its execution as required by Section 43.51 of the Commission's Rules, 47 C.F.R. § 43.51.

11. IT IS FURTHER ORDERED that the applicant shall file a tariff pursuant to Section 203 of the Communications Act, 47 U.S.C. § 203, and Part 61 of the Commission's Rules, 47 C.F.R. Part 61, for the services authorized in this Order.

12. IT IS FURTHER ORDERED that C&W shall file the annual reports of overseas telecommunications traffic required by Section 43.61 of the Commission's Rules, 47 C.F.R. § 43.61.

13. IT IS FURTHER ORDERED that C&W shall file additional Section 214 applications to supplement existing facilities to Canada or to make additional use of the facilities authorized herein.

14. IT IS FURTHER ORDERED that this authorization is subject to possible revocation or modification as a result of findings, rules, requirements or other actions resulting from the Commission's resolution of *Regulation of International Accounting Rates*, 5 FCC Rcd 4948 (1990), or other proceedings.

15. This order is issued under Section 0.291 of the Commission's Rules and is effective on adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules, 47 C.F.R. §1.106, may be filed within 30 days of public notice of this order (*see* Section 1.4(b)(2), 47 C.F.R. §1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

FOOTNOTES

[1] *See* International Carrier Policies, 102 FCC 2d 812 (1985) *recon. denied* 60 R.R. 2d 1435 (1986).

[2] *See* Southernnet of South Carolina, Inc., 5 FCC Rcd 1024 (Com. Car. Bur. 1990), *amended*, 5 FCC Rcd 2094 (Com. Car. Bur. 1990).

[3] *See* Cable & Wireless Communications, Inc., Order, Authorization and Certificate, File No. I-T-C-90-101, DA 90-1822, released December 18,1990.

[4] *See e.g.*, cases cited in Teltec Savings Communications Co., File No. I-T-C-86-062, Mimeo No. 3548 (released April 4, 1986) at n.2.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

MICRONESIAN
TELECOMMUNICATIONS
CORP.

Application for authority to establish channels of communications between the Susupe, Saipan earth station and INTELSAT Pacific Ocean Region satellites for the provision of INTELSAT Business Services between the Northern Mariana Islands and Pacific points

File No. I-T-C-90-083

MICRONESIAN
TELECOMMUNICATIONS
CORP.

Application for authority to modify its Susupe, Saipan 13-meter C-band earth station, Call Sign KA-34, for the provision of INTELSAT Business Services

File No. CSG-90-046-ML

ORDER AND AUTHORIZATION

Adopted: December 31, 1990; Released: January 14, 1991

By the Chief, International Facilities Division:

1. The above-captioned applications, filed on March 2, 1990 by Micronesian Telecommunications Corporation (MTC), request authority pursuant to Section 214 and Title III of the Communications Act of 1934, as amended, and Sections 201 (c)(4), (c)(6) and (c)(7) of the Communications Satellite Act of 1962, as amended, to establish channels of communications between its Susupe, Saipan earth station (Call Sign KA-34) and INTELSAT Pacific Ocean Region satellites and to modify its 13-meter C-band INTELSAT Standard B earth station, Call Sign KA-34, at Susupe, Saipan, Northern Mariana Islands for the provision of INTELSAT Business Services (IBS) between the Northern Mariana Islands and various Pacific points. The applications were placed on public notice on April 11 and 25, 1990, respectively. No comments were received. Upon consideration of the applications, we find that authorization of the requested services and facilities is required by the public convenience and necessity.

2. Accordingly, IT IS ORDERED that applications File Nos. I-T-C-90-083 and CSG-90-046-ML ARE GRANTED, and MTC is authorized to:

a. establish channels of communication between its Susupe, Saipan earth station, Call Sign KA-34, and INTELSAT Pacific Ocean Region satellites for the provision of IBS and related digital video services between the Northern Mariana Islands and those Pacific points which are now or may hereafter be listed in Comsat's tariff provisions for the space segment component of IBS and related digital video services; and

b. modify its 13-meter C-band INTELSAT Standard B earth station, Call Sign KA-34, at Susupe, Saipan for the provision of IBS and related digital video services, provided, however, before completion of equipment installation, the applicant shall provide the Commission with a summary of the equipment which was actually installed.

3. The Commission retains jurisdiction over this matter to reallocate circuits in the satellite system among the various international common carriers and other authorized users as required to ensure nondiscriminatory use of, and equitable access to, the communications satellite system.

4. This order is issued under Section 0.291 of the Commission's Rules and is effective upon release. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of the date of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

US SPRINT COMMUNICATIONS COMPANY LIMITED PARTNERSHIP	File Nos. CSG-90-108-P/L CSG-90-108-P/L(A)

Application for authority to
construct and operate earth station
facilities at Beeline, Florida for
provision of multipurpose services
via INTELSAT Atlantic Ocean Region
Satellites.

ORDER AND AUTHORIZATION

Adopted: December 31, 1990; Released: January 14, 1991

By the Chief, International Facilities Division:

1. The captioned application, filed by US Sprint Communications Company Limited Partnership (US Sprint), filed on April 3, 1990, and as amended on August 24, 1990 (CSG-90-108-P/L(A)) and December 26, 1990, requests authority pursuant to Sections 304, 308, 309, and 319 of the Communications Act of 1934, as amended, and Section 201(c)(7) of the Communications Satellite Act of 1962, as amended, to construct and operate international earth station facilities at Beeline, Florida for the provision of multipurpose services via INTELSAT Atlantic Ocean Region (AOR) satellites. The application was placed on public notice on September 19, 1990. No comments were received.

2. The proposed earth station will consist of an 18.3 meter C-band antenna which shall meet INTELSAT Revised Standard A technical parameters and communicate with appropriate INTELSAT AOR satellites in the 5925-6425 MHz transmitting frequency band and the 3700-4200 MHz receiving frequency band. The earth station will be located at Beeline, Florida, and US Sprint has completed the necessary frequency coordination in accordance with Section 25.203 of the Commission's Rules. However, international frequency coordination in accordance with Article 11 of the International Telecommunication Union (ITU) Radio Regulations has not been completed.

3. US Sprint's legal, financial and technical qualifications to construct and operate the proposed earth station facilities are established. US Sprint provides a wide range of international services and has been authorized to construct and operate other international earth station facilities.

4. In its Report and Order in the *Earth Station Ownership Proceeding*, CC Docket No. 82-540, the Commission established a more open and flexible earth station policy which allows entities other than the Earth Station Ownership Committee (ESOC) to own and operate international earth stations that access the INTELSAT system. The Order permitted the joint carrier owners of ESOC earth stations to decide among themselves the future of ESOC.[1] The Commission also concluded that when reviewing applications for these international earth stations, it would distinguish between earth stations dedicated to providing IBS and/or television services and multipurpose stations. IBS and/or television earth stations, the Commission found, do not have the same potential for revenue diversion and significant impact on system efficiency as multipurpose earth stations. Consequently, the Commission concluded that it would consider only the minimal legal, financial and technical qualifications of the applicant as required by Sections 308 and 319 of the Communications Act of 1934, as amended, when reviewing applications for IBS and/or television earth stations. Absent special problems, the Commission stated that it would treat these applications as routine and process them expeditiously.

5. With respect to multipurpose stations, the Commission stated that it would continue close scrutiny of applications for construction and operation of these facilities since they tend to raise more complex economic, technical and operational issues that may affect the variety, quality and price of service offered to users. In determining whether the grant of an application for a multipurpose earth station will serve the public interest, the Commission stated that it would conduct an analysis by balancing the possible benefits (*e.g.*, shorter terrestrial hauls, increased user options, lower charges to users, and increased customer base for INTELSAT services) against the possible detriments (*e.g.*, reduced technical efficiency, harmful revenue diversion, service deterioration and higher charges to users) which a particular application may present.[2] However, with the dissolution of ESOC earth station ownership arrangements and the transition to a competitive environment, the issue of harmful revenue diversion from existing ESOC earth stations is no longer a concern.

6. Upon consideration of the application, we find that authorization of the requested earth station facilities and multipurpose services would serve the public convenience and necessity.

7. Accordingly, IT IS ORDERED that application File No. CSG-90-108-P/L, as amended, IS GRANTED and US Sprint is authorized to construct and operate the proposed 18.3-meter C-band earth station at Beeline, Florida to provide multipurpose services. [3]

8. IT IS FURTHER ORDERED that before completion of equipment installation and facility activation, the applicant shall provide the Commission with a summary of equipment which was actually installed.

9. IT IS FURTHER ORDERED that no service shall be provided via the subject earth station prior to grant of authority for such service pursuant to Section 214 of the Communications Act.

10. IT IS FURTHER ORDERED that US Sprint's earth station authorization is subject to coordination with other administrations in accordance with Article 11 of the ITU Radio Regulations.

11. The Commission retains jurisdiction over this matter to reallocate circuits in the satellite system among the various international common carriers and other autho-

rized users as required to ensure nondiscriminatory use of, and equitable access to, the communications satellite system.

12. No material changes inconsistent with this or any other relevant Commission order shall be made before final execution of operating agreements between US Sprint and its correspondents, and copies of the agreements shall be filed with the Commission within 30 days of their execution.

13. This order is issued under Section 0.291 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of the date of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

FOOTNOTES

[1] *Earth Station Ownership*, 100 FCC 2d 250 (1984).

[2] *Id.* at 284.

[3] This authorization is not to be construed as permitting the provision of any services between earth stations located within the United States.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

AMERICAN TELECOMMUNICATIONS CORPORATION — File No. I-T-C-90-176

Application for authority to operate as an international resale carrier.

AMERICALL SYSTEMS OF LOUISVILLE — File No. I-T-C-90-177

Application for authority to operate as an international resale carrier.

ORDER, AUTHORIZATION AND CERTIFICATE

Adopted: December 28, 1990; Released: January 14, 1991

By the Chief, International Facilities Division:

1. The captioned applications, filed by American Telecommunications Corporation (ATC) and Americall Systems of Louisville (ASL), respectively, request authority pursuant to Section 214 of the Communications Act of 1934, as amended, to resell the switched message telephone services of existing common carriers to provide international switched voice service between the U.S. and various overseas points. The applications were placed on public notice on September 12, 1990. No comments were received.

2. The applicants are non-dominant domestic resale common carriers which now propose to resell international switched voice services in competition with other common carriers already providing resale of such services. In authorizations of new entrants over the past decade, the Commission has recognized that increased competition in international markets is beneficial.[1] Upon review of the subject applications we find that the market will support additional carriers and that the added competition will be in the public interest.[2]

3. For the foregoing reasons, IT IS HEREBY CERTIFIED that the present and future public convenience and necessity require the provision of international switched voice services to the general public on a resale basis by ATC and ASL.

4. Accordingly, IT IS ORDERED that applications File Nos. I-T-C-90-176 and I-T-C-90-177 ARE GRANTED; and

a. ATC is authorized to provide international switched voice services by the resale of the international switched voice services set forth in AT&T's Tariffs FCC Nos. 1 and 2 and MCI's Tariff FCC No. 1 between the U.S. and the points listed in those tariffs; and

b. ASL is authorized to provide international switched voice services by the resale of the international switched voice services set forth in AT&T's Tariffs FCC Nos. 1 and 2, MCI's Tariff FCC No. 1 and US Sprint's Tariffs FCC Nos. 1 and 2 between the U.S. and the points listed in those tariffs.

5. Copies of any operating agreements entered into between the applicants and their correspondents shall be filed with the Commission within 30 days of their execution.

6. IT IS FURTHER ORDERED that the applicants shall file tariffs pursuant to Section 203 of the Communications Act, 47 U.S.C. Section 203, and Part 61 of the Commission's Rules, 47 C.F.R. Part 61, for the services authorized in this Order.

7. IT IS FURTHER ORDERED that the applicants shall file the annual reports of overseas telecommunications traffic required by Section 43.61 of the Commission's Rules, 47 C.F.R. §43.61 (October 1, 1989).

8. This order is issued under Section 0.291 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of public notice of this order (*See* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

FOOTNOTES

[1] *See, e.g.*, the cases cited in *Teltec Saving Communications Co.*, File No. I-T-C-86-062, Mimeo No. 3548, n.2 (released April 4, 1986).

[2] *FCC v. RCA Communications, Inc.*, 346 U.S. 86 (1953); *Mackay Radio and Telegraph Co.*, 28 FCC 231 (1960).

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of

CPS OPERATOR SERVICES, INC.
File No. I-T-C-90-191

Application for authority to operate as an international resale carrier.

ORDER, AUTHORIZATION AND CERTIFICATE

Adopted: December 28, 1990; Released: January 14, 1991

By the Chief, International Facilities Division:

1. The above-captioned application filed on September 24, 1990 by CPS Operator Services, Inc. (CPS), requests authority pursuant to Section 214 of the Communications Act of 1934, as amended, to resell the switched message telephone services of existing common carriers to provide international switched voice service between the U.S. and various overseas points. The application was placed on public notice on October 4, 1990. No comments were received.

2. CPS is a domestic resale carrier. It now proposes to resell international switched voice services in competition with other common carriers already providing resale of such services. In authorizations of new entrants over the past decade, the Commission has recognized that increased competition in international markets is beneficial.[1] We find that the market will support additional carriers and that the added competition will be in the public interest.[2]

3. For the foregoing reasons, IT IS CERTIFIED that the present and future public convenience and necessity require the provision of international switched voice services to the general public by CPS.

4. Accordingly, IT IS ORDERED that application File No. I-T-C-90-191 IS GRANTED and CPS is authorized to provide international switched voice services by the resale of the international switched voice services set forth in AT&T's Tariff F.C.C. Nos. 1 and 2, MCI's Tariff F.C.C. No. 1 and US Sprint's Tariffs F.C.C. Nos. 1 and 2 between the U.S. and the points listed in those tariffs.

5. Copies of any operating agreements entered into between the applicant and its correspondents shall be filed with the Commission within 30 days of their execution.

6. IT IS FURTHER ORDERED that the applicant shall file a tariff pursuant to Section 203 of the Communications Act, 47 U.S.C. Section 203, and Part 61 of the Commission's Rules. 47 C.F.R. Part 61, for the services authorized in this Order.

7. IT IS FURTHER ORDERED that the applicant shall file the annual reports of overseas telecommunications traffic required by Section 43.61 of the Commission's Rules. 47 C.F.R. §43.61 (October 1, 1989).

8. This order is issued under Section 0.291 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

FOOTNOTES

[1] *See, e.g.*, the cases cited in *Teltec Saving Communications Co.*, File No. I-T-C-86-062, Mimeo No. 3548, (released April 4, 1986) at n.2.

[2] *FCC v. RCA Communications, Inc.*, 346 U.S. 86 (1953); *Mackay Radio and Telegraph Co.*, 28 FCC 231 (1960).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

THE MICRONESIAN TELECOMMUNICATIONS CORPORATION

File No. I-T-C-91-010

Application for authority to
acquire, install and operate
a Digital Circuit Multiplication
System and a Stratum 1 Clock.

ORDER AND AUTHORIZATION

Adopted: December 31, 1990; Released: January 14, 1991

By the Chief, International Facilities Division:

1. The captioned application, filed by the Micronesian Telecommunications Corporation (MTC), requests authority pursuant to Section 214 of the Communications Act of 1934, as amended, to acquire, install and operate one Digital Circuit Multiplication System (DCMS) and one Stratum 1 Clock to supplement its existing authorized services between the Commonwealth of the Northern and Mariana Islands and Japan, Hawaii and the continental U.S. The application was placed on public notice on October 18, 1990. No comments were received. Upon consideration of the application, we find that authorization of the requested facilities and services is required by the public convenience and necessity.

2. Accordingly, IT IS ORDERED that application File No. I-T-C-91-010 IS GRANTED, and MTC is authorized to:

a. acquire, install and operate one DCMS and Stratum 1 Clock; and

b. use said facilities to provide MTC's regularly authorized services between the Commonwealth of the Northern Mariana Islands, on the one hand, and Japan, Hawaii and the continental U.S., on the other hand, and beyond.

3. This order is issued under Section 0.291 of the Commission's rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's rules may be filed within 30 days of the date of public notice of this order (*See* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

FOX
COMMUNICATIONS
CORPORATION

File No. I-T-C-91-023

Application for authority to operate
as an international resale carrier.

ORDER, AUTHORIZATION AND CERTIFICATE

Adopted: December 28, 1990; Released: January 14, 1991

By the Chief, International Facilities Division:

1. The above-captioned application requests authority pursuant to Section 214 of the Communications Act of 1934, as amended, to resell the switched message telephone services of existing common carriers to provide international switched voice service between the U.S. and various overseas points. The application was placed on public notice on November 15, 1990. No comments were received.

2. Fox is a communications carrier providing domestic resale service. It now proposes to resell international switched voice services in competition with other common carriers already providing resale of such services. In authorizations of new entrants over the past decade, the Commission has recognized that increased competition in international markets is beneficial.[1] We find that the market will support additional carriers and that the added competition will be in the public interest.[2]

3. For the foregoing reasons, IT IS CERTIFIED that the present and future public convenience and necessity require the provision of international switched voice services to the general public by Fox.

4. Accordingly, IT IS ORDERED that application File No. I-T-C-91-023 IS GRANTED, and Fox is authorized to provide international switched voice services by the resale of the international switched voice services set forth in AT&T's Tariffs F.C.C. Nos. 1 and 2, and US Sprint's Tariffs F.C.C. Nos. 1 and 2 between the U.S. and the points listed in those tariffs.

5. Copies of any operating agreements entered into between the applicant and its correspondents shall be filed with the Commission within 30 days of their execution.

6. IT IS FURTHER ORDERED that the applicant shall file a tariff pursuant to Section 203 of the Communications Act, 47 U.S.C. Section 203, and Part 61 of the Commission's Rules, 47 C.F.R. Part 61, for the services authorized in this Order.

7. IT IS FURTHER ORDERED that the applicant shall file the annual reports of overseas telecommunications traffic required by Section 43.61 of the Commission's Rules, 47 C.F.R. §43.61 (October 1, 1989).

8. This order is issued under Section 0.291 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

FOOTNOTES

[1] *See, e.g.*, the cases cited in *Teltec Saving Communications Co.*, File No. I-T-C-86-062, Mimeo No. 3548, (released April 4, 1986) at n.2.

[2] *FCC v. RCA Communications, Inc.*, 346 U.S. 86 (1953); *Mackay Radio and Telegraph Co.*, 28 FCC 231 (1960).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

GENCOM INC. File No. I-T-D-90-012

Application for authority
to close Maritime Mobile
Public Coast III-B Station
KPB685 at Palomar Mountain,
California.

ORDER AND AUTHORIZATION

Adopted: December 31, 1990; Released: January 14, 1991

By the Chief, International Facilities Division:

1. The captioned application, filed on August 16, 1990 by Gencom Inc. (Gencom), requests authority pursuant to Section 214 of the Communications Act of 1934, as amended, to discontinue service from Maritime Mobile Public Coast III-B Station KPB685 at Palomar Mountain, California. The application was placed on public notice on September 5, 1990. No comments were received.

2. Station KPB685 is located 3.8 miles south of the Palomar Mountain Observatory in San Diego County and was licensed to serve commercial and non-commercial vessels out of Oceanside, California. At the time the station was licensed, Gencom states that the Oceanside port serviced not less than 10 commercial and 50 non-commercial radio-equipped vessels. The facility is designed to serve the coastal area extending seaward from the facility about 50 miles.

3. In support of its application for closure of Station KPB685, Gencom states that it has been operating the facility for more than five years and that during the past twelve months the facility has carried no traffic. Although Gencom states that it has no detailed information regarding the availability of other facilities to provide services similar to those contemplated when it constructed the facility, it believes that much of the marine traffic in this area has migrated to cellular radio. Gencom notes that both PacTel Cellular and U.S. West New Vector offer cellular telephone service in the area. According to Gencom, it has checked with the U.S. Coast Guard which indicated that there are two facilities in San Diego that provide distress coverage in the area served by the Gencom facility; one operated by the Coast Guard Group and the other operated by the Coast Guard Station. In view of these circumstances, Gencom requests authority to discontinue operation of Station KPB685.

4. The basic statutory test to be applied by the Commission in considering applications for discontinuance of common carrier service to a community is found in Section 214(a) of the Act. Under this Section, the Commission may permit discontinuance of service upon a finding that "neither the present nor future public convenience and necessity will be adversely affected by the proposed action." Application of this standard presents the Commission with the task of balancing the financial burden that would be imposed on the carrier by continued operation of its facilities with the needs and interests of the user community.[1]

5. Upon consideration of the application, we conclude that Gencom has met the basic statutory test for closing Station KPB685. Gencom has demonstrated that it is not carrying traffic and other facilities are available to serve its coverage area. In addition, distress service is provided by two U.S. Coast Guard locations. In view of these circumstances, IT IS HEREBY CERTIFIED that neither the present nor future public convenience and necessity will be adversely affected by the discontinuance of service via the instant station.

6. Accordingly, IT IS ORDERED that application File No. I-T-D-90-012 IS GRANTED, and Gencom is authorized to discontinue service from Maritime Mobile Public Coast III-B Station KPB685 at Palomar Mountain, California.

7. This order is issued under Section 0.291 of the Commission's rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the rules may be filed within 30 days of the date of public notice of this order (*See* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

FOOTNOTE

[1] *Public Coast Radiotelegraph Stations*, 67 FCC 2d 791 at 795 (1978).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-312

In the Matter of

Amendment of Section 73.202(b),	RM-6127
Table of Allotments,	RM-6135
FM Broadcast Stations.	
(Pearl and Magee, Mississippi)	

MEMORANDUM OPINION AND ORDER

Adopted: December 28, 1990; Released: January 14, 1991

By the Chief, Policy and Rules Division:

1. The Commission has before it a Petition for Reconsideration filed by Colon Johnston directed to the *Report and Order* in MM Docket No. 88-312 (*R&O*). [1] The *R&O* allotted Channel 230A to Magee, Mississippi. Airwaves Company ("Airwaves") filed an Opposition to the petition, and Johnston submitted a reply to that opposition.

2. In his petition, Johnston challenges our dismissal of his proposal to allot Channel 230A to Pearl, Mississippi. This proposal was one of two mutually exclusive proposals, the second of which, submitted by Airwaves, proposed the allotment of the same channel to Magee, Mississippi. An allotment of Channel 230A to Pearl would have provided that community with its first local aural service. However, as specified in the *Notice of Proposed Rule Making* (*NPRM*) [2] in this case, before a channel can be allotted, the original proponent must submit a statement of continuing interest affirming that it will apply for the station if its proposal is granted. In the *Report and Order*, the staff allotted the channel to Magee after concluding that Johnston had not filed the requisite expression of continuing interest and declaration of intent to apply for the channel at Pearl.

BACKGROUND

3. Johnston and Airwaves submitted proposals to have Channel 230A allotted to Pearl and Magee, respectively, and the Commission issued a *NPRM* setting forth both proposals and requesting comments. On the last day of the comment period, Johnston and Jerome Huey, licensee of Station WIZK, Channel 228A at Bay Springs, Mississippi, submitted what they termed a "counterproposal" with a cover letter attached thereto. In the cover letter, Johnston declared that he would apply for the Pearl channel, if allotted. However, even though the rules require that an original and four copies of a pleading be submitted [3] along with a certificate stipulating that service has been made to the other parties in the proceeding, it appears that only one copy of the counterproposal and cover letter were submitted. It also appears that only one copy of the certificate of service was submitted four days later.

4. In the counterproposal, Johnston and Huey proposed that Channel 230A be allotted to Pearl coupled with a scheme of allotments which would replace Channel 228A at Bay Springs with Channel 232C2. This latter substitution would free Channel 227A for allotment to Magee in lieu of Channel 230A. Johnston and Huey proposed, in the alternative, that Channel 227A be allotted to Mendenhall, Mississippi, instead of Magee. They cited Magee's existing local service and Mendenhall's lack of local service as reasons for their choice of Mendenhall over Magee for the allotment of Channel 227A. The counterproposal did not contain a statement of interest in filing an application for the Mendenhall allotment from either Johnston or Huey. Airwaves stated in its reply that the proposed scheme of allotments was acceptable to it in most respects. However, it objected to having Channel 227A allotted to Mendenhall since no party had expressed an interest in applying for a channel at that location.

5. The staff dismissed Johnston and Huey's counterproposal on several grounds. First, allotments for new communities were proposed and "neither expressions of interest nor indications that applications would be filed should channels be allotted to these communities were provided." Second, the staff concluded that Johnston and Huey had not submitted a certificate of service. For these reasons, the staff found the counterproposal to be unacceptable. In addition, Johnston's original petition to have Channel 230A allotted to Pearl was dismissed because it appeared that he had not submitted the required statement of interest in operating a station on that channel.

PETITION FOR RECONSIDERATION

6. The gravamen of Johnston's petition for reconsideration is his contention that he, in fact, had submitted a statement of continuing interest in the allotment at Pearl and thus, his proposal was erroneously denied on procedural grounds before the merits of the Pearl and Magee proposals could be considered. He includes as Attachment "A" a copy of the aforementioned cover letter and counterproposal. Johnston further contends that, even though the counterproposal was rejected, this fact alone is not sufficient to negate the validity of his statement of interest in the original proposal to allot a channel to Pearl. He asserts that, had the Pearl and Magee proposals been considered on their merits, a comparative analysis would have resulted in an award of Channel 230A to Pearl, thus providing that community with its first local radio service.

7. In a limited opposition to the petition for reconsideration, Airwaves addresses the proposal set forth in Johnston's counterproposal. Airwaves states that it opposes the allotment of 227A to Mendenhall because no expression of interest was filed for that allotment. It states that it would accept an award of Channel 227A to Magee, in lieu of Channel 230A, but it would prefer to have Channel 230A allotted to Magee since this was the channel originally sought and since it has already been allotted. Moreover, Airwaves prefers Channel 230A because site restrictions may have to be applied were another channel allotted to Magee and because it has already made considerable expenditures in preparing to apply for a license to operate on Channel 230A. Airwaves finally contends that, if Channel 230A is ultimately awarded to Pearl, Johnston should be required to reimburse Airwaves for monetary losses incurred in making these preparations.

8. In his reply, Johnston counters that Airwaves proceeded with its preparations at its own risk and that no precedent exists for the proposition that a party who ultimately prevails in a contested allotment case is liable to the losing party for its costs. Johnston also points out that Airwaves does not challenge his assertion that his expression of continuing interest in the allotment at Pearl was timely filed, or his contention that Pearl would receive preference over Magee in a comparison of the merits of each proposal.

DISCUSSION

9. We conclude that Johnston had submitted a statement of continuing interest in the cover letter to his counterproposal and that a certificate of service was submitted four days later. However, it appears that an insufficient number of copies of each of these documents was submitted. These copies were placed in the appropriate docket files, but no copies were then available to distribute to decision-making personnel. The rules specifically require that petitioners supply the Commission with an original and four copies of each filing so that this type of mishap might be avoided. Clearly then, Johnston has only himself to blame for his present predicament. Given the enormous number of documents filed with the Commission each day, were the staff required to makes copies for subsequent distribution, Commission efficiency would be greatly impaired. Had Johnston followed proper procedures, the Allocations Branch staff would have had all required documents at the time the decision to allot Channel 230A was made. Even so, because we were alerted to the problem before an application was granted for the allotment, and because it now appears that Johnston did submit a statement of continuing interest, we are prepared, in this case, to excuse the lesser infraction of the rules caused by Johnston's submission of insufficient numbers of copies of his counterproposal.

10. Given that Johnston's statement of interest in the allotment of Channel 230A to Pearl was included in the cover letter to the counterproposal, we conclude that the earlier allotment of Channel 230A to Magee, which was based on the belief that this statement had not been submitted, now must be rescinded.[4]

11. Having rescinded our previous action, the substantive issues regarding the allotment of Channel 230A, for which comments were sought in the *NPRM*, may now be addressed. Johnston argued that, based on Commission allotment policy, the channel should be awarded to Pearl because that community has no existing local radio service, and Magee does have one local station. We find his argument to be correct in that it clearly reflects our allotment priorities. These priorities, enunciated in *Revision of FM Assignment Policies and Procedures*, 90 FCC 2d 88 (1982), are as follows:

(1) First full-time aural service;

(2) Second full-time aural service;

(3) First local service;

(4) Other public interest matters.[5]

Where the case arises, as it does here, that one proposal would provide a first local service to one community and another proposal would provide a second local service to another community, the Commission's policy is to allot the disputed channel to the community which would obtain its first local service.

12. In view of the above, we believe that the public interest would be better served by allotting Channel 230A to Pearl, since this would provide that community with its first local service. As stated in the *NPRM*, Channel 230A can be allotted to Pearl in compliance with the Commission's minimum distance separation requirements with a site restriction of 7.1 kilometers (4.4 miles) northeast of the community.[6] Such a restriction will prevent a conflict with Station WHJT, Channel 228A, Clinton, Mississippi.

13. Finally, in response to Airwaves' claim that it should be reimbursed by Johnston for monies spent preparing to apply for a license to operate on Channel 230A at Magee, we note that there is no Commission policy of requiring reimbursement when mere applicants for a channel assignment are involved. Only licensees and permittees are afforded such protected rights.[7] Therefore, Johnston is not responsible for reimbursing Airwaves for its expenses.[8]

14. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **February 28, 1991,** the FM Table of Allotments, Section 73.202(b) of the Commission's rules, IS AMENDED, with respect to the communities listed below, to read as follows:

City	Channel No.
Pearl, MS	230A
Magee, MS	298C

15. IT IS FURTHER ORDERED, That the window period for filing applications will open on **March 1, 1991,** and close on **April 1, 1991.**

16. IT IS FURTHER ORDERED, That the Secretary of the Commission SHALL SEND by certified mail, return receipt requested, a copy of this *Memorandum Opinion and Order* to the following:

Airwaves Company
P.O. Box 649
Magee, MS 39111

Jeanette Mathis
615 North Main
Magee, MS 39111

17. IT IS FURTHER ORDERED, That this proceeding is terminated.

18. For further information concerning the above, contact Fawn E. Wilderson, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Douglas W. Webbink
Chief, Policy and Rules Division
Mass Media Bureau

FOOTNOTES

[1] 4 FCC Rcd 1764 (1988).

[2] 3 FCC Rcd 4121 (1988).

[3] *See* 47 C.F.R. 1.420(e).

[4] In addition, it appears that one copy of the certificate of service which should have been submitted with the counterproposal was, indeed, filed. However, this fact only partially cures the otherwise defective counterproposal. Other reasons cited in the *R&O* for dismissing the counterproposal include the fact that new communities were introduced therein for which neither expressions of interest nor indications that applications would be filed should channels be allotted to these communities were provided. These are not minor infractions of the rules. Thus, we affirm the previous dismissal of Johnston's counterproposal.

[5] *See Dayton, Kettering, Moraine, Oakwood, and West Carrollton, Ohio*, 59 RR 2d 1676, 1677 (1986).

[6] The coordinates for Channel 230A at Pearl, Mississippi, are 32-15-07 and 90-03-41.

[7] *See Circleville, Ohio*, 8 FCC 2d 159 (1967).

[8] However, deletion of Channel 230A at Magee, Mississippi, may entitle the two applicants for that channel -- Airwaves (BPH-890511MI) and Jeanette Mathis (BPH-890511MF) -- to a refund of filing fees pursuant to Section 1.1111(a)(4) of the Commission's Rules. Applicants seeking refunds may do so by letter directed to the Managing Director. A copy of this *Memorandum Opinion and Order* will be sent to each applicant.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-130

In the Matter of

Amendment of Section 73.202(b), RM-7160
Table of Allotments,
FM Broadcast Stations.
(Rockledge, Florida)

MEMORANDUM OPINION AND ORDER
(Proceeding Terminated)

Adopted: December 28, 1990; Released: January 14, 1991

By the Chief, Policy and Rules Division:

1. The Commission has before it the Petition for Reconsideration filed by D.V.R. Broadcasting ("petitioner") of the *Report and Order*, 5 FCC Rcd 5985 (1990), which dismissed its request for the substitution of Channel 274C2 for Channel 274A at Rockledge, Florida, and the modification of its construction permit for Station WHKR(FM) to specify operation on the higher class channel, based on a failure to show a continuing interest in the allotment.[1] Petitioner states that it filed comments restating its intention to apply for Channel 274C2, if allotted to Rockledge, and has furnished a copy of its comments showing a receipt date of May 11, 1990, by the Commission. Petitioner has, therefore, submitted proof that supporting comments were timely filed.

2. We believe the public interest would be served by substituting Channel 274C2 for Channel 274A at Rockledge since it would provide the community with an expanded coverage area FM channel. Channel 274C2 can be substituted for Channel 274A at Rockledge in compliance with the Commission's minimum distance separation requirements, with a site restriction of 24.2 kilometers (15.0 miles) north of the city.[2] In accordance with Section 1.420(g) of the Commission's Rules, we will modify the construction permit of Station WHKR(FM) to specify operation on Channel 274C2.

3. Accordingly, pursuant to the authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **February 28, 1991,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, as follows:

City	Channel No.
Rockledge, Florida	274C2

4. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the permittee of Station WHKR(FM), Rockledge, Florida, IS MODIFIED, to specify operation on Channel 274C2 in lieu of Channel 274A, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the permittee shall submit to the Commission a minor change application for a construction permit (Form 301), specifying the new facility;

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620; and

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

5. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

6. For further information concerning this proceeding, contact Nancy J. Walls, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Douglas W. Webbink
Chief, Policy and Rules Division
Mass Media Bureau

FOOTNOTES

[1] Public Notice of the Petition for Reconsideration was given on November 26, 1990, Report No. 1830.

[2] The coordinates for Rockledge are North Latitude 28-33-30 and West Longitude 80-48-00. Because the petition for rule making in this proceeding was filed prior to October 2, 1989, petitioner may avail itself of the provisions of Section 73.213(c) of the Commission's Rules. *See* 47 C.F.R. § 73.213(c).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-74

In the Matter of

Amendment of Section 73.202(b), RM-6440
Table of Allotments, RM-6772
FM Broadcast Stations.
(Bourbon and Columbia,[1] Missouri)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: December 31, 1990; Released: January 14, 1991

By the Acting Chief, Allocations Branch:

1. At the request of Lake Broadcasting, Inc. ("Lake"), the Commission has before it for consideration the *Notice of Proposed Rule Making*, 4 FCC Rcd 2527 (1989), proposing the allotment of FM Channel 244A to Bourbon, Missouri, as that community's first local service. Petitioner filed comments restating its interest in a channel at Bourbon. Ronald L. Peterson (Peterson) filed a counterproposal.[2] Petitioner and Peterson filed reply comments. [3]

2. Peterson counterproposed the substitution of FM Channel 244C2 for Channel 244A at Columbia, Missouri, and modification of the license for Station KCMQ(FM) to specify the higher class channel. According to Peterson, adoption of his counterproposal will enable Station KCMQ(FM) to compete more effectively against other Columbia stations and thus be in a financially stronger position to serve the public interest.

3. Lake, in reply comments, opposes Peterson's counterproposal. Lake notes that it is established Commission policy that a proposal, like Peterson's, to upgrade a channel to a higher class does not provide as great a public benefit as that of a new primary service. Lake further notes that Peterson has not provided a showing of need for the proposed increase in existing service or any data concerning what new areas are to be served and the extent to which these areas are currently unserved or underserved. Lake argues that Peterson has only provided unsupported generalities that an upgrade would enable Station KCMQ(FM) to serve a much wider area and greater population and enable it to compete more effectively against other Columbia stations. Lake continues to support Channel 244A at Bourbon and urges the Commission to dismiss Peterson's counterproposal.

4. Peterson, in his reply comments, proposes to eliminate the conflict between Bourbon and Columbia by substituting Channel 244C3 rather than 244C2 for Channel 244A at Columbia. Peterson indicates that he will promptly file an application for Channel 244C3 at Columbia. According to Peterson, Channel 244C3 can be allotted to Columbia and Channel 244A to Bourbon if the Bourbon allotment is made with a site restriction southwest of the community. Peterson requests adoption of his proposal as it would provide for the most effective utilization of Channel 244.

5. Lake concludes that its proposal to provide first local service to Bourbon without a site restriction should be adopted. Lake argues that the proposed site restriction on the Bourbon channel should be rejected as incompatible with the Commission's engineering, cross-ownership and application processing rules. Lake further argues that with the proposed site restriction, property is not available for installation of a transmitter, as all applicants for Channel 244A at Bourbon would need to locate the transmitter within the boundaries of the Onondaga Cave State Park (Vilander Bluff Unit). Lake adds that at the restricted site it could not file an acceptable application under Sections 73.315(a) and 73.3555(a)(2) of the rules, the city grade coverage and duopoly rules. Lake notes that it is the sole applicant for a station at Cuba, Missouri, a station close enough to Bourbon that the Commission's duopoly rule is implicated. The site restriction requires that applicants locate their transmitter sites closer to Cuba than would otherwise be necessary.

6. We believe the public interest would be served by allotting Channel 244A to Bourbon, Missouri, as that community's first local service. We also find that the public interest would be served by the substitution of Channel 244C3 for Channel 244A at Columbia, Missouri, and modification of the license for Station KCMQ(FM). Channel 244A can be allotted to Bourbon, Missouri, in compliance with the minimum distance separation requirements with a site restriction 8.4 kilometers (5.2 miles) southeast of the community.[4] The site restriction will avoid a conflict with Channel 244C3 at Columbia, Missouri. Channel 244A at Bourbon is currently short spaced to Station KNSX, Channel 244A, Steelville, Missouri. However, Station KNSX has been upgraded from Channel 244A to Channel 227C2, effective July 11, 1988. *See* 3 FCC Rcd 3073 (1988). Issuance of a license for Channel 244A at Bourbon may be withheld until the actual licensing of Station KNSX at Steelville on Channel 227C2. Our engineering analysis indicates sites are available for Channel 244A at Bourbon outside the boundaries of the state park and at locations which would allow compliance with Section 73.315(a) of the Commission's Rules. Channel 244C3 can be allotted to Columbia, Missouri, in compliance with the minimum distance separation requirements at Peterson's proposed site.[5] In accordance with Section 1.420(g) of the Commission's Rules, we shall modify the license of Station KCMQ(FM), Channel 244A, to specify operation on Channel 244C3.[6]

7. Although the *Notice* did not indicate a site restriction on the Bourbon allotment, to accommodate both Channel 244C3 at Columbia and Channel 244A at Bourbon, it is necessary to site restrict the Bourbon channel. The site restriction would allow efficient use of the spectrum, in that it would provide for both expanded service at Columbia and new service at Bourbon. We note Lake's concerns that it will not be able to apply for a maximally efficient facility at Bourbon because Lake is also an applicant for a station at Cuba, and, therefore, might be constrained by the Commission's duopoly rules. Although we share Lake's concern about compliance with our multiple ownership rules, and under some circumstances, might choose to disregard Lake's expression of interest due to the fact that Lake might not be able to effectuate its proposal in compliance with our rules, we believe there are sufficient

available means for Lake to comply with our rules and that disregarding Lake's expression of interest would be unwarranted. We decline to elevate Lake's site preference, which represents Lake's private interest and is only one of several potential means of avoiding potential multiple ownership considerations, into a factor altering our judgment as to the public's interest in the best overall use of the spectrum. We have consistently declined to consider one party's preference for a specific site as anything more than a private preference. *See Rockport, TX*, 4 FCC Rcd 8075 (1989). This approach is especially appropriate in this case, since the multiple ownership disability to which Lake refers would likely not apply to any applicant for the channel at Bourbon other than Lake.

8. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **February 28, 1991,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, to read as follows:

Community	Channel No.
Bourbon, Missouri	244A
Columbia, Missouri	230A, 244C3, 252C2, 268C2

9. IT IS FURTHER ORDERED, pursuant to the authority contained in Section 316 of the Communications Act of 1934, as amended, that the license of Station KCMQ(FM), Columbia, Missouri, IS MODIFIED to specify operation on Channel 244C3, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall file with the Commission a minor change application for construction permit (Form 301), specifying the new facility.

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620.

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

10. The window period for filing applications for Channel 244A at Bourbon will open on **March 1, 1991** and close on **April 1, 1991.**

11. IT IS FURTHER ORDERED, That the Secretary of the Commission SHALL SEND BY CERTIFIED MAIL, Return Receipt Requested, a copy of this Order to the following:

Twenty-one Sound Communications, Inc.
8422 N. Lindburgh
Steelville, Missouri 63031
(Licensee of Station KNSX-FM, Channel 244A)

12. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

13. For further information concerning this proceeding contact Kathleen Scheuerle, Mass Media Bureau, (202 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Andrew J. Rhodes
Acting Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

FOOTNOTES

[1] The community of Columbia has been added to the caption.

[2] Public Notice of the counterproposal was given on June 2 1989, Report No. 1781.

[3] The following comments were unauthorized or late filed: 1) Motion for Leave to File Responsive Pleading, and Response to Counterproposal and Reply Comments of Lake Broadcasting Inc., filed by Donald W. Boyles, successor to Ronald Peterson; 2) Opposition to Motion for Leave to File Responsive Pleading and Motion to Strike and Opposition to Unauthorized Responsive Pleading of Boyles filed by Lake Broadcasting, Inc.; 3) Motion for Leave to File Amended Counterproposal filed by Donald W Boyles; and 4) Opposition to Amended Counterproposal of Boyles filed by Lake Broadcasting. In accordance with Section 1.415(d) of the Commission's Rules, we shall not consider these pleadings.

[4] The coordinates for Channel 244A at Bourbon are 38-06-10 and 91-10-22.

[5] The coordinates for Channel 244C3 at Columbia are 38-58-0 and 92-18-39.

[6] Because these allotments are made as a result of petitions filed prior to October 2, 1989, the licensee of Channel 244A at Columbia and applicants for Channel 244A at Bourbon may avail themselves of the provisions of Section 73.213(c)(1) of the Commission's rules. *See* 47 CFR § 73.213(c).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-409

Amendment of Section 73.202(b), RM-7344
Table of Allotments,
FM Broadcast Stations.
(Otterville, Missouri)

ERRATUM

Released: January 14, 1991

By the Acting Chief, Allocations Branch:

1. On December 18, 1990, the Commission released the *Report and Order*, DA 90-1806, in the above captioned proceeding. In the *Order*, at paragraph 3, the community is Otterville, Kansas. The state is incorrect. Paragraph 3 is hereby corrected to show Otterville, Missouri.

FEDERAL COMMUNICATIONS COMMISSION

Andrew J. Rhodes
Acting Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-559

In re Applications of

EDMISSON/EUBANK COMMUNICATIONS, INCORPORATED File No. BPH-890117MM
(hereafter "Edmisson")

T & M BROADCASTING, INC. File No. BPH-890119MF
(hereafter "T & M")

BAYARD H. WALTERS File No. BPH-890119MG
(hereafter "Walters")

For Construction Permit
for a New FM Station on
Channel 229A in Dickson, Tennessee

HEARING DESIGNATION ORDER

Adopted: October 26, 1990 Released: January 15, 1991

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.

2. *Financial.* The material submitted by the applicant below does not demonstrate its financial qualifications. Accordingly, an issue will be specified concerning the following deficiency.

APPLICANT	DEFICIENCY
T & M	Applicant certifies that it is not financially qualified, but states that it believes it is financially qualified and is in the process of assembling appropriate documentation to support certification of its financial qualifications. No amendment was filed.

3. The engineering data submitted by Edmisson, T & M and Walters do not clearly demonstrate that it provides a 3.16 mV/m signal to the entire proposed city of license, as required by Section 73.315(a) of the Commission's Rules. The FM Branch does not require waiver of this requirement unless the proposed 3.16 mV/m coverage falls below 80% of the area of the principal community. *See John R. Hughes*, 50 Fed. Reg. 5679 (February 11, 1985). *See* also *Southwest Communications, Inc.*, released July 16, 1986 (Letter from the Chief, FM Branch, reference 8920-HVT). Engineering study reveals that the 3.16 mV/m contour of all applicants is in substantial compliance with this requirement in that the 3.16 mV/m contours would cover approximately 80% of the community of license. Accordingly, no waiver is required.

4. Edmisson is the licensee of WDKN(AM), Dickson, Tennessee. Edmisson also provides management for Station WQZQ(FM), Dickson Tennessee, licensed to American Communications, Incorporated. Programming offered by WDKN(AM) is simulcast over the facilities of WQZQ(FM). Edmisson's connection with WDKN(AM) and WQZQ(FM) could violate the Commission's cross-interest policy. However, Edmisson has indicated its intent to terminate its relationship with Stations WDKN(AM) and WQZQ(FM) in the event of grant of its application. Accordingly, in the event of grant of Edmisson's application, it will be required to sever connections with stations WDKN(AM) and WQZQ(FM), Dickson, Tennessee prior to the commencement of program test authority.

5. Walters petitioned for leave to amend his application on July 27, 1989, September 20, 1989, and May 10, 1990. The accompanying amendments were filed after June 5, 1989, the last date for filing minor amendments as of right. Under Section 1.65 of the Commission's Rules, the amendments are accepted for filing. However, an applicant may not improve its comparative position after the time for filing amendments as of right has passed. Therefore, any comparative advantage resulting from the amendments will be disallowed.

6. Attempts to obtain FAA clearance through the Commission's Antenna Survey Branch and T & M have been unsuccessful. Accordingly, since no determination has been received as to whether the antenna proposed by T & M would constitute a hazard to air navigation, an issue with respect thereto will be included and the FAA made a party to the proceeding.

7. Data submitted by the applicants indicate there would be significant difference in the size of the areas and populations which would receive service from the proposals. Consequently, the areas and populations which would receive FM service of 1 mV/m or greater intensity, together with the availability of other primary aural services in such areas, will be considered under the standard comparative issue for the purpose of determining whether a comparative preference should accrue to any of the applicants.

8. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

9. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

> 1. To determine whether there is a reasonable possibility that the tower height and location proposed by the T & M would constitute a hazard to air navigation.
>
> 2. To determine with respect to T & M, whether the applicant is financially qualified.

3. To determine which of the proposals would, on a comparative basis, best serve the public interest.

4. To determine, in light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

10. IT IS FURTHER ORDERED, That, in the event of grant of Edmisson's application, Edmisson will be ordered to divest himself of all interests in and sever all connections with Stations WDKN(AM) and WQZQ(FM), Dickson, Tennessee prior to the commencement of program test authority.

11. IT IS FURTHER ORDERED, That the petitions for leave to amend filed by Walters IS GRANTED, and the corresponding amendments ARE ACCEPTED to the extent indicated herein.

12. IT IS FURTHER ORDERED, That the Federal Aviation Administration IS MADE A PARTY to this proceeding with respect to the air hazard issue only.

13. IT IS FURTHER ORDERED, That a copy of each document filed in this proceeding subsequent to the date of adoption of this Order shall be served on the counsel of record in the Hearing Branch appearing on behalf of the Chief, Mass Media Bureau. Parties may inquire as to the identity of the counsel of record by calling the Hearing Branch at (202) 632-6402. Such service shall be addressed to the named counsel of record, Hearing Branch, Enforcement Division, Mass Media Bureau, Federal Communications Commission, 2025 M Street, N.W., Suite 7212, Washington, D.C. 20554. Additionally, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall also be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Federal Communications Commission, Room 350, 1919 M Street, N.W., Washington, D.C. 20554.

14. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

15. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-584

In re Applications of

Angela M. Segal (hereafter: Segal)	File No. BPH-881026MA
Alfred T. Moore, Jr. and Elbert Wiggins Giles d/b/a NWLA Broadcasting Co. (hereafter: NWLA)	File No. BPH-881026MB
Marcus D. Jones d/b/a Fresh Radio (hereafter: Fresh)	File No. BPH-881026MG
M.S.C. Communications, Inc. (hereafter: MSC)	File No. BPH-881026MH
Homer Broadcasting (hereafter: Homer)	File No. BPH-881026MJ

For Construction Permit
for a New FM Station on Channel
294C2 in Homer, Louisiana

HEARING DESIGNATION ORDER

Adopted: November 1, 1990; Released: January 15, 1991

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.

2. *Homer.* Homer states that it plans to locate its transmitting antenna on an existing tower approximately 12 miles North-Northwest of Homer, Louisiana, a structure previously cleared (the applicant indicates) by Federal Aviation Administration study 85-ASW-0062-OE. Our Antenna Survey Branch records confirm a structure at this location. However, the 177 meters overall height of the tower above mean sea level listed in Homer's application differs from the 204.2 meters specified in our records. Further, the longitude plotted on Homer's transmitter site map (93 degrees-13 minutes-32.8 seconds) differs from that listed in both Section V-B, Item 2 of its application and in our Antenna Survey Branch records (93-degrees-13 minutes- *24* seconds). Since Homer clearly proposes to locate on an existing tower of a Commission licensee, and because specific reference is made to this tower within Homer's application, the staff could confidently verify the tower's existence in the Commission's files for this facility. Therefore, the tower height and coordinate discrepancies do not render Homer's application unacceptable for filing. However, it will be required to submit the appropriate amendment to the presiding Administrative Law Judge within 30 days of the release of this Order.

3. Section II, Item 4 (old form) of FCC Form 301 (October 1986) requires that an applicant specify its address (number, street, city, state) as well as the home address of each of its principals. Homer has not completed Item 4 correctly. Homer's application gives a post office box number as the residence address for Murry Powell. Accordingly, Homer must submit an amendment which gives all the information required by Section II, Item 4 to the presiding Administrative Law Judge after this Order is released.

4. *MSC.* MSC states that it proposes to place its transmitting antenna on a new tower to be constructed approximately 4.25 kilometers Northeast of Minden, Louisiana. However, there is a discrepancy between the 131 meters tower height above ground level listed in Section V-B, Item 7(a)(2) of MSC's application and the 152 meter height displayed in its antenna sketch (Exhibit VB-2). While this discrepancy does not affect the acceptability of MSC's application, the applicant will be required to submit the appropriate amendment to the presiding Administrative Law Judge within 30 days of the release of this Order.

5. *Other Matters.* Attempts to obtain FAA clearance for Fresh and MSC through the Commission's Antenna Survey Branch and the applicants have been unsuccessful. Accordingly, since no determination has been received as to whether the antennas proposed by Fresh and MSC would constitute a hazard to air navigation, an issue with respect thereto will be included and the FAA made a party to the proceeding.

6. Data submitted by the applicants indicate there would be significant difference in the size of the areas and populations which would receive service from the proposals. Consequently, the areas and populations which would receive FM service of 1 mV/m or greater intensity, together with the availability of other primary aural services in such areas, will be considered under the standard comparative issue for the purpose of determining whether a comparative preference should accrue to any of the applicants.

7. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

8. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

> 1. To determine whether there is a reasonable possibility that the tower heights and locations proposed by Fresh and MSC would constitute a hazard to air navigation.
>
> 2. To determine which of the proposals would, on a comparative basis, best serve the public interest.

3. To determine, in light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

9. IT IS FURTHER ORDERED, That Homer must submit the amendment noted in paragraph 2 hereinabove to the presiding Administrative Law Judge within 30 days of the release of this Order.

10. IT IS FURTHER ORDERED, That Homer shall submit an amendment which contains the information required by Section II, Item 4 (old form) of FCC Form 301, to the presiding Administrative Law Judge within 30 days after the release of this Order.

11. IT IS FURTHER ORDERED, That MSC must file the amendment described in paragraph 4 hereinabove with the presiding Administrative Law Judge within 30 days of the release of this Order.

12. IT IS FURTHER ORDERED, That the Federal Aviation Administration IS MADE A PARTY to this proceeding with respect to the air hazard issue only.

13. IT IS FURTHER ORDERED, That a copy of each document filed in this proceeding subsequent to the date of adoption of this Order shall be served on the counsel of record in the Hearing Branch appearing on behalf of the Chief, Mass Media Bureau. Parties may inquire as to the identity of the counsel of record by calling the Hearing Branch at (202) 632-6402. Such service shall be addressed to the named counsel of record, Hearing Branch, Enforcement Division, Mass Media Bureau, Federal Communications Commission, 2025 M Street, N.W., Suite 7212, Washington, D.C. 20554. Additionally, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall also be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Federal Communications Commission, Room 350, 1919 M Street, N.W., Washington, D.C. 20554.

14. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

15. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 85-397

In re Application of

KOZN FM STEREO 99 LTD.,
Debtor in Possession

Licensee of Radio Station KOZN(FM)
Imperial, California

Order to Show Cause why The License
Of KOZN(FM), Imperial, California
Should Not Be Revoked

MEMORANDUM OPINION AND ORDER

Adopted: January 4, 1991; Released: January 15, 1991

By the Commission:

1. Before the Commission are a Trustee's Second Petition for Extraordinary Relief filed October 29, 1990 by the Trustee in Bankruptcy for Stereo 99, Ltd. (Stereo), licensee of radio station KOZN(FM).[1] The petition seeks permission to assign the license for KOZN(FM) to Acacia Amusement Corporation (Acacia). We will grant the requested relief.

BACKGROUND

2. On May 3, 1990, the Commission approved the Bankruptcy Trustee's Petition for Extraordinary Relief and authorized the assignment of the license of radio station KOZN(FM) to New World Communications. *KOZN*, 5 FCC Rcd 2849 (1990). The action taken by the Commission was conditioned, however, as follows:

> IT IS FURTHER ORDERED, That this proceeding IS TERMINATED, provided that if the application from the Bankruptcy Trustee to New World Communications, Inc., is denied, or the assignment to New World Communications, Inc., is not consummated, the action taken herein shall be void.

Id. at 2850 ¶ 10. The sale to New World was not consummated and the Bankruptcy Trustee is before us again with a new request.

3. In the bankruptcy court's order approving the sale to Acacia, the court notes that it's previous order approving the sale to New World authorized the Trustee to sell to the next highest and willing bidder in the event the sale was not consummated. Supplement to Trustee's Second Petition for Extraordinary Relief at 2. Acacia was the third highest bidder in that auction and the second highest bidder failed to indicate interest. *Id.*

DISCUSSION

4. As in its previous petition, the Trustee requests permission to assign the license of KOZN(FM) pursuant to the policy enunciated in *Second Thursday Corp.*, 22 FCC 2d 515, recon. granted, 25 FCC 2d 112 (1970). This policy allows assignment when outstanding questions exist about a licensee's basic qualifications if the following conditions are met:

> [T]he individuals charged with misconduct will have no part in the proposed operations and will either derive no benefit from favorable action on the [assignment] applications or only a minor benefit which is outweighed by equitable considerations in favor of innocent creditors. [citations omitted]

22 FCC 2d at 516 ¶ 5.

5. The purchase agreement in the case previously before us provided for a payment of $255,000 to Stereo and the estimated total of all creditor claims against Stereo was $257,057.94. The agreement was modified to provide that Stereo waived all rights to receive any proceeds from the sale of KOZN and any excess funds from the sale would be held in a blocked account subject to the determination of the FCC and the bankruptcy court as to how the funds should be appropriated. *See* 5 FCC Rcd at 2849 ¶ 6. The sale was approved by the bankruptcy court.

6. As reflected in the pleadings before us now, the bankruptcy trustee has entered into an agreement with Acacia to sell the assets of KOZN for $250,000. The proceeds from the sale plus $20,000 (cash-on-hand) would be available to pay approximately $280,000 in total claims against the estate. The bankruptcy court has approved the sale. *See* Supplement to Trustee's Petition for Extraordinary Relief at 4.

7. The terms of the requested sale are substantially the same as those contained in the prior unconsummated agreement that we approved.[2] Richard Green, Stereo's general partner, will have no part in the future operation of KOZN(FM) and, because the sale price is less and the claims are more than those in the case we approved before, there is less chance that any money would be left over after satisfaction of all the claims. Even so, this agreement contains a provision, just as did the previously approved agreement, precluding the payment to Mr. Green of any funds from the sale. *See* paragraph five, above.

8. These facts justify the application of the *Second Thursday* policy. As presently structured, the current licensee's general partner will receive only an incidental benefit from the sale through the elimination of his potential secondary liability. The innocent creditors may well be paid in full. Under these circumstances, we will grant the petition for extraordinary relief. [3]

9. ACCORDINGLY, IT IS ORDERED, That the Trustee's Second Petition for Extraordinary Relief, filed October 29, 1990, by the Trustee in Bankruptcy for KOZN(FM) Stereo 99, Ltd, as amended by the Supplement to Trustee's Second Petition for Extraordinary Relief filed on November 5, 1990, IS GRANTED.

10. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED, provided that if the application for assignment from the Bankruptcy Trustee to Acacia

Amusement Corporation is denied, or the assignment to Acacia Amusement Corporation is not consummated, the action taken herein shall be void.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] In addition, the Trustee in Bankruptcy filed a Supplement to Trustee's Second Petition for Extraordinary Relief on November 5, 1990, and the Mass Media Bureau filed Comments in Support of Trustee's Second Petition for Extraordinary Relief on November 14, 1990.

[2] Other than the sale price and the increase in the amount of claims, the only significant difference is that the buyer may withdraw from the proposed sale if a mutually exclusive application is filed against KOZN's renewal.

[3] An application to assign the license of KOZN(FM) to Acacia Amusement Corporation (BALH-901030GR), filed by the Trustee on October 30, 1989, is pending before the Mass Media Bureau. Because the Bureau has not yet passed on Acacia's qualifications to be a licensee, we will terminate this proceeding conditioned on the approval of the assignment application and the consummation of the assignment to Acacia.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-308

In re Application of

REAL LIFE EDUCATIONAL FOUNDATION OF BATON ROUGE, INC.	File No. BPED-840322CA
JIMMY SWAGGART MINISTRIES	File No. BPED-840822IF

For Construction Permit for a New
Noncommercial Educational Broadcast
Station, Channel 203C2, in
Baton Rouge, Louisiana

MEMORANDUM OPINION AND ORDER

Adopted: January 4, 1991; Released: January 16, 1991

By the Commission:

1. In his *Initial Decision*, Administrative Law Judge Richard L. Sippel (ALJ) granted the application of Jimmy Swaggart Ministries (JSM), in the above-captioned noncommercial educational comparative proceeding. 4 FCC Rcd 8433 (Admin. L.J. 1989). Real Life Educational Foundation of Baton Rouge, Inc. (Real Life) filed exceptions claiming, in part, that the ALJ erred by failing to consider diversification of media interests as a necessary criterion in the comparative evaluation of noncommercial applicants.[1] *Id*. at 8433 ¶ 4.

2. Subsequent to the filing of the pleadings before the Board, the Commission released its decision in *Valley Broadcasters*. 5 FCC Rcd 2785 (1990). The Board characterized the opinion as containing "a historic policy revision" terminating the practice of "ignoring noncommercial stations" in the ordinary transmission service analysis required under 47 U.S.C. § 307(b).

3. The Board acknowledges that *Valley Broadcasters* did not directly overrule *New York University*, 10 RR 2d 215 (1967), which held that diversification and other standard comparative criteria applicable to commercial comparative proceedings were "meaningless" in noncommercial educational comparative proceedings. However, the Board opines that *Valley Broadcasters* "may also be read to recognize noncommercial 'voices' in a manner that impacts upon the *New York University* view of diversity." *Real Life*, 5 FCC Rcd at 3421 ¶ 8.

4. Therefore, based on its uncertainty as to the policy implications of *Valley Broadcasters* beyond section 307(b), the Board certified the following question to the Commission:

> Should the co-ownership of other media "voices" (commercial or noncommercial) now be recognized as a comparative factor in contests for noncommercial frequencies.

5 FCC Rcd 3420, 3421 ¶ 8 (Rev. Bd. 1990).

5. Comments were subsequently requested from the parties to permit them to express their views concerning the certified question. FCC 90I-100, released September 10, 1990. Comments were filed by JSM on September 24, 1990 and by Real Life and the Mass Media Bureau on September 25, 1990.[2]

6. Real Life follows the lead offered by the Board and submits that the Commission's action in *Valley Broadcasters* supports not only the inclusion of noncommercial stations for 307(b) analyses but also the removal of distinctions between commercial and noncommercial stations in the comparative process as well. Real Life argues that the Commission, in *Valley Broadcasters*, did no more than recognize a reality -- noncommercial stations are media voices. Real Life Comments at 13. Furthermore, it asserts that viewpoint diversity among media voices is a fundamental and preeminent goal of broadcast regulation and, therefore, the failure to consider diversification in the comparative consideration of noncommercial applicants is arbitrarily inconsistent with that goal. Real Life Comments at 14-16.

7. The Mass Media Bureau argues that our holding in *Valley Broadcasters* does not compel the sweeping policy consequence that concerns the Board. Bureau Comments at 2. The Bureau suggests that specific rule changes relating to power, minimum hours of operation and issue-responsive programming for noncommercial stations were the basis of the Commission's decision in *Valley Broadcasters*. The question certified to the Commission, however, asks whether diversity should be added to the criteria for resolving noncommercial educational comparative hearings. The Bureau argues that diversity is a corollary of the multiple ownership rules, which are not applicable to noncommercial broadcasters. *See* 47 CFR § 73.3555(f). Any application of diversification to noncommercial contests would, in its view, require a change in the multiple ownership rules to include noncommercial broadcasters, and such sweeping changes in Commission policy should only be accomplished on the basis of a complete record developed through Rule Making. Bureau Comments at 3. Therefore, it is the Bureau's view that the Commission's opinion in *Valley Broadcasters* does not, in and of itself, provide an adequate basis to change long standing Commission precedent such as that enunciated in *New York University* and its progeny.

8. JSM argues that *Valley Broadcasters* does not provide a basis for a change in the comparative criteria applicable to noncommercial educational proceedings because, (1) adding the diversification criterion will fundamentally change the character of all future noncommercial applicants and the matter is, therefore, more properly suited for a Rule Making proceeding; (2) nothing in *Valley Broadcasters* suggests that the Commission should abandon the essential distinctions between commercial and noncommercial services in noncommercial comparative cases; and (3) even if the Commission is of the opinion that the noncommercial comparative process should be modified, the prudent course would be to develop a new

set of criteria for the assessment of competing applicants based on a Rule Making proceeding that would provide sufficient data for a complete evaluation of the changing nature of noncommercial stations. JSM Comments at 3.

DISCUSSION

9. After review of the Board's decision and all of the related pleadings before us, we conclude that our holding in *Valley Broadcasters* is distinguishable from the issues inherent in the question posed by the Board and that the public interest would not be served by expanding that holding in this case.

10. Of the issues before the ALJ, the following is pertinent:

> 1. To determine . . . (b) the extent to which each of the proposed operations will be integrated into the overall cultural and educational objectives of the respective applicants; and (c) whether other factors in the record demonstrate that one applicant will provide a superior FM educational service.

Real Life, 3 FCC Rcd 4359 (MMB July 20, 1988).

11. These issues are commonly designated in noncommercial educational comparative proceedings and have been since first enunciated in *New York University*. 10 RR 2d at 218. In that case we indicated that the purpose for establishing FM educational reservations was to make facilities available to the applicant for the advancement of its educational work and for the transmission of educational and entertainment programs to the general public. 10 RR 2d at 217. In addition, we also noted that our rules provided that a noncommercial station would be licensed "only to an organized non-profit educational agency and upon a showing that the station will be used for the advancement of the agency's educational program." [3] Thus, both the purpose and the eligibility requirements were distinctly different from those for commercial allocations.[4]

12. It was in recognition of those basic differences that we held that the standard comparative criteria applicable to commercial proceedings, such as local residence, integration, broadcast experience, and diversification, were "virtually meaningless" in noncommercial educational proceedings. 10 RR 2d at 217.

13. Real Life applied for a license to operate a station on a channel reserved for noncommercial educational service. Because a central purpose for setting aside the channels was to assist educational entities advance their educational work, the number of other stations owned by an applicant, commercial or noncommercial, is irrelevant to the determination of which applicant would best serve that purpose. Although Real Life argues that the differences between noncommercial and commercial stations have disappeared, it has failed to demonstrate that this central purpose has been eroded in any way, and thus it has also failed to provide any reason to change the criteria relevant to this case.

14. It is in this context, then, that we review our decision in *Valley Broadcasters*. At the outset, it is clear that *Valley Broadcasters* did not involve an analysis of the standard comparative criteria. It simply reviewed the status of noncommercial stations in connection with our policy of excluding noncommercial educational stations from the 307(b) transmission analysis. Past cases enunciating that policy had relied primarily on a footnote in the Commission's rules, subsequently deleted. *Valley Broadcasters*, 5 FCC Rcd at 2787 ¶¶ 23-24. That footnote provided that noncommercial educational stations were not to be considered for the purpose of determining whether an AM application met certain requirements to provide a community with a first or second authorized aural transmission service. Given the elimination of the pivotal footnote in 1985, we held that the past cases were no longer valid. *Id.* at 2788 ¶¶ 25-26.

15. Thus, in the determination of which community has the greatest need for commercial broadcast transmission facilities, we said that noncommercial stations should not be automatically excluded from the 307(b) analysis. *Id.* at ¶ 26. But it does not necessarily follow, as suggested by Real Life, that by including noncommercial stations in the 307(b) analysis for commercial stations, the Commission necessarily has altered the basic purpose for the reservation of noncommercial educational channels.[5]

16. Real Life also argues that the Commission's recent decision in *Kargo Broadcasting, Inc.*, 5 FCC Rcd 3442, 3445, n.11 (1990), eliminates the ownership distinction between commercial and noncommercial stations. *See* Real Life Comments at 10. We disagree. Not unlike our decision in *Valley Broadcasters*, we said in *Kargo* that although noncommercial stations are not counted for multiple ownership purposes, they were properly included in that case in analysing the effect that the addition of a commercial FM station would have on competition and overall market influence. Ownership of noncommercial stations may affect competition and overall market influence in the context of the acquisition of a new commercial station. It does not follow, however, that the ownership of commercial stations necessarily should affect the licensing determinations to be made for a noncommercial station in light of the distinct and different purposes for the establishment of reserved channels for noncommercial educational stations. *See* paragraph 11, *supra*.

17. In light of the above, we are convinced that our holding in *Valley Broadcasters* need not, and should not, in the context of this case, be interpreted as removing the distinctions between commercial and noncommercial licensing procedures. As noted, *supra*. ¶¶ 14 & 15, *Valley Broadcasters* was limited to whether noncommercial stations should be considered in Section 307(b) analyses. Nothing in its rationale compels the automatic application of comparative policies governing commercial applications to noncommercial comparative cases which, as noted above, involve policy considerations that are quite distinct. In recognition of those differences, we have consistently applied the separate criteria outlined in *New York University* which exclude diversity of programming from comparative noncommercial educational proceedings.[6] The issues designated for resolution of this proceeding were based on those criteria. We find no public interest reason to modify the criteria recognized as comparative factors in an individual contest for a noncommercial educational license.

18. ACCORDINGLY, IT IS ORDERED, That the Motion for Leave to File Brief filed July 23, 1990 and corrected July 24, 1990 by Arizona State University, the Petition to Accept Amicus Brief of Public Broadcasting Entities filed August 1, 1990, and Motion of Association

for Public Broadcasting for Leave to File Comments as Amicus Curiae filed August 9, 1990 ARE GRANTED; that the Brief filed July 23, 1990 and corrected July 24, 1990 by Arizona State University, Amicus Comments filed July 23, 1990 and corrected July 24, 1990 by National Public Radio, Amicus Brief of Public Broadcasting Entities filed August 1, 1990 and Comments of Amicus Curiae Association for Public Broadcasting filed August 9, 1990 ARE ACCEPTED; and that this matter IS REMANDED to the Review Board for consideration of the matters pending before it in this proceeding consistent with this opinion.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] Real Life has no other media interests and JSM owned and operated six commercial radio stations and produced a daily 30-minute and a weekly one-hour program at the time the applications were filed.

[2] Earlier, and prior to the comment process, amicus pleadings were filed by: (1) Arizona State University (ASU) on July 23, 1990; (2) National Public Radio (NPR) on July 24, 1990; (3) Public Broadcasting Entities (PBE) on August 1, 1990; and (4) The Association for Public Broadcasting (APB) on August 9, 1990. These pleadings all recommend making no change in the current comparative hearing process for noncommercial educational stations without first allowing for public notice and comment.

[3] The current rule, 47 C.F.R. § 73.503, reads as follows:

> A noncommercial educational FM broadcast station will be licensed only to a nonprofit educational organization and upon showing that the station will be used for the advancement of an educational program.

[4] Although the Commission noted that there was an unresolved question as to whether the reservations were intended strictly as educational tools or to serve both that function and to serve as additional available broadcast outlets, there was no question that their purpose was distinct from that of commercial operators. *New York University*, 10 RR 2d 215, 217 ¶ 7 (1967).

[5] In this connection we have recently terminated a Rule Making proceeding seeking to determine whether the multiple ownership rules should be expanded to include noncommercial FM and TV stations without adopting any modifications thereof. *In the Matter of Amendment of the Commission's Multiple Ownership Rules to Include Educational FM and TV Stations*, Docket No. 78-165, 68 FCC 2d 831 (1978), proceeding terminated without prejudice, 5 FCC Rcd 392 (1990).

[6] *See* note 5, *supra, and Seattle Public Schools*, 4 FCC Rcd 625, 643 ¶ 74 (Rev. Bd. 1989) affirming that the comparative criteria adopted in *New York University* excluded the "standard comparative criteria (local residence, integration, broadcast experience, diversification, etc.)" as meaningless in noncommercial educational comparative proceedings.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

DIGITRAN CORPORATION — File No. I-T-C-91-021

Application for authority
to operate as an international
resale carrier.

ORDER, AUTHORIZATION AND CERTIFICATE

Adopted: December 28, 1990; Released: January 14, 1991

By the Chief, International Facilities Division:

1. The captioned application, filed by Digitran Corporation, requests authority pursuant to Section 214 of the Communications Act of 1934, as amended, to resell the switched voice services of other common carriers to provide switched voice and facsimile services between the U.S. and overseas points listed in AT&T's Tariff FCC No. 1. MCI's Tariff FCC No. 1, US Sprint's Tariff FCC No. 1 and Cable and Wireless' Tariff FCC No. 3. The application was placed on public notice on October 31, 1990. No comments were received.

2. Digitran, a Delaware Corporation, proposes to provide international voice and facsimile service between the U.S. and international points through the resale of the services of underlying common carriers authorized to provide International Message Telephone Service (IMTS). Digitran believes that the data market between the United States and foreign points is growing and will continue to grow significantly and that additional competition in these markets is therefore feasible and will stimulate new demand. In authorizations of new entrants over the past decades, the Commission has recognized that increased competition in international markets is beneficial.[1] We find that the market will support additional carriers and that the added competition will be in the public interest.[2]

3. Upon consideration of the application and in view of the foregoing, IT IS HEREBY CERTIFIED that the present and future public convenience and necessity require the provision of international voice and facsimile service by Digitran between the United States and those international points named in AT&T's Tariff FCC No. 1, MCI's Tariff FCC No. 1, US Sprint's Tariff FCC No. 1 and Cable and Wireless' Tariff FCC No. 3.

4. Accordingly, IT IS ORDERED that application File No. I-T-C-91-021 IS GRANTED, and Digitran is authorized to provide international voice and facsimile service by the resale of the International Message Telephone Service set forth in AT&T's Tariff FCC No. 1, MCI's Tariff FCC No. 1, US Sprint's Tariff FCC No. 1 and Cable and Wireless' Tariff FCC No. 3 between the contiguous U.S. and those international points named in the underlying tariffs.

5. IT IS FURTHER ORDERED that Digitran shall obtain any necessary operating arrangements in each of the countries to which it provides service and shall file with the Commission any operating agreements with its correspondents within 30 days of their execution.

6. IT IS FURTHER ORDERED that the applicant shall file a tariff pursuant to Section 203 of the Communications Act of 1934, as amended, 47 U.S.C. Section 203, and Part 61 of the Commission's Rules, 47 C.F.R. Part 61, for the services authorized in this Order.

7. IT IS FURTHER ORDERED that the applicant shall file the annual reports of overseas telecommunications traffic required by Section 43.61 of the Commission's Rules, 47 C.F.R. Section 43.61 (October 1, 1989).

8. IT IS FURTHER ORDERED that Digitran is limited, under this order, to the provision of international voice and facsimile services only. Nothing in this authorization should be construed to include authorization for the transmission of money in connection with the services it seeks authority to provide. The transmission of money is not considered to be a common carrier service. Therefore, nothing in this Order should be construed as containing authority for the transmission of money.

9. This order is issued under Section 0.291 of the Commission's rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's rules may be filed within 30 days of the date of public notice of this order (*See* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

FOOTNOTES

[1] *See, e.g.*, the cases cited in *Teltec Saving Communications Co.*, File No. I-T-C-86-062, Mimeo No. 3548, (released April 4, 1986) at n.2.

[2] *FCC v. RCA Communications, Inc.*, 346 U.S. 86 (1953); *Mackay Radio and Telegraph Co.*, 28 FCC 231 (1960).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-603

In re Applications of

GRANTS PASS BROADCASTING, CORP. (hereafter: Grants)	File No. BPH-890428MD
E. LARA SHAINIS (hereafter: Shainis)	File No. BPH-890505MA

For Construction Permit
for a New FM Station on Channel 252A
in Harbeck-Fruitdale, Oregon

HEARING DESIGNATION ORDER

Adopted: November 20, 1990; Released: January 16, 1991

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.

2. Data submitted by the applicants indicate there would be significant difference in the size of the areas and populations which would receive service from the proposals. Consequently, the areas and populations which would receive FM service of 1 mV/m or greater intensity, together with the availability of other primary aural services in such areas, will be considered under the standard comparative issue for the purpose of determining whether a comparative preference should accrue to any of the applicants.

3. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

4. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

> 1. To determine which of the proposals would, on a comparative basis, best serve the public interest.
>
> 2. To determine, in light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

5. IT IS FURTHER ORDERED, That a copy of each document filed in this proceeding subsequent to the date of adoption of this Order shall be served on the counsel of record in the Hearing Branch appearing on behalf of the Chief, Mass Media Bureau. Parties may inquire as to the identity of the counsel of record by calling the Hearing Branch at (202) 632-6402. Such service shall be addressed to the named counsel of record, Hearing Branch, Enforcement Division, Mass Media Bureau, Federal Communications Commission, 2025 M Street, N.W., Suite 7212, Washington, D.C. 20554. Additionally, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall also be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Federal Communications Commission, Room 350, 1919 M Street, N.W., Washington, D.C. 20554.

6. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

7. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In Re Application of

DAVID R.
WILLIAMS, d/b/a
INDUSTRIAL
COMMUNICATIONS, INC.

File No. 24622-CD-P/L-01-87

For authority to construct a
new one-way facility in the
Public Land Mobile Service
operating on frequency
152.24 MHz at Provo, Utah

MEMORANDUM OPINION AND ORDER ON RECONSIDERATION

Adopted: December 31, 1990; Released: January 16, 1991

By the Deputy Chief, Common Carrier Bureau:

1. David R. Williams d/b/a Industrial Communications, Inc. (Industrial) has filed a petition for reconsideration of the Mobile Services Division (MSD) action dismissing its Provo, Utah application.[1] Daniels and Associates Inc. d/b/a Interlink Communications of Utah (Interlink) filed an opposition to the petition for reconsideration and Industrial filed a reply. We deny reconsideration for the reasons stated below.

I. BACKGROUND

2. On June 8, 1987 Industrial filed an application to provide service on frequency 152.24 MHz at Provo, Utah. Interlink filed a petition to deny Industrial's application on July 27, 1987. On August 12, 1987 Interlink filed an application for additional facilities on frequency 152.24 MHz for Station KRS691 at Provo. Interlink's application for additional facilities for Station KRS691 was designated as mutually exclusive with Industrial's Provo application by Public Notice on January 13, 1988.

3. In its petition to deny, Interlink argued that Industrial's proposal would cause harmful electrical interference to its existing co-channel facilities at Garfield and Ensign Peak, Utah. The MSD dismissed as defective Industrial's application because Industrial had not demonstrated that its proposed facilities would not cause harmful electrical interference to Interlink's co-channel facilities as required by Section 22.15 of the rules.[2]

II. CONTENTIONS OF THE PARTIES

4. In its petition for reconsideration, Industrial maintains that the dismissal of its application was arbitrary and capricious and that the order should be rescinded and Industrial's application reinstated *nunc pro tunc*. Industrial argues that it did not submit the manufacturer's description of the expected antenna pattern because this submission is not required by Section 22.15 of the rules. In addition, Industrial maintains that the MSD, contrary to established procedures and precedents, did not formally request Industrial to submit additional information pursuant to Section 22.13(c)(2) of the rules. Industrial argues that the MSD's decision, without seeking this additional determinative information, was unfair, unreasonable and a violation of due process of law.

5. In its opposition, Interlink argues that the petition for reconsideration should be summarily denied because it is procedurally and substantively defective. According to Interlink, the petition refers to factual matters (the antenna pattern) which have been available or could have been produced by Industrial for MSD consideration during the proceeding. By failing to produce such evidence, argues Interlink, Industrial has forfeited its right to do so. In addition, Interlink maintains that the MSD was not specifically required to request a manufacturer's antenna pattern from Industrial before dismissing its application.

6. In its reply, Industrial argues that doubts on an antenna pattern raised by a petitioner do not impose a duty on the applicant to submit evidence not otherwise required by the rules.

III. ADDITIONAL INFORMATION

7. On February 27, 1989, the MSD, although not specifically required to do so by the rules (*see* discussion paragraph 11, *infra)* sent a letter to Industrial requesting it to send a measured pattern for the proposed antennas and a description of the mounting, phasing, and power distribution of the proposed antennas. In addition, the staff requested a description of all nearby structures including their height, composition, and distance and direction from the proposed site.

8. In response to this letter Industrial filed an amendment to its application on March 29, 1989, which included an engineering statement from David Carter, its consulting engineer. In its amendment, Industrial contends that it would have to expend significant financial resources to submit the information requested by the Commission. According to Industrial, this is an onerous burden it is not prepared to undertake and which is not justified by the circumstances in question. Industrial informed the Commission it was relying on its original submission in the proceeding. In addition, Industrial maintains, that the techniques and calculations proposed in its application are not unusual and have been authorized by the Commission in other applications.[3]

IV. DISCUSSION

9. After a thorough analysis of the facts in this case we find that the MSD decision returning Industrial's application as defective was correct. The factual record developed in the proceeding supports the finding that Industrial had not demonstrated interference-free operation as required by Section 22.15 of the rules because of the questionable performance characteristics of its proposed composite antenna array. In these circumstances, it is correct for the staff to rely on the applicant to submit the manufacturer's description of the expected antenna pattern to help it make its own determination. *See Beep Beep Suncoast*, 3 FCC Rcd 1646 (Mob. Serv. Div. 1988) (in cases where there are disputes involving antenna patterns, the staff will rely on the description of the expected antenna pat-

tern from the manufacturer in resolving the dispute). To this day, Industrial has failed to provide the manufacturer's description of the expected antenna pattern in support of its proposal.

10. Although the rules do not specifically require applicants to submit the manufacturer's description of the expected antenna pattern, the burden of proof is on the applicant to demonstrate interference-free operation. In cases such as this one, where allegations are raised in a petition to deny questioning whether an interference-free showing has been made, it is the duty of the applicant to respond to these allegations. This duty includes the submission of any relevant evidence necessary to prove its case, even if such evidence is not specifically required by the rules. Section 22.15 requires that applications comply with all technical requirements, including demonstrating interference-free operations.[4] Section 22.20 of the rules requires that applications be complete when filed. In addition, Section 1.65 of the rules requires that applicants maintain their applications substantially accurate and complete. Industrial did not comply with these requirements. Finally, the applicant in this case had been put on notice by previous Commission pronouncements that we would rely on the manufacturer's description of the expected antenna pattern as the best evidence to resolve the dispute.[5] Industrial's technical information, contained in its application, is not sufficient to demonstrate interference free operations. In these circumstances, we conclude that the MSD was legally justified in dismissing Industrial's application for failure to demonstrate interference-free operation.

11. We also reject Industrial's assertions that MSD was obligated to request the manufacturer's antenna pattern before dismissing Industrial's application. Although the staff may require additional information to assist it in processing applications,[6] it is under no obligation to do so. It is the duty of the applicant to file complete applications and the staff is not required to give applicants an opportunity to amend defective proposals before they are dismissed.[7] Moreover, the Commission's rules state that defective applications will be dismissed. *See* Section 22.20 of the rules. In this case, the applicant failed to submit the necessary evidence to refute the allegations of harmful interference and therefore did not comply with the requirements of Section 22.15 of the rules.[8] Accordingly, its application was properly dismissed under Section 22.20 of the rules.[9]

V. CONCLUSION

12. It is the burden of the applicant to demonstrate interference-free operation. Under these circumstances, where Industrial has failed to meet its burden of proof that its proposal will not cause harmful electrical interference. we find that the MSD's decision was correct and did not deny Industrial due process of law. We affirm its decision.

VI. ORDERING PARAGRAPH

13. WHEREFORE, the foregoing premises considered, IT IS HEREBY ORDERED that the Petition for Reconsideration filed by David R. Williams, d/b/a Industrial Communications, Inc. IS DENIED and the Mobile Services Division's dismissal of David R. Williams, d/b/a Industrial Communications, Inc.'s application File No. 24622-CD-P/L-01-87 IS AFFIRMED.

FEDERAL COMMUNICATIONS COMMISSION

Gerald P. Vaughn
Deputy Chief (Operations)
Common Carrier Bureau

FOOTNOTES

[1] *David R. Williams d/b/a Industrial Communications Inc.* (*Williams)*, 3 FCC Rcd 6646 (Mob. Serv. Div. 1988).

[2] Specifically, Interlink argued that Industrial's proposal was not supported by generally accepted engineering principles regarding the operational performance of its directional antenna. The MSD found that where there are disputes involving antenna patterns, the manufacturer's description of the expected antenna pattern is critical to evaluating the interference potential of the proposed facility. In this case Industrial had not submitted the manufacturer's pattern for the proposed antenna with its application. The MSD concluded that without actual measured values from the manufacturer, Industrial had not demonstrated interference free operation. *Williams*, 3 FCC Rcd at 6646.

[3] On April 10, 1989 Interlink filed an Opposition to Minor Amendment. Interlink maintains that the submission by Industrial fails to respond to the request. Industrial filed a Response to Opposition to Minor Amendment on April 25, 1989. In its response Industrial argues that the opposition is an unauthorized pleading and should be rejected on procedural grounds. On substantive grounds the pleading should be dismissed as repetitious, Industrial maintains. We will not consider these pleadings in this proceeding because they are not authorized. *See* Section 22.30(b) of the rules. Moreover, the pleadings are repetitious and do not add any material facts beyond those already presented warranting consideration.

[4] Section 22.15(j)(4) specifically requires the applicant to file information regarding antenna radiation patterns.

[5] *Beep Beep Suncoast*, 3 FCC Rcd 1646 at n. 3.

[6] Section 22.13 (c) (2) provides, "In addition . . . applicants shall submit any additional documents, exhibits, or signed written statements of fact: . . . (2) as the Commission, at any time after the filing of an application . . . may require . . . . to enable it to determine whether a radio authorization should be granted, denied, or revoked.

[7] *Compare Moore's Service* 86 FCC 2d 787, 795 (Com. Car. Bur. 1981), cited with approval in *David R. Williams d/b/a Industrial Communications*, 53 Rad. Reg. 2d (P&F) 38, 42 (1983), *aff'd sub nom. Williams v FCC*, No. 83-1233 (D.C. Cir. November 30, 1983) (a defective Public Land Mobile application which has been returned must be retendered with a curative amendment prior to the cut-off date in order to be entitled to comparative consideration). *See also Ram Mobile Communications of Colorado Inc.*, 2 FCC Rcd 86 (1987).

[8] In this case, Industrial was given an additional opportunity to submit evidence in support of its proposal. It refused to do so because it would be expensive to comply with the request. Its concern over making monetary expenditures to prove its case cannot excuse its lack of compliance with Commission requests.

Its refusal to respond to the MSD request constitutes an independent ground for dismissal of its application. *See* Section 22.20(d) of the rules.

[9] The fact that we may have granted uncontested applications in the past with similar technical proposals cannot be determinative in this case where the antenna patterns are disputed and a petition to deny has been filed based on allegations of harmful electrical interference. In addition, the mere fact that other applications with similar technical proposals may have been granted does not serve as a precedent to allow the use of a defective interference showing in this contested proceeding. *See generally Clyde W. Pierce,* 4 FCC Rcd 2378 (1989).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-651

In the Matter of

Amendment of Section 73.202(b), RM-7544
Table of Allotments,
FM Broadcast Stations.
(Bald Knob and Clarendon, Arkansas)

NOTICE OF PROPOSED RULE MAKING AND ORDER TO SHOW CAUSE

Adopted: December 24, 1990; Released: January 17, 1991

By the Acting Chief, Allocations Branch:

1. Before the Commission for consideration is the petition for rule making filed by Capps Radio Company (petitioner), licensee of Station KKSY(FM), Bald Knob, Arkansas, requesting the substitution of Channel 296C3 for Channel 296A at Bald Knob, and modification of its license accordingly to specify operation on the higher powered channel. In order to accommodate the request in conformity with the Commission's minimum distance separation requirements, petitioner also requests the substitution of Channel 281A for Channel 297A at Clarendon, Arkansas. Petitioner stated its intention to apply for Channel 296C3 if allotted.

2. A staff analysis reveals that Channel 296C3 can be substituted for Channel 296A at Bald Knob at the petitioner's suggested site located 22.8 kilometers (14.2 miles) southwest of the community.[1] Additionally, Channel 281A can be substituted for Channel 297A at Clarendon, Arkansas, at the authorized site of B&H Broadcasting Co. ("B&H") the permittee of Channel 281A.[2]

3. Although the Bald Knob proposal complies with Section 73.207(b) of the Commission's Rules, we question whether, at the petitioner's specified site, the requirements of Section 73.315 of the Commission's Rules could be met. In this regard, we note that, at the rule making stage, a Class C3 allotment is assumed to provide a 70 dBu service to the entire community of license where the transmitter is located no more than 23.2 kilometers (14.4 miles) from the community's furthest point. Petitioner recognizes that its proposal specifies a transmitter site that is located at the outer limits for a Class C3 operation. Petitioner states that with an average terrain computed at 244 feet (74.3 meters) and an antenna height of 572 feet (174.3 meters), the station could operate at 25 kW and an antenna height above average terrain of 100 meters. It further contends that the 70 dBu contour of Channel 296C3 would extend 15.2 miles (24.5 kilometers) "in the direction of Bald Knob."

4. In *Woodstock and Broadway, VA*, 3 FCC Rcd 6398 (1988), the Commission set forth a limited exception to its allotment policy of predicting city-grade coverage based upon the assumption of uniform terrain rather than an analysis of the terrain characteristics of specific radials. This exception applies only where the new allotment will not be available for competing applications. Petitioner's request falls within this exception and thus warrants further exploration. Assuming petitioner is correct in its assertion concerning the provision of the required 70 dBu signal, it failed to provide a map reflecting that compliance with the requirements of Section 73.315 could be met from its specified site, and should do so in response to this *Notice*. Moreover, petitioner is requested to provide additional information demonstrating that it has taken positive measures to obtain assurances from the owner of the proposed site that it will be able to buy or lease the location specified in its petition, as well as FAA approval for a tower. Absent such showings, the requested upgrade may not be permitted.

5. We believe the public interest would be served by the proposal since it could enable Station KKSY(FM) to provide an expanded coverage area FM service to the community. Since the petitioner's modification request at Bald Knob, Arkansas, conforms with the provisions of Section 1.420 of the Commission's Rules, we shall propose to modify the facilities of Station KKSY(FM) without entertaining other expressions of interest. In addition, we shall direct an *Order to Show Cause* to the permittee at Clarendon, Arkansas, why its permit (File No. BPH-891002MN) should not be modified to specify operation on Channel 281A in lieu of Channel 297A.

6. Whenever an existing licensee or permittee is ordered to change frequencies in order to accommodate a new channel allotment, Commission policy requires the benefitting party to reimburse the affected station for costs incurred. In this instance, petitioner stated its willingness to reimburse B&H, as an applicant, for its reasonable costs incurred in moving to Channel 281A. Since H&B was accorded permittee status prior to the adoption of this *Notice*, it is entitled to reimbursement for the reasonable and prudent costs associated with the requested frequency change. Petitioner is requested to state its willingness to reimburse B&H for the reasonable costs to be incurred in moving to Channel 281A if this proposal is ultimately adopted.

7. In view of the above, the Commission believes it is appropriate to solicit comments on the proposal to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to the communities listed below, as follows:

	Channel No.	
City	Present	Proposed
Bald Knob, Arkansas	296A	296C3
Clarendon, Arkansas	297A	281A

8. IT IS ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, B and H Broadcasting Co., permittee of Channel 297A, Clarendon, Arkansas SHALL SHOW CAUSE why its permit (File No. BPH-891002MN) should not be modified to specify operation on Channel 281A in lieu of Channel 297A.

9. Pursuant to Section 1.87 of the Commission's Rules, B and H Broadcasting Co. may, not later than **March 11, 1991,** file a written statement showing with particularity why its permit should not be modified as proposed in the *Order to Show Cause*. The Commission may call on B and H Broadcasting Co. to furnish additional information. If

B and H Broadcasting Co. raises a substantial and material question of fact, a hearing may be required to resolve such a question pursuant to Section 1.87. Upon review of the statements and/or additional information furnished, the Commission may grant the modification, deny the modification, or set the matter of modification for hearing. If no written statement is filed by the date referred to above, B and H Broadcasting Co. will be deemed to have consented to the modification as proposed in the *Order to Show Cause* and a final *Order* will be issued by the Commission, if the above-mentioned channel modification is ultimately found to be in the public interest.

10. IT IS FURTHER ORDERED, That the Secretary of the Commission SHALL SEND a copy of this *Notice of Proposed Rule Making and Order to Show Cause* by CERTIFIED MAIL, RETURN RECEIPT REQUESTED, to the permittee of Channel 297A at Clarendon, Arkansas, as follows: B and H Broadcasting Co., 4004 Clay Drive, Jonesboro, Arkansas 72401.

11. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

12. Interested parties may file comments on or before **March 11, 1991,** and reply comments on or before **March 26, 1991,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner, as follows:

Capps Radio Company
Attn: John Paul Capps
P.O. Box 1488
Searcy, Arkansas 72143

13. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73. 202 (b), 73. 504 and 73. 606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

14. For further information concerning this proceeding, contact Nancy Joyner, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Andrew J. Rhodes
Acting Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

> (a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (*See* Section 1.420(d) of the Commission's Rules.)
>
> (b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.
>
> (c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on

behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTES

[1] Coordinates at the petitioner's suggested site for Channel 296C3 at Bald Knob are 35-10-00 and 91-44-54.

[2] At the time this proposal was filed, B & H Broadcasting Co. ("B&H") was the sole applicant for Channel 297A at Clarendon (File No. BPH-891002MN). However, its application for a construction permit was subsequently granted. Coordinates at the site specified in the construction permit issued to B&H at Clarendon are 34-37-19 and 91-22-46.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Application of

TELEPHONE AND DATA SYSTEMS, INC. File No. 10209-CL-P-715-B-88

For a construction permit to
establish a new cellular system
to operate on Frequency Block B
in the Domestic Public Cellular
Telecommunications Radio Service
to serve the Wisconsin - 8
(Vernon) Rural Service Area-
Market Number 715-B

ORDER ON RECONSIDERATION

Adopted: December 31, 1990; Released: January 15, 1991

By the Deputy Chief, Common Carrier Bureau:

1. Century Cellunet, Inc. ("Century"), Contel Cellular, Inc., Coon Valley Farmers Telephone Company, Inc., Hillsboro Telephone Company, LaValle Telephone Cooperative, Monroe County Telephone Company, Mount Horeb Telephone Company, North-West Cellular, Inc., Richland-Grant Telephone Cooperative, Inc., Vernon Telephone Cooperative and Viroqua Telephone Company ("Century Group")[1] filed a petition seeking reconsideration of a Memorandum Opinion and Order ("*Order*") released by the Mobile Services Division (MSD), which granted the application of Telephone and Data Systems, Inc. ("TDS") for authority to construct a wireline Block B cellular facility in the Vernon RSA.[2] For the reasons set forth below, we deny the petition for reconsideration and affirm the MSD *Order*.

I. BACKGROUND

2. On June 9, 1989, TDS was named tentative selectee for the wireline Block B construction authorization for the Vernon RSA. [3] Century, a mutually exclusive applicant, filed a petition to deny. In its petition, Century alleged that TDS held prohibited ownership interests in more than one application in the Vernon RSA. Century pointed out that ten of the thirteen wireline carriers ("wireline applicants") who filed applications for the Vernon RSA, including Century itself, and four additional wireline carriers with a presence in the Vernon RSA who did not file applications for the Vernon RSA ("carriers") entered into a post-filing, pre-lottery, partial settlement agreement.[4] The partial settlement agreement provided that if one of the applications of these ten wireline applicants won the lottery, a partnership made up of the signatories to the partial settlement agreement ("Wisconsin RSA 8 Partnership") would be substituted as the applicant for the Vernon RSA. While TDS was not a party to the partial settlement agreement, one of the four carriers that did not file an application for the Vernon market but was a party to the settlement agreement was UTELCO, Inc. (UTELCO), a company in which TDS owns 49% of the stock. Thus, Century argued, TDS had a prohibited ownership interest in more than one application for the same RSA. The MSD *Order* denied Century's petition. Subsequently, Century Group filed a petition for reconsideration of the *Order*, TDS submitted an opposition to the petition and Century Group filed a reply.

II. CONTENTIONS OF THE PARTIES

3. In its petition for reconsideration, Century Group reiterates the argument that Century made in its petition to deny, namely that TDS, because of its 49% ownership of UTELCO, had a prohibited ownership interest in more than one application for the Vernon RSA in violation of Section 22.921(b)(1) of the Commission's Rules, and that TDS failed to disclose the existence of the prohibited ownership interest as required by Section 1.65 of the Rules. Additionally, Century Group argues that, pursuant to Section 22.33(b)(2) of the Rules, TDS, through its ownership interest in UTELCO, was a member of a joint enterprise entitled to cumulative lottery chances in the Vernon RSA. Based on this joint enterprise theory, Century Group reiterates that TDS had an ownership interest in more than one application in the Vernon RSA and that TDS' application should be dismissed and a new lottery conducted.

4. In opposition, TDS contends that settlement agreements do not create any form of ownership interest which is cognizable under Section 22.921(b)(1) and thus, TDS, through UTELCO, acquired no interest in the application of Wisconsin RSA 8 Partnership, since the settlement agreement was never implemented. Additionally, TDS argues that since it was not subject to the settlement agreement, it was not obligated to report it to the Commission in its application. TDS notes that Section 22.33(b)(2) states explicitly that cumulative lottery chances will be awarded to partial settlement enterprises among wireline applicants. TDS avers that Section 22.33(b)(2) does not apply to TDS, because it was not a signatory to the partial settlement agreement and does not apply to UTELCO because it was not an applicant.

III. DISCUSSION

5. Century Group requests that we find TDS in violation of Section 22.921(b)(1) and dismiss TDS's application in the Vernon RSA because UTELCO joined a partial settlement group in the same market that TDS was already a wireline applicant. With regard to the viability of the partial settlement, the Commission has consistently stated that it favors settlement agreements among wireline applicants. *See* Section 22.29 of the Rules, and *Clarification of Requirements for Pre-filing Settlement Agreements by Wireline Applicants in Rural Service Area Cellular Markets*, 64 Rad. Reg. (P&F) 1637, 1638 (1988) (*Requirements*). Specifically, in the *Third Report and Order*, 4 FCC Rcd 2440 (1988), the Commission concluded that the prohibition against partial settlements for non-wireline applicants should not apply to wireline applicants. Similarly, Section 22.33(b)(2) of the Rules provides that a partial settlement among mutually exclusive cellular wireline applicants for RSAs, if entered into after the filing of individual applica-

tions by its members, will receive the cumulative number of lottery chances that the individual applicants would have had if no partial settlement had been reached.

6. Section 22.921(b)(1) states in pertinent part:

> No party to a wireline application shall have an ownership interest, direct or indirect, in more than one application for the same Rural Service Area, except that interests of less than one percent will not be considered.

TDS held a 49% interest in UTLECO, one of the parties to the partial settlement agreement. There is no doubt that, absent the fact that TDS had an application on file for the Vernon market, the partial settlement agreement was permissible under the Commission's Rules. *See Bloomington-Normal MSA Limited Partnership*, 3 FCC Rcd 3743 (Mob. Serv. Div. 1988).

7. Had TDS held a greater than 1% interest in any of the Century Group applicants at the time the applications were filed, all applications in which TDS had an interest would have been dismissed as violative of Section 22.921(b) because Section 22.921(b) prohibits wireline carriers from having greater than 1% ownership interests in more than one application in the same market. However, UTELC0 was not an applicant in the Vernon RSA. Nonetheless, a violation of Section 22.921(b) occurred when UTELCO entered into the partial settlement agreement. Notwithstanding this violation, we decline to dismiss TDS's application because it would be inequitable to do so for three reasons. First, at the time it filed its application, TDS was in compliance with the Commission's Rules. After filing, Century Group formed a partial settlement group which included wireline carriers, such as UTELCO, who had not originally filed applications in the Vernon market. Century Group knew of TDS's ownership interest in UTELCO and, despite this knowledge, permitted UTELCO to join the settlement group. In these circumstances, it appears to be UTELCO's and Century Group's actions which led to the violation of Section 22.921(b) of the Rules and not TDS's actions.[5] Short of withdrawing its own application, TDS could do nothing more than object to UTELCO's entry into the partial settlement group.

8. Second, even if Century Group's theory were correct, a more appropriate sanction than dismissing only TDS's application would be to dismiss all Century Group applications and TDS's application since all of the these applications suffered from the rule violation.[6] This action would be inequitable to TDS because it was not within TDS's control to prohibit UTELCO from joining the settlement group.

9. Third, the cross-ownership rule is intended to prevent applicants from unfairly skewing the lottery by receiving cumulative chances to win a lottery. As such, the rule is intended to protect other applicants from being unfairly prejudiced in the lottery. Here, all the partial-settlment applicants had the power to veto UTELCO's participation in the settlement agreement. Whatever prejudice existed was wholly within their control and they failed to protect their own interests.[7] In these circumstances, we do not believe that dismissing TDS's application would be an appropriate sanction.

10. Similarly, we find that TDS has not violated Section 1.65 of the Rules. Petitioners' allegations regarding TDS' duty to disclose in its application the details of the partial settlement agreement are based on a misapplication of the obligations contained in *Requirements* 64 Rad. Reg. (P & F) at 1638. Section 1.65 obligates TDS, as an applicant, to maintain the continuing accuracy and completeness of its pending application. *Requirements* indicates that applicants should disclose the details of settlement agreements involving the applicant. TDS is not the controlling party in UTELCO which entered into the settlement agreement, and UTELCO was not an applicant in the Vernon RSA market. Particularly because the settlement agreement did not become effective when TDS won the lottery, TDS had no obligation to inform the Commission of the settlement.[8]

11. After carefully reviewing the facts and circumstances in the record before us, we affirm the grant of the application of Telephone and Data Systems, Inc.[9]

IV. CONCLUSION AND ORDERING PARAGRAPH

12. Accordingly, IT IS ORDERED, that the petition for reconsideration filed by Century Cellunet, Inc., *et. al.* IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Gerald P. Vaughn
Deputy Chief, Common Carrier Bureau

FOOTNOTES

[1] The Century Group consists of wireline carriers who are losing applicants in the Wisconsin-8 (Vernon) Rural Service Area Market Number 715-B (Vernon RSA) wireline lottery or who are non-applicant wireline carriers with a presence in the Vernon RSA.

[2] *Memorandum Opinion and Order*, 4 FCC Rcd 8021 (Mob. Serv. Div. 1989).

[3] Public Notice, Report No. CL-89-174 (June 9, 1989).

[4] Twelve wireline applicants entered the lottery for Market No. 715 Wisconsin - Vernon. Of these twelve applicants, TDS, GTE Mobilnet Incorporated (GTE) and Ameritech Mobile Communications, Inc. (Ameritech) did not enter into the partial settlement agreement. GTE and Ameritech did not file petitions against TDS.

[5] Century Group alleges that TDS somehow tricked it by withdrawing from the settlement at the last moment. TDS denies this allegation. Century Group could have written the settlement agreement to exclude UTELCO if TDS did not sign, but it failed to do so. TDS was under no legal obligation to protect Century Group's interest in the settlement.

[6] Under the circumstances, other equitable sanctions for violation of Section 22.921(b) would be to punish the settling applicants for permitting UTLECO to join the settlement or to punish UTELCO directly for entering into the partial settlement agreement.

[7] GTE and Ameritech were the only applicants other than TDS which could have been prejudiced by any technical violation of Section 22.921(b), and neither GTE nor Ameritech challenged TDS's application.

[8] Notwithstanding, the Commission did become aware of the partial settlement agreement, including UTELCO's involvement, through letters submitted prior to the lottery.

[9] To the extent that the MSD *Order* suggests that any contingent interest in a cellular application does not amount to an ownership interest within the meaning of Section 22.921(b)(1), the *Order* is overruled.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re application of

CENTRAPAGE OF VERMONT, INC. File No. 21766-CD-MP/L-90

For authority to construct
and operate a new facility
in the Public Mobile Service
on frequency 152.60 MHz for
Station KNKL401 at Goffstown,
New Hampshire

MEMORANDUM OPINION AND ORDER

Adopted: December 31, 1990; Released: January 15, 1991

By the Deputy Chief, Common Carrier Bureau:

I. BACKGROUND

1. On January 6, 1989, Centrapage of Vermont, Inc. ("Centrapage") was granted a Radio Station Authorization to construct a base station facility on frequency 152.60 MHz for Station KNKL401 at Goffstown, New Hampshire ("Goffstown facility"). On January 3, 1990, three days before the date of required completion, Centrapage filed a Request for Extension of Time ("Form 489 Notification") to complete construction of the Goffstown facility. By letter dated February 1, 1990, the Mobile Services Division ("MSD") denied Centrapage's request for extension of time and terminated the authorization for the Goffstown facility. On March 2, 1990, Centrapage filed a Petition for Reconsideration of the MSD decision. For the reasons set forth below, we deny Centrapage's Petition for Reconsideration.

II. CONTENTIONS

2. In its Petition for Reconsideration, Centrapage argues that the MSD erred in its decision to deny the request for extension of time and terminate the authorization because the MSD based its decision on three inaccuracies. First, Centrapage asserts that, in its February 1, 1990 letter, the MSD did not acknowledge the fact that in July of 1989, Centrapage had applied for a control station ("control link") for use with the base station facility at Goffstown, but did not receive authorization for this control link until November 8, 1989, just two months before the expiration of its construction permit for the Goffstown facility. Second, Centrapage argues that its Form 489 Notification, which it filed on January 3, 1990, contained an inconsistency between the answer to question 6(a), which indicated that equipment had not been delivered, and Exhibit E1, which indicated that equipment had been delivered. Centrapage avers that equipment had, in fact, been delivered and that it was ready to construct the facility. Third, Centrapage contends that by the time the application for a control station was granted in November of 1989, unexpectedly severe winter weather conditions in Goffstown precluded it from completing construction within the authorized time period.

III. DISCUSSION

3. Section 22.43, the controlling Commission Rule in this case, provides, in pertinent part, that:

> (a)(2) [T]he station must be completed and ready for operation, as shown by commencement of service within 12 months after the grant of the radio station authorization . . .
>
> (3) If construction is not completed within the time period set forth in this rule the authorization will automatically expire. Before the period for construction expires an application for an extension of time to complete construction (FCC Form 489) may be filed . . .
>
> (b)(1) . . . Extensions will be granted only if the licensee shows that the failure to complete construction is due to causes beyond his control. No extensions will be granted for lack of financing, site availability, for the assignment or transfer of control of an authorization, or for failure to timely order equipment. If the licensee orders equipment within 90 days of the license grant, a presumption of due diligence is created.

4. Initially, we note that Centrapage did not complete construction of the Goffstown facility and commence service within 12 months after the grant of its radio station authorization. Instead, on January 3, 1990, Centrapage filed a Form 489 Notification requesting additional time to construct. It explained that installation had not progressed due to (1) Centrapage's decision to wait for a control station permit and (2) severe winter weather in December of 1989. Additionally, we note that when Centrapage filed its original application for the Goffstown base station it did not at the same time file an application for a control station authorization. On July 12, 1989, 6 months after receiving its construction authorization for the Goffstown facility, Centrapage applied for a control station permit which was granted on November 8, 1989, two months before the Form 489 Notification was filed. What is more, Centrapages's Form 489 Notification did not specify how long an extension of time was required to bring the authorization into compliance with the Commission's Rules.

5. In its letter of February 1, 1990, denying the request for extension of time and terminating Centrapage's authorization, the MSD found that, in light of Centrapage's decision to wait for the grant of a control channel authorization, Centrapage's allegations of severe winter weather did not justify an extension of time. The MSD stated that the original Goffstown authorization had been granted on January 6, 1989, and that Centrapage had ample time to construct its Goffstown facilities during the spring, summer or fall of 1989 without encountering the problems inherent in severe winter weather conditions. It is clear from the facts presented in this case that the only reason that winter weather became a problem for Centrapage was because it waited for the control station permit.

6. Section 22.43(b)(1) of the Rules states that extensions of time to complete construction will only be granted if the authorization holder is unable to construct due to causes beyond its control. Centrapage's decisions to (1) wait until July 1989 to apply for a control facility and (2) wait for the grant of that application are both within its control. Centrapage could have constructed the Goffstown facility within the 12 month time period. In order to avoid the risk of constructing the Goffstown facility with a control authorization application pending, Centrapage should have requested all needed facilities at one time, rather than six months apart. In these circumstances, the MSD's decision to deny the open-ended extension request was correct.

7. Moreover, while it is true that the MSD did not acknowledge in its February 1, 1990 letter, that Centrapage's application for a control link was filed on July 12, 1989 and not granted until November 8, 1989, this omission has no bearing on the result of this case. Centrapage's decision to apply for the control link was wholly within its control, and does not justify an extension of time pursuant to Section 22.43(b)(1) for the base station facilities whose authorization was granted on January 6, 1989. Similarly, Centrapage's contention that its Form 489 Notification contained an inconsistency between the answer to question 6(a), indicating that equipment had not been delivered and Exhibit E1, which indicated that equipment had been delivered, is also without decisional significance. The MSD decision was not based on the presumption of due diligence in ordering equipment incorporated in Section 22.43 (b)(1) of the Rules, but rather on Centrapage's failure to demonstrate that it did not complete construction of its Goffstown facilities due to causes beyond its control. Because we find that Centrapage has offered no justification for a grant of an extension of time to complete construction, we need not consider whether Centrapage did or did not timely order equipment. Therefore, in light of the circumstances in this case, we deny Centrapage's Petition for Reconsideration.

IV. ORDERING PARAGRAPH

8. Accordingly, IT IS ORDERED that the Petition for Reconsideration filed by Centrapage of Vermont, Inc. IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Gerald P. Vaughn
Deputy Chief, Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Amendment of Section 61.58(a)(2)
of the Commission's Rules and
Regulations

ORDER

Adopted: December 26, 1990; Released: January 7, 1991

By the Commission:

1. By the Federal Communications Commission Authorization Act of 1990, Public Law 101-396 (FCCAA), the United States Congress, *inter alia*, amended Section 203 of the Communications Act, 47 U.S.C. § 203, to extend the maximum notice period for tariff filings from 90 to 120 days.[1] The current Section 61.58 of the Commission's Rules, 47 C.F.R. § 61.58, establishes notice periods for various types of tariff filings. Section 61.58(a)(2) delegates to the Chief, Common Carrier Bureau, authority to defer the effective date of any tariff filing to a maximum of 90 days.[2]

2. In order to allow the Chief, Common Carrier Bureau, to continue to exercise the full statutory authority granted this Commission to defer the effective date of tariff filings, Section 61.58 is hereby amended to conform to the amended Section 203 of the Communications Act.[3]

3. Accordingly, IT IS ORDERED that pursuant to Sections 4(i), 4(j), 203(b)(1), and 203(b)(2) of the Communications Act, 47 U.S.C. §§ 154(i), 154(j), 203(b)(1), 203(b)(2), and Section 1.412(b)(5) of the Commission's Rules, 47 C.F.R. § 1.412(b)(5), Section 61.58(a)(2) of the Commission's Rules, 47 C.F.R. § 61.58(a)(2), IS AMENDED as set forth in the Appendix to this Order. Pursuant to 5 U.S.C. § 553(d)(3), and in order expeditiously to implement the clear congressional mandate, this Order is effective upon release.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX

AMENDMENTS TO THE CODE OF FEDERAL REGULATIONS

Title 47 of the Code of Federal Regulations, Part 61, is amended as follows:

PART 61 -- TARIFFS

1. The authority citation for Part 61 continues to read as follows:

Authority: Sec. 4, 48 Stat. 1066, as amended; 47 U.S.C. 154. Interpret or apply Sec 203, 48 Stat. 1070; 47 U.S.C. 203.

2. Section 61.58 is amended by revising paragraph (a)(2) to read as follows:

§ 61.58

(a) * * *

(2) The Chief, Common Carrier Bureau, may require the deferral of the effective date of any tariff filing made on less than 120 days' notice, so as to provide for a maximum total of 120 days' notice, or of such other maximum period of notice permitted by Section 203(b) of the Communications Act, regardless of whether petitions under § 1.773 of the Commission's Rules have been filed.

* * * * *

FOOTNOTES

[1] Section 7 of the FCCAA amends Section 203(b)(1) and (2) of the Communications Act "by striking out 'ninety days' and inserting in lieu thereof 'one hundred and twenty days.'"

[2] Section 61.58(a)(2) reads as follows:

> [t]he Chief, Common Carrier Bureau may require the deferral of the effective date of any tariff filing made on less than 90 days' notice, so as to provide for a maximum total of 90 days' notice, regardless of whether petitions under § 1.773 of the Commission's rules have been filed.

[3] Notice and public comment are not required to effect this change. *See* Section 1.412(b)(5) of the Commission's Rules, 47 C.F.R. § 1.412(b)(5). *See also* 5 U.S.C. § 553(b)(A).

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: January 10, 1991

MEETING OF THE SYSTEMS SUBCOMMITTEE OF THE FCC ADVISORY COMMITTEE ON ADVANCED TELEVISION SERVICE

The 12th meeting of the Systems Subcommittee of the Advisory Committee on Advanced Television Service will be held at 10:00 a.m. on February 21, 1991, in Room 856 at the FCC's offices at 1919 M Street, N.W., Washington, D.C.

The agenda for the meeting is:

1. Introductory Remarks
2. Approval of Agenda
3. Approval of Minutes from November 6, 1990 Meeting
4. Status of Open Action Items from the Previous Meeting
5. Report on Mr. Wiley's Meeting with the System Proponents
6. Discussion of 4th Interim Report
7. Report on Subjective Test Materials
8. Report by Working Party 1 (Systems Analysis)
9. Report by Working Party 2 (System Evaluation and Testing)
    - A. Report on Field Test Procedures Plans
    - B. Report from the Laboratories
10. Report by Working Party 3 (Economic Assessment)
11. Report by Working Party 4 (System Standard)
12. Open Discussion
13. Next Meeting

All interested parties are invited to attend. Those interested may also submit written statements at the meeting. Oral statements and discussion will be permitted under the direction of the Committee Chairman.

Any questions regarding this meeting should be addressed to Dr. Irwin Dorros at (201) 740-3200 or Alan Stillwell at (202) 632-7060.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-608

In re Applications of

ROUND ROCK VENTURES (hereafter "RRV")	File No. BPH-880712MM
ROUND ROCK RADIO GROUP, INC. (hereafter "RRRGI")	File No. BPH-880713MG
ELINOR LEWIS STEPHENS (hereafter "Stephens")	File No. BPH-880714ML
AUGUST COMMUNICATIONS GROUP, INC. (hereafter "August")	File No. BPH-880714MN
CATHERINE DIAL EASLEY (hereafter "Easley")	File No. BPH-880714MR
ROCA REDONDO RADIO, INC. (hereafter "Roca")	File No. BPH-880714MT
VANTAGE BROADCASTING, A GENERAL PARTNERSHIP (hereafter "Vantage")	File No. BPH-880714MV
TRI-R FM (hereafter "Tri-R")	File No. BPH-880714MX
ROUND ROCK BROADCASTING, INC. (hereafter "RRBI")	File No. BPH-880714MZ
GRASS ROOTS RADIO, INC. (hereafter " GRRI")	File No. BPH-880714NJ
LYNN E. GERSTEIN (hereafter "Gerstein")	File No. BPH-880714NN
JIMMY L. RAY (hereafter "Ray")	File No. BPH-880714NU
RADIO ROUND ROCK LIMITED PARTNERSHIP (hereafter "Radio Round")	File No. BPH-880714MH (Dismissed Herein)

For Construction Permit for a
New FM Station on Channel 290C2 (105.9 MHz)
in Round Rock, Texas

and

TOM S. WHITEHEAD, INC. (hereafter "Whitehead")	File No. BPH-880527IB (Dismissed Herein)

For Modification of Facilities
For Station KWHI-FM
Brenham, Texas

HEARING DESIGNATION ORDER

Adopted: November 20, 1990; Released: January 16, 1991

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.

2. *Preliminary Matters.* By *Report and Order* in MM Docket No. 86-442, 3 FCC Rcd 2495 (1988) the Commission amended the Table of FM allotments to modify the license of Whitehead's Station KWHI-FM, Brenham, Texas to specify operation as a Class C2 facility on Channel 291. In that same *Report and Order* the Commission also added to the Table of FM Allotments Channel 290C2 at Round Rock, Texas. The *Report and Order* fixed the effective date of each allotment as June 13, 1988, gave Whitehead up to 90 days from the effective date to tender its resultant minor change application, and opened a filing window from June 14 to July 14, 1988 for the Round Rock allocation. In addition, in order for the proposed Round Rock and Brenham facilities to co-exist, the Commission stated that Channel 290C2 at Round Rock required a site restriction of 17.9 km (11.1 miles) west of the community.

3. On May 27, 1988, Whitehead filed an application to upgrade KWHI's facilities. GGRI, on July 15, 1988, filed a "petition to dismiss or deny and petition for reconsideration of acceptance" of Whitehead's application.[1] GGRI argues that Whitehead's application should be dismissed because it proposes a site that is 5.3 km short of the required 130 km for protection of the Commission's allotment at Round Rock. On December 16, 1988, Whitehead filed a "petition for reconsideration" of the acceptance for tender of the applications filed by the following Round Rock applicants; RRV, Radio Round, August [formerly Barger], Easley, Roca, Vantage, RRBI, GRRI and Ray. Whitehead alleges that these applications propose antenna locations short-spaced to its pending facilities modification proposal in varying distances from 0.1 to 4.0 km.[2]

4. An engineering review of Whitehead's application reveals that the application was inadvertently accepted for tender. First, the application was filed before the effective

date of the *Report and Order*. At the time of filing, no allocation existed for Channel 291C2 in Brenham, Texas. The allocation change did not officially occur until June 13, 1988, the effective date of the *Report and Order*. Pursuant to 47 C.F.R. § 73.203, applications may only be filed for allocations presently entered in the FM Table of Allotments (47 C.F.R. § 73.202(b)). This section further notes that no applications will be accepted for tender where an allocation has not been made, notwithstanding any petition for Rule Making that may be filed at that time. Accordingly, the application will be returned as inadvertently accepted for tender.

5. Furthermore, even had the application been tenderable, it would have been dismissed as unacceptable for filing for reasons which follow. [3] As of the close of the amendment of right period the application was in violation of 47 C.F.R. § 73.207 in that it was short spaced by 5.3 kilometers to the reference coordinates for the first adjacent Class C2 allocation in Round Rock, Texas. The proposed spacing is 124.7 km while the required spacing is 130 km. Whitehead apparently disregarded the site restrictions placed on both allotments to allow them to co-exist within the confines of the Commission's minimum distance separation requirements.

6. Whitehead recognized the short spacing and requested a waiver of § 73.207(a). However, the request does not contain a sufficient showing to justify a waiver of § 73.207(a).[4] When an applicant seeks waiver of a rule, it must plead with particularity the facts and circumstances which warrant such action. *Rio Grande Family Radio Fellowship, Inc.* v. *FCC*, 406 F2d 644 (D.C. Cir. 1968). We have afforded Whitehead's waiver request the "hard look" called for under the *WAIT* Doctrine, *WAIT Radio* v. *FCC*, 418 F2d 1153 (D.C. Cir. 1969), but find that the facts and circumstances set forth in Whitehead's justification are insufficient to establish that grant of the requested waiver would be in the public interest.

7. Additionally, an applicant proposing to relocate its transmitter to a short-spaced site must make a three-part threshold showing to justify a waiver of the spacing rules. The application must show: (i) that the present site is no longer suitable, *John Lamar Hill*, 70 FCC 2d 153 (Rev. Bd. 1978); (ii) that alternative, non-short-spaced sites are unavailable, *Carrol-Harrison Broadcasting, Inc.*, 62 FCC 2d 45, 46, (1976) and *Townsend Broadcasting Corp.*, 62 FCC 2d 511, 512, (1976); and (iii) that the proposed site is the least short spaced of all suitable sites, *Megamedia*, 67 FCC 2d 1527, 1528 (1978). After meeting the aforementioned tests, the applicant must still show that waiver of the spacing requirements would serve the public interest. Moreover, when seeking a waiver of this magnitude of our minimum spacing requirements, an applicant must produce concrete support, preferably documentary, that non-short-spaced and lessor short-spaced sites are unavailable. Such a showing typically consists of affidavits from real estate agents attesting to the lack of suitable land. Whitehead's application, as of the close of the amendment of right period, failed to provide any documentation to support its claim that suitable spaced sites were unavailable.[5] Therefore, Whitehead's request for waiver must be denied.

8. By amendment filed November 23, 1988, Whitehead provided additional information to supplement its original request for waiver of § 73.207(a). Furthermore, by amendment filed April 18, 1989, Whitehead provided supplemental information concerning its efforts to locate a suitable transmitter site near the reference point specified in the Commission's *Report and Order*. However, in the *Report and Order* in MM Docket 84-750, 50 Fed. Reg. 19193 (1985), *recon. denied*, 50 Fed. Reg. 43157 (1985), the Commission adopted strict rules governing acceptance of amendments for FM facilities. These rules provide that amendments which address the acceptability or grantability of an application may be filed as a matter of right any time prior to the expiration of the 30-day period triggered by release of the *Public Notice* announcing that the application has been accepted for tender. 50 Fed. Reg. at 19941; *see also* 47 C.F.R. § 73.3522(a)(6). Notwithstanding an applicant's arguments that "good cause" for accepting an amendment exists, the Commission's commercial FM processing rules are quite clear that applicants may not perfect their applications by filing a curative amendment to correct an acceptability or grantability defect after the time for filing amendments as of right has passed. Whitehead's application was put on *Public Notice* for acceptance for filing and simultaneously for acceptance for tender on June 20, 1988. Whitehead, therefore, had until July 21, 1988 to file amendments as a matter of right. Therefore, Whitehead's November 23, 1988 and April 18, 1989 amendments were untimely filed and accordingly, even if tenderable, Whitehead's application remained unacceptable for filing.[6]

9. Accordingly, based on the foregoing, Whitehead's petition for reconsideration dated December 16, 1988, will be denied and the petition to dismiss or deny and petition for reconsideration of acceptance filed by GGRI will be dismissed as moot.

10. *Radio Round.* An engineering review of Radio Round's application reveals the proposed operation exceeds the maximum facilities allowed under the United States-Mexican Agreement, 24 U.S.T. 1815, T.I.A.S. No. 7697. This agreement limits Class C2 facilities within 320 km of the Mexican border to 50 kw effective radiated power (ERP) and 150 meters antenna height above average terrain (HAAT). For applicants whose HAAT exceeds 150 meters, the ERP power must be appropriately derated in accordance with Annex IV of the agreement. Radio Round proposes a HAAT of 298 meters, which would limit the ERP to 9.3 kw. Radio Round's application proposes an ERP of 11.5 kw. The limitations set forth in the agreement were not considered in Radio Round's application. *See, e.g., Kerrville Radio, A Limited Partnership*, 2 FCC Rcd 3441 (1987); *Kerr County Broadcasting*, 4 FCC Rcd 5021 (1989). Accordingly, Radio Round's application will be dismissed as inadvertently accepted for filing.

11. *RRBI.* Information before the Commission indicates that RRBI was organized and is affiliated with Sonrise Management Services ("Sonrise"). Sonrise has been the subject of numerous "real party-in-interest" issues added by presiding Administrative Law Judges in a number of mutually exclusive proceedings. For example, issues concerning Sonrise have been designated in each of the following proceedings:

City/State	Docket No.
Solona, Florida	87-464
Rockledge, Florida	87-556
Silver Springs, Florida	88-119
East Ridge, Tennessee	88-122
Des Moines, Iowa	88-238
Nags Head, North Carolina	88-277
Tyler, Texas	88-280
Raleigh, North Carolina	88-306
Sedona, Arizona	88-335
Mableton, Georgia	88-400
Evansville, Indiana	88-403
Swanton, Ohio	88-432
Atlantic City, New Jersey	88-433

Identical issues were specified in each of these proceedings: whether or not Sonrise was a real party-in-interest in the subject applicant, whether or not the applicant's organizational structure was a sham, and the effect thereof on the applicant's qualifications to be a Commission licensee. In each of the proceedings listed above, the Sonrise-affiliated applicant has dismissed its application rather than resolving these issues. These unresolved issues call into question RRBI's qualification to be a Commission licensee. Therefore, such issues will be specified and tried against RRBI in this proceeding.

12. RRBI's proposal indicates that it is in the process of forming a corporation which will become the applicant. RRBI has not amended its application to indicate that such a corporation has been formed. Accordingly, RRBI will be required to submit an amendment to the presiding Administrative Law Judge, within 30 days of the release of this Order, indicating whether the corporation represented as the applicant for its instant proposal has indeed been formed.

13. *RRV*. The Commission requires that if there will be five or more fulltime station employees, the applicant must complete and file Section VI of Form 301, and supply a statement detailing hiring and promotion policies for women and each minority group whose representation in the available labor force is five percent or greater in the proposed service area. Although RRV has filed such statement, it is deficient. RRV has not listed specific sources of recruitment specializing in minority candidates. Accordingly, RRV will be required to file an amended EEO program with the presiding Administrative Law Judge, within 30 days of the release of this Order, or an appropriate issue will be specified by the Judge.

14. *Roca*. Roca proposes to mount its antenna on an existing tower structure. However, the tower data submitted in Section V-G of FCC Form 301 in Roca's application is inconsistent with that contained in the Commission's records. Roca lists the overall height above ground level (AGL) as 259 meters and the overall height above mean sea level (AMSL) as 564. Commission records indicate heights of 161.2 meters AGL and 472 meters AMSL for the existing tower. Because Roca is clearly proposing to mounts its antenna on an existing tower structure that is contained in the Commission's records, this discrepancy is neither a tenderability nor an acceptability defect and may be corrected by an amendment. Accordingly, Roca must either file an amendment with the presiding Adminstrative Law Judge within 30 days of the release of this Order correcting the heights listed in its application, or submit documentation to establish that the heights specified are, in fact, correct and the Commission's records are in error. In addition, because of the discrepancies in the heights an FAA issue will be specified.

15. *Tri-R*. Tri-R's application, as amended on April 5, 1990, indicated that it was applying for a Class C facility instead of a Class C2 as authorized by the Commission in the instant proceeding. However, because the ERP and HAAT parameters specified in Tri-R's amendment are for Class C2 facilities per 47 C.F.R. § 73.211, we can confidently and reliably determine that Tri-R is applying for a C2 facility. Accordingly, Tri-R will be required to file an amendment with the presiding Administrative Law Judge within 30 days of the release of this Order correcting this discrepancy.

16. On January 19, 1990, October 24, 1989, April 5, 1990 and January 3, 1990, August, Vantage, Tri-R, and Ray, respectively, petitioned for leave to amend their applications after the last day for filing amendments as of right. The subject amendments were accompanied by the good cause showing required by 47 C.F.R. § 73.3522(a)(2); consequently, the amendments are accepted for filing. However, an applicant may not improve its comparative advantage after the time for filing amendments as of right has passed. Therefore, any comparative advantage resulting from the amendments will be disallowed.

17. The applicants below have petitioned for leave to amend their applications on the dates shown. The accompanying amendments were filed after the last day for filing minor amendments as of right. Under 47 C.F.R. § 1.65 the amendments are accepted for filing. However, an applicant may not improve its comparative position after the time for amendments as of right has passed. Therefore, any comparative advantage resulting from the amendments will be disallowed.

APPLICANTS	DATE(S) FILED
Stephens	December 15, 1989
August	October 23, 1989
Vantage	August 24, 1989
GRRI	January 9, 1989, May 31, 1989 December 11, 1989 (engineering)
Gernstein	October 18, 1990
Ray	March 23, 1989, February 7, 1990

18. The Federal Aviation Administration has determined that the antenna proposed by RRV, RRRGI, Stephens, August, Roca, Vantage, Tri-R, RRBI, GRRI, Gerstein and Ray would constitute a hazard to air navigation. Accordingly, an issue with respect thereto will be included and the FAA made a party to the proceeding.

19. Attempts to obtain FAA clearance through the Commission's Antenna Survey Branch and Easley have been unsuccessful. Accordingly, since no determination has been received as to whether the antenna proposed by Easley would constitute a hazard to air navigation, an issue with respect thereto will be included and the FAA made a party to the proceeding.

20. Data submitted by the applicants indicate there would be significant difference in the size of the areas and populations which would receive service from the propos-

als. Consequently, the areas and populations which would receive FM service of 1 mV/m or greater intensity, together with the availability of other primary aural services in such areas, will be considered under the standard comparative issue for the purpose of determining whether a comparative preference should accrue to any of the applicants.

21. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

22. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

> 1. To determine whether Sonrise Management Services, Inc. is an undisclosed party to the application of RRBI.
>
> 2. To determine whether RRBI's organizational structure is a sham.
>
> 3. To determine, from the evidence adduced pursuant to Issues 1 through 2 above, whether RRBI possesses the basic qualifications to be a licensee of the facilities sought herein.
>
> 4. To determine whether there is a reasonable possibility that the tower height and location proposed by the RRV, RRRGI, Stephens, August, Easley, Roca, Vantage, Tri-R, RRBI, GRRI, Gerstein and Ray would constitute a hazard to air navigation.
>
> 5. To determine which of the proposals would, on a comparative basis, best serve the public interest.
>
> 6. To determine, in light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

23. IT IS FURTHER ORDERED, That Whitehead's application for a modification of facilities (BPH-880527IB) IS DISMISSED as inadvertently accepted for tender.

24. IT IS FURTHER ORDERED, That the petition for reconsideration filed by Whitehead on December 16, 1988 against RRV, Radio Round, August [formerly Barger], Easley, Roca, Vantage, RRBI, GRRI and Ray IS DENIED and the petition to dismiss or deny and petition for reconsideration of acceptance filed by GGRI on July 15, 1988 against Whitehead IS DISMISSED AS MOOT.

25. IT IS FURTHER ORDERED, That Whitehead's September 22, 1989 amendment stylized a "request to separately process application" is untimely and IS DISMISSED.

26. IT IS FURTHER ORDERED, That the application of Radio Round IS DISMISSED as inadvertently accepted for filing.

27. IT IS FURTHER ORDERED, That RRBI shall submit an amendment in accordance with paragraph 12 hereinabove to the presiding Adminstrative Law Judge within 30 days of the release of this Order.

28. IT IS FURTHER ORDERED, That within 30 days of the release of this order, RRV shall submit Section VI information in accordance with the requirement of Section 73.2080(c) of the Commission's Rules to the presiding Administrative Law Judge.

29. IT IS FURTHER ORDERED, That Roca shall submit an amendment in accordance with paragraph 14 hereinabove to the presiding Administrative Law Judge within 30 days of the release of this Order.

30. IT IS FURTHER ORDERED, That Tri-R shall submit an amendment in accordance with paragraph 15 hereinabove to the presiding Administrative Law Judge within 30 days of the release of this Order.

31. IT IS FURTHER ORDERED, That the petitions for leave to amend filed by Stephens, August, Vantage, Tri-R, GRRI, Gerstein and Ray ARE GRANTED, and the corresponding amendments ARE ACCEPTED to the extent indicated herein.

32. IT IS FURTHER ORDERED, That the Federal Aviation Administration IS MADE A PARTY to this proceeding with respect to the air hazard issue only.

33. IT IS FURTHER ORDERED, That a copy of each document filed in this proceeding subsequent to the date of adoption of this Order shall be served on the counsel of record in the Hearing Branch appearing on behalf of the Chief, Mass Media Bureau. Parties may inquire as to the identity of the counsel of record by calling the Hearing Branch at (202) 632-6402. Such service shall be addressed to the named counsel of record, Hearing Branch, Enforcement Division, Mass Media Bureau, Federal Communications Commission, 2025 M Street, N.W., Suite 7212, Washington, D.C. 20554. Additionally, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall also be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Federal Communications Commission, Room 350, 1919 M Street, N.W., Washington, D.C. 20554.

34. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

35. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

FOOTNOTES

[1] Procedurally, a petition to deny does not lie against a minor change application. *See* 47 U.S.C. § 309(d)(1). Accordingly, GGRI's petition will be considered as an informal objection.

[2] Section 1.45 sets out the pleading cycle for responsive pleadings and authorizes the filing of oppositions against petitions to deny and the filing of replies against oppositions. As to pleadings outside that cycle, 47 C.F.R. § 1.45(c) states that "[a]dditional pleadings may be filed only if specifically requested or authorized by the Commission." The Commission made no such request and gave no such authorization in the instant case. Therefore, the pleadings filed outside of the cycle were not considered.

[3] We note that the application, although inadvertently accepted for tender, was nevertheless placed on a notice for tender and acceptance on June 20, 1988. Accordingly, Whitehead had until July 21, 1988 to submit curative amendments correcting any acceptability defects. *See* the discussion in paragraph 8 below.

[4] In support of the requested waiver Whitehead stated: "No suitable site could be found within the very small area imposed by the new allocation of Channel 290C2 at Round Rock, Texas. All of the land in the area is owned by large ranching interests,. none of whom would make available a plat of land suitable for construction of the proposed facilities."

[5] It is noted that Whitehead's original application did not contain an explanation as to the unavailability of land in the area of the coordinates it proposed to the Commission in its petition for Rule Making. Furthermore, Whitehead did not explain why it was not able to find an available site at or near the coordinates specified for Brenham in the *Report and Order* in Docket 86-442, *supra*, - coordinates of a site that comply with the site restrictions imposed by the Commission.

[6] Whitehead's September 22, 1989 amendment, stylized a "request to separately process application" is also untimely and will be dismissed.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-305

In re Applications of

AUDREY R. MORRIS	File No. BPH-880630ME
MGR LIMITED PARTNERSHIP	File No. BPH-880630NO
CAROLINA COMMUNICATIONS V LIMITED PARTNERSHIP	File No. BPH-880630NU

For Construction Permit for
New FM Station, Channel 262A,
Pawley's Island, South Carolina

ORDER

Adopted: January 7, 1991; Released: January 17, 1991

By the Review Board: MARINO (Chairman), and BLUMENTHAL.

1. On November 21, 1990, the Review Board by *Order*, 5 FCC Rcd 6966, deferred action on an Appeal filed by Audrey R. Morris, at her request, pending resolution of a proposed settlement agreement. By *Memorandum Opinion and Order*, FCC 90M-3894, released December 10, 1990, Administrative Law Judge Miller approved that settlement agreement and terminated the proceeding.

2. ACCORDINGLY, IT IS ORDERED, That the Appeal from Presiding Judge's Interlocutory Order Concerning Privileged Documents filed September 26, and corrected September 28, 1990, by Audrey R. Morris IS DISMISSED as moot.

FEDERAL COMMUNICATIONS COMMISSION

Joseph A. Marino
Chairman, Review Board

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Applications of

CALIFORNIA BROADCASTING CORPORATION Ventura, California	**BC DOCKET NO. 80-698** File No. BPCT-790130LP
CHANNEL ISLANDS TELEVISION CORPORATION Ventura, California	**BC DOCKET NO. 80-699** File No. BPCT-790103LQ

For a Construction Permit

MEMORANDUM OPINION AND ORDER

Adopted: December 21, 1990; Released: January 16, 1991

By the Commission:

1. This proceeding involves mutually exclusive applications for a new television station in Ventura, California filed by Channel Islands Television Corporation (CITC) and California Broadcasting Corporation (CBC). The Review Board affirmed the ALJ's initial decision, 98 FCC 2d 1003 (1984), disqualifying CITC on character and financial issues, and the supplemental initial decision, FCC 86D-28 (Apr. 9, 1986), also disqualifying CBC. *California Broadcasting Corp.*, 2 FCC Rcd 4175 (1987). The Board found that neither applicant was qualified to be a Commission licensee, and refused to approve a settlement agreement between them.

2. Having examined the pleadings before us,[1] we agree with the Board that CITC and CBC are basically unqualified to be Commission licensees. With regard to the financial issues, the Board is correct that neither applicant was ever financially qualified. 2 FCC Rcd at 4195 n.3. Despite certifying in their applications that all statements contained therein were "true, complete, and correct to the best of [their] knowledge and belief, and [were] made in good faith," both applicants supplied false financial information in their applications. These deficiencies in the original applications provide ample basis for their denial. We further find that approval of the proposed settlement agreement between CBC and CITC will not serve the public interest. Accordingly, we will deny the applicants' Applications for Review.

3. CITC is currently comprised of its majority stockholder, Ralph Andrews, and 17 minority stockholders. The proposed settlement agreement provides for the dismissal of CBC's application, the withdrawal of majority stockholder Ralph Andrews from CITC, the transfer of Andrews' stock to four of CITC's other stockholders, and the grant of a construction permit to an entity comprised of CITC's 17 remaining stockholders. After grant of a construction permit to CITC, CITC will go into partnership with an unrelated third party, Roger McKinnon, to form Ventura Broadcasting Partnership (VBP). VBP will then acquire CITC's construction permit and build the proposed station. Initially. VBP will be 85 percent owned by CITC and 15 percent owned by McKinnon. However, McKinnon has options to acquire an additional 34 percent of VBP within two years. After the station has been operating for three years, McKinnon may, subject to CITC's right of first refusal, acquire another 26 percent of VBP.

4. The agreement recites that CITC principal Ralph Andrews and CBC principal Harry Keiffer, allegedly responsible for the disqualifying conduct of CITC and CBC respectively, will receive substantially less than they expended in prosecuting their respective applications. There is no comparable representation as to whether CITC's 17 other stockholders stand to realize a profit as a result of their agreement with MacKinnon, either initially or upon the future exercise by MacKinnon of his various options to increase his interest in the permittee.

5. For the reasons provided below, we agree with the Board that the withdrawal of CITC's 50.1% stockholder, Ralph Andrews, who is also chairman and chief executive officer of CITC, at this stage of the proceeding does not render it fully qualified to be a Commission licensee. In other words, CITC cannot escape the consequences of Andrews' wrongdoing by securing his withdrawal from the applicant, particularly at this late stage of the proceeding. Thus, we will deny the proposed settlement without regard to the proposed role of non-party McKinnon and we need not reach the question of whether the participation of a third party would also warrant denial of this settlement.[2]

6. In rejecting the settlement agreement between CITC and CBC, the Review Board relied on *Kannapolis Television Co.*, 1 FCC Rcd 1037 (1986). There we rejected a settlement agreement that contemplated the grant of a construction permit to an unqualified applicant because "[i]t is well established that construction permits may be awarded only to fully qualified applicants." 1 FCC Rcd at 1039. However, after the Board's decision in this case, we granted reconsideration and approved the proposed settlement in *Kannapolis*. 3 FCC Rcd 2676 (1988). Nevertheless, for the reasons set forth below, we believe that *Kannapolis* is distinguishable, and that approval of the settlement agreement between CBC and CITC would disserve the public interest.

7. In *Kannapolis* the Review Board assessed a decisive character demerit against Commmunity Action Communications, Inc. because of the misconduct of its principal, Rev. D. Garland Faw, and denied its application on comparative grounds. *Focus Television Co.*, 98 FCC 2d 546 (Rev. Bd. 1984). Before the Commission acted on pending applications for review and a settlement agreement in *Kannapolis*, it adopted its *Policy Regarding Character Qualifications in Broadcast Licensing*, 102 FCC 2d 1179 (1986), which expressly applies to pending adjudicatory proceedings. *Id.* at 1235 ¶ 121.

8. The *Character Policy Statement* eliminated character as a *comparative* factor in licensing proceedings such as that case. *Id.* at 1232 ¶ 113. In view of this change in Commission policy, the Commission reevaluated the misconduct of Faw, who was Chairman of the Board of Community, proposed general manager, and a voting member of Community's owner, Truth Temple. *Kannapolis Television Co.*, 1 FCC Rcd 1037, 1038-39 ¶¶

12-15 (1986). It determined that Community was basically unqualified, and rejected the settlement agreement because it provided for the grant of Community's application. 1 FCC Rcd at 1039 ¶¶ 16-18.

9. On reconsideration, the Commission accepted an amendment reporting Faw's resignation and complete withdrawal from Community, approved the settlement agreement, and granted Community's amended application. *Kannapolis Television Co.*, 3 FCC Rcd 2676 (1988). The Commission found that Community had acted diligently in securing Faw's departure from Community, and that the amendment reporting his resignation as an officer and director of Community was therefore supported by good cause, as 47 C.F.R. § 73.3522(b) requires. In concluding that Community's amendment was supported by good cause, the Commission noted that the Board assessed only a comparative demerit against Community under a character issue concerning Faw's misconduct, and that the Commission did not conclude that Faw's conduct was basically disqualifying until after Community submitted its original settlement agreement. Thus, the Commission reasoned that Community may have concluded that the elimination of character as a *comparative* factor in the *Character Policy Statement* removed any stigma from Faw's misconduct. Under these circumstances, the Commission refused to penalize Community for not severing its connection with Faw in the original settlement agreement. *Id.* at 2676-77 ¶ 7.

10. In other words, rather than following the wait-and-see approach taken by the applicants in this case, Community diligently secured Faw's withdrawal before the end of the thirty day period for seeking reconsideration of the order disapproving the settlement. In contrast, there is no comparable basis for concluding that CITC acted diligently in securing the removal of its majority stockholder, Ralph Andrews. The ALJ disqualified CITC on March 21, 1984 based on Andrews' misconduct. Yet, CITC waited more than three years before reporting in its May 21, 1987 Petition for Leave to Amend filed with the Review Board that Andrews had resigned as president, treasurer, and director of CITC. Given this more than three year delay in entering into the settlement, the amendment reporting Andrews' withdrawal from CITC is not supported by good cause, as section 73.3522(b) requires for post-designation amendments. Under these circumstances, we conclude that Andrews' departure from CITC does not provide a basis for finding it qualified to be a Commission licensee, and we will not approve the settlement agreement.

11. From a public interest standpoint, CITC's clear lack of due diligence offsets its claim that approval of the settlement agreement would potentially expedite the start of new broadcast service to the community of Ventura. As the Court of Appeals has explained, the Commission has not adopted "a *per se* rule excusing the want of diligence whenever the defect to be cured by amendment is disqualifying." *Royce International Broadcasting Co. v. FCC*, 820 F.2d 1332, 1337-38 (D.C. Cir. 1987). In fact, we are concerned that, given CITC's lack of diligence, permitting CITC to remove Andrews at this stage of the proceeding would delay the resolution of future adjudicatory proceedings. By disapproving this agreement on this basis, we encourage applicants in other proceedings to evaluate their postures, with respect to the standard comparative issue and any basic qualifying issues, and to address any problems promptly.

12. ACCORDINGLY, IT IS ORDERED, That, pursuant to 47 U.S.C. § 155(c)(5) and 47 C.F.R. § 1.115(g), the Application for Review, filed September 11, 1987, by California Broadcasting Corporation, and the Application for Review, filed September 11, 1987, by Channel Island Television Corporation ARE DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] Now before the Commission are: (a) an Application for Review, filed September 11, 1987, by CBC; and (b) an Application for Review, filed September 11, 1987, by CITC.

[2] *See Rebecca Radio of Marco*, 5 FCC Rcd 937 (1990), recon. denied, 5 FCC Rcd 2913 (1990), appeal pending sub nom. *Rowland Gulf, Inc. v. FCC*, No. 90-1308 (D.C. Cir. June 11, 1990), where the Commission denied a proposed settlement because of the participation of a third party.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Application of

CAGAL CELLULAR COMMUNICATIONS CORPORATION File No. 12573-CL-P-123-A-86

For a construction permit to establish
a cellular system operating on Frequency
Block A in the Domestic Public Cellular
Radio Telecommunications Service in the
Santa Rosa-Petaluma, California
Metropolitan Statistical Area.

MEMORANDUM OPINION AND ORDER

Adopted: December 19, 1990; Released: January 16, 1991

By the Commission:

1. R. Grant Singleton ("Singleton") has filed an Application for Review of the action taken by the Mobile Services Division ("MSD") granting the captioned application of Cagal Cellular Communications Corporation ("Cagal") and denying the petition to deny filed by Singleton. *Cagal Cellular Communications Corporation*, 2 FCC Rcd 4270 (1987) ("*MSD Order*"). Cagal has filed an Opposition to Singleton's Application for Review.[1]

I. BACKGROUND

2. Cagal filed an application for the Santa Rosa-Petaluma, California Metropolitan Statistical Area on February 3, 1986. It won the lottery[2] and its application was placed on public notice listing it as the non-wireline tentative selectee. [3] Competing applicants Singleton (who was the second-ranked applicant), Roam-Tel Communications ("Roam-Tel"), and United States Cellular Corporation ("U.S. Cellular") filed petitions to deny contending that Cagal's application contained numerous technical defects. On August 6, 1986, Cagal filed a consolidated reply to the three petitions. Subsequently, on March 16, 1987, Cagal filed a Memorandum in Support of Corrective Amendment and Clarification of Record (collectively, "corrective amendment") regarding its application. The corrective amendment contained: (a) the equipment supplier's original equipment and construction cost estimates, (b) Cagal's June 18, 1986 balance sheet and a current balance sheet, and (c) corrected coordinate and elevation data for each of Cagal's cell sites, with corresponding adjustments to antenna designs, tower height, and effective radiated power ("ERP").[4] Singleton filed a response to Cagal's corrective amendment contending that Cagal's application was so blatantly defective that it could not be cured by corrective amendment. In its order, the MSD rejected Singleton's arguments, as well as the other petitions to deny, found Cagal's application as amended to be consistent with the Commission's Rules, and granted Cagal's application. Thereafter, Singleton filed his Application for Review.[5]

II. CONTENTIONS

A. Singleton's arguments

3. In his Application for Review, Singleton first asserts that the MSD erred by refusing to return Cagal's application as unacceptable for filing, pursuant to Section 22.26(b) of the Commission's Rules.[6] In support, Singleton argues that the engineering parts of Cagal's application were completely deficient when filed and, thus, Cagal's application was a skeleton application containing little more than its correct Cellular Geographic Service Area ("CGSA") boundary. Singleton argues that the errors in engineering data in Cagal's original application were of the kind that require application dismissal under precedent established in *Sainte Broadcasting Corporation*, 60 R.R. 2d (P&F) 1377 (1986) ("*Sainte*"). Singleton also argues that *Offshore Telephone Co.*, 2 FCC Rcd 4575 (Mob. Serv. Div. 1987) ("*Offshore*"), *application for review denied*, 3 FCC Rcd 4601 (1988), stands for the proposition that the Commission can reinvestigate its finding of acceptability where it later finds upon review that an application is defective and should be dismissed.

4. Singleton then argues that the *MSD Order*'s determination that Cagal's application was not deficient relies on erroneous findings of fact. Singleton states that two findings in the *MSD Order* -- that the engineering configuration of Cell A contained no defect, and that Cagal properly recomputed its coordinates for all cell sites based on data contained in Cagal's original submission -- are unsupported in the record. According to Singleton, Cagal admitted in its corrective amendment that the Cell A engineering in the original application filed was based on faulty location and elevation information and required the computation of new coverage data.[7] Moreover, Singleton asserts, there is nothing in the original application from which the correct coordinates and elevations of the sites could be determined by either Cagal or the Bureau. Singleton argues that Cagal conceded in its corrective amendment that the engineering exhibits in the original application were based on incorrect coordinates.[8]

5. Next, Singleton asserts, no explanation was given in the *MSD Order* for: the denial of Singleton's request for a hearing, the conclusion that Cell A's engineering was not defective, the failure to address the application's acceptability for filing, and the departure from precedent by permitting a major post-processing engineering amendment to cure defects in the application. Thus, Singleton states, the *MSD Order* violated Section 309(d)(2) of the Communications Act, 47 U.S.C. Sec. 309(d)(2), because the *MSD Order* did not "issue a concise statement of the reasons for denying the petition, which statement shall dispose of all substantial issues raised by the petition."

6. Singleton also argues that the MSD erred by allowing Cagal to file a major amendment after the cut-off period and after the application had been reached by the staff for processing on May 19, 1986 (*i.e.*, the date the Commission announced Cagal as the non-wireline tentative selectee). According to Singleton, under *Moore's Service*,[9] the corrective amendment Cagal filed ten months after the application was reached for processing was a major amendment and, therefore, could not cure serious defects

that were present when Cagal initially filed its application. Singleton argues that Cagal's corrective amendment changed virtually every aspect of a seriously defective engineering showing and, thus, cannot be deemed a minor amendment.

7. Finally, Singleton contends that an evidentiary hearing is required because Cagal's corrective amendment raised numerous substantial and material issues of fact concerning the application. Singleton identifies the following as substantial questions of fact which require resolution in a hearing:

> (1) the facts and circumstances by which Cagal determined cell-site coordinates and elevations in its original application and certified those descriptions as correct;
>
> (2) whether Cagal took proper steps to verify the accuracy of the information contained in its application;
>
> (3) whether Cagal's reaffirmation of the correctness of virtually all of its engineering data contained in its consolidated reply pleading and corrective amendment constitutes a lack of candor with the Commission or demonstrates Cagal's ineptness to operate a cellular system in fulfillment of the responsibilities of a Commission licensee;
>
> (4) whether the site locations specified in Cagal's application, consolidated reply pleading, or the corrective amendment were actually intended as describing the same sites;
>
> (5) whether Cagal had reasonable assurance of site availability at the time of filing or at any later time or had falsely certified that it had such assurance;
>
> (6) whether Cagal's endorsement of its engineering consultant's qualifications in its consolidated reply is contradicted by the implicit admission in the corrective amendment that its consultant's engineering determinations were incorrect;
>
> (7) the facts and circumstances surrounding Cagal's false certification to the Commission that its system would cover 75% of its CGSA with 39 dBu contours, as originally proposed;
>
> (8) whether the deficiencies in Cagal's application as originally filed render Cagal technically unqualified to be a licensee;
>
> (9) the facts and circumstances concerning the filing of Cagal's admittedly incorrect financial amendment;
>
> (10) whether, in light of the careless preparation of this application, Cagal's cavalier response to the petitions to deny, and the fact that its application was prepared by a mass-marketer of cellular applications, Cagal sincerely intended to construct and operate a cellular system when it filed its application.

Singleton cites *Citizens for Jazz on WRVR v. FCC*, 775 F.2d 392 (D.C. Cir. 1985), for the proposition that when the Commission is faced with allegations involving substantial and material questions of fact, it must make a determination as to whether a hearing is warranted. Singleton argues that the *MSD Order* is devoid of any such determination.

8. Singleton subsequently filed a Supplement to his Application for Review, claiming that he recently discovered new evidence that Cagal never had a reasonable assurance of the availability of one of its four cell sites. Singleton claims that Marion L. Davis, the owner of the land on which Cagal proposes to erect a tower for its cell site D, has never had any contact or conversations with either Cagal or any agent of Cagal concerning the use of her land. Singleton appended Mrs. Davis' July 24, 1988 declaration stating that there is no lease between herself and Mr. Dale Westerterp ("Westerterp") (who is a partner of DBD Associates, which is the tenant on Mrs. Davis' land) to use the land as a cellular antenna site location. Consequently, Singleton contends that the site-availability letter included in Cagal's application and signed by Westerterp representing that the tower site would be available upon the execution of a lease is untrue. Singleton has also appended the July 24, 1988 declaration of Col. Davis, Mrs. Davis' husband, supporting her declaration. Singleton, in his supplement, requests a hearing to resolve this site-availability issue.

B. Cagal's arguments

9. Cagal responds that its corrective amendment was properly accepted because it was a minor amendment pursuant to Section 22.918 of the Rules [10] and that the changes made in the corrective amendment are of the type routinely accepted by the Commission. Cagal contends that the corrective amendment merely conformed coordinates, elevations, and antennas for each cell to the sites submitted with the original application and described in the original site letters. In reply to Singleton's Supplement, Cagal submits a copy of a lease dated January 27, 1984, between Col. and Mrs. Davis, and DBD Associates which states that DBD Associates is authorized to "sublease space for radio equipment for purpose of communications service." Cagal asserts that after Singleton filed its Supplement, Cagal's Vice President, Dr. Lawrence Rosenthal ("Rosenthal") showed Col. Davis a copy of the lease, and that Col. Davis admitted that DBD Associates did enter into a lease with Col. and Mrs. Davis for the site. Cagal appends Rosenthal's Declaration to this effect and an August 29, 1988 statement, jointly signed by both Col. and Mrs. Davis, conceding that contrary to their previous declarations, they had indeed signed a lease with DBD Associates for the use of their land. Cagal thus concludes that it had a reasonable assurance of the availability of the location for cell site D.[11]

III. DISCUSSION

10. We first must determine whether the engineering/technical errors that Singleton found in Cagal's application render it unacceptable for filing under Section 22.20 of the Rules.[12] Review of applications continues after lottery selection, and post-lottery errors might still be found which render an application defective. We agree with the *MSD Order* that the errors complained of by Singleton do not render Cagal's application defective under Section 22.20. The errors were minor in nature, and the Commission has previously found that such minor engineering errors do not render an application defective and unacceptable for filing so long as "the information contained in the application is generally complete, and the defects at issue did not hinder the processing of the application." *See e.g.*, *Timothy Roper*, 4 FCC Rcd 4070,

4071 (1989).[13] Although Cagal's application contained some errors, there were no material omissions or inconsistencies that, in the absence of the amendment, would have prevented the staff from processing the application. Having found the application acceptable for filing, the next question is the permissibility of the amendment. The amendment was a minor, not major amendment and was, therefore, permissible.[14] Specifically, Cagal's amendment corrected coordinates and site elevations for each cell originally identified in the application.[15]Furthermore, as the *MSD Order* specifically stated:

> [t]he corrected coordinates and elevations for each cell site as well as other changes have been permissibly adjusted to maintain cell coverage as originally intended. Further, the CGSA has not been changed, no 39 dBu contours extend beyond the CGSA or beyond the originally proposed extensions, and the 39 dBu contours still maintain 75% coverage of the CGSA.

MSD Order, 2 FCC Rcd at 4271.[16]

11. Moreover, contrary to Singleton's argument, the rule in *Moore's Service* is not applicable to cellular applications. *See Florida Cellcom*, 2 FCC Rcd 7044 (Com. Car. Bur. 1987). Section 22.918, not *Moore's Service*, governs cellular amendments and specifically permits tentative selectees, such as Cagal, to file minor amendments after the lottery.[17]

12. With respect to Singleton's argument that a hearing must be held to resolve substantial questions of fact concerning the errors in Cagal's application, parties challenging an application and who seek a hearing must satisfy a two-prong test established in 47 U.S.C. Sec. 309(d)(1) and (2). *See Astroline Communications Company Limited Partnership*, 857 F.2d 1556, 1557 (D.C. Cir. 1988) ("*Astroline*"). The protesting party must present "specific allegations of fact sufficient to show . . . that a grant of the application would be prima facie inconsistent with [the public interest, convenience, and necessity]." 47 U.S.C. Sec. 309(d)(1). The Commission must proceed "on the assumption that the specific facts set forth [in the petition] are true." *Citizens for Jazz on WRVR v. FCC*, 775 F.2d at 397. If the Commission determines that the petitioning party satisfies the threshold standard, the inquiry proceeds to a second phase. Having found that such party has alleged a *prima facie* case that grant of the application would be inconsistent with the public interest, the Commission determines whether, "on the basis of the application, the pleadings filed, or other matters which it may officially notice[,] . . . a substantial and material question of fact is presented." 47 U.S.C. Sec. 309(d)(2). *See also Gencom, Inc. v. FCC*, 832 F.2d 171, 181 (D.C. Cir. 1987). In summary, if the Commission concludes that such a question of fact has been raised, or if it cannot, for any reason, find that grant of the application would be consistent with the public interest, it must conduct a hearing in accordance with 47 U.S.C. Section 309(e)

13. In light of the foregoing, and as discussed in detail below, we disagree with Singleton that the MSD should have granted Singleton's request for an evidentiary hearing.[18]

14. Issues (1), (2), and (6) in paragraph 7, *supra*, and the minor engineering errors referred to therein, do not present a *prima facie* case that Cagal engaged in misrepresentation or lack of candor or is otherwise unqualified to be a licensee. No facts have been presented to suggest any intent to deceive the Commission or such gross carelessness as to render Cagal unqualified. With reference to site availability (issues (4) and (5) in paragraph 7, *supra)*, with the exception of Cell site D, which we discuss in paragraph 16, *infra*, no facts at all have been alleged to support the argument that Cagal failed to obtain reasonable assurance of site availability, and, thus, Singleton has not met prong 1 of the *Astroline* test.[19] Similarly, there has been no *prima facie* case that Cagal intentionally deceived the Commission in connection with its site-availability certification. Singleton's allegation (issue (7) in paragraph 7, *supra)* that Cagal falsely certified in its original application that its system would cover 75% of its CGSA with 39 dBu contours fails to raise a substantial and material question of fact. As the *MSD Order* correctly found, Cagal's original application proposed a system whose 39 dBu contours maintained 75% coverage of the CGSA. 2 FCC Rcd at 4271. In the first part of issue (3), Singleton argues that a hearing is required on whether Cagal's reaffirmation in its consolidated reply pleading of the correctness of its original engineering data raises issues regarding Cagal's lack of candor. Cagal explained in its corrective amendment that subsequent to the filing of its consolidated reply pleading, it retained new legal counsel and a new consulting engineer to independently review its application. As a result of this review, Cagal states, minor inconsistencies in the application were found and it was therefore determined that a corrective amendment should be filed. In light of this explanation, and in view of the fact that we have already concluded that the errors in Cagal's application as originally filed were in fact minor, we find no substantial and material question of fact regarding lack of candor. Singleton, in the second part of issue (3) and in issue (8), argues that Cagal is unqualified technically to be a Commission licensee because of its "ineptness" in submitting its original engineering proposal. As noted above, the minor errors in Cagal's application do not raise a *prima facie* case that it is so careless as to be unqualified to be a licensee. Nor do they make a *prima facie* case that it lacks the requisite technical qualifications.

15. Moreover, Issue (9) in paragraph 7, *supra*, regarding Cagal's incorrect financial amendment does not present a *prima facie* case that the application cannot be granted. Cagal conceded in its corrective amendment that, in its application as originally filed, it had mistakenly submitted construction and equipment costs for its proposed cellular system from an equipment vendor who was not in fact chosen by Cagal. In its corrective amendment, Cagal submitted construction and equipment costs from the correct vendor, which were considerably higher. However, as the *MSD Order* correctly found, Cagal's financial commitment letter contained sufficient funds to cover even the higher costs. In these circumstances, we find that Cagal met the Commission's financial showing requirement in Section 22.917 of the Rules and that its error was minor. In issue (10), Singleton alleges that Cagal's careless preparation of its application, its allegedly cavalier response to the petition to deny, and the fact that it used a mass-marketer of cellular applications to prepare its application, demonstrate that Cagal never intended to construct its cellular system. Even if we accept all of these facts as true, Single-

ton has not presented a *prima facie* case that Cagal's application should not be granted. None of these allegations, if true, logically lead to the conclusion that Cagal was not a sincere applicant. Therefore, no hearing is required on this issue.

16. We also conclude that no hearing is required regarding the allegations raised by Singleton in his Supplement. Singleton established a *prima facie* case for a hearing by alleging specific allegations of fact which, if true, could result in the denial of Cagal's application, namely, that Cagal did not have reasonable assurance of one cell site. Notwithstanding, we conclude, based on the evidence of record, that Singleton has not satisfied the second prong of the *Astroline* test with respect to the site-availability issue. Specifically, we find that Cagal's Reply to the Supplement demonstrates that Cagal had a reasonable assurance of cell site D. The jointly signed August 29, 1988 statement of Col. and Mrs. Davis appended to Cagal's Reply specifically states that Col. and Mrs. Davis "suddenly realized that we had signed a lease with DBD [Associates] in 1984." Their joint declaration goes on to say that Col. and Mrs. Davis "received a copy [of the lease] only recently." They acknowledge that "we are now fully aware of the 1984 lease between DBD Associates and [Col. and Mrs. Davis]." There is no dispute that their jointly signed declaration was signed approximately one month after Col. and Mrs. Davis signed their individual declarations that were appended to Singleton's Supplement declaring that they had not leased the site to Cagal. We thus find that the contents of the August 1988 joint declaration of Col. and Mrs. Davis effectively repudiate their individual July 1988 declarations, and no evidence has been presented to the contrary. Accordingly, we conclude that, contrary to Singleton's argument, the record demonstrates that DBD Associates had the authority to sublease the cell site location for Cell D to Cagal, and that, consequently, Cagal did have a reasonable assurance that the site was available, as required by the rules. In summary, we conclude that, with reference to the ten hearing issues proposed by Singleton, either no *prima facie* case has been raised or no substantial and material question of fact has been presented, and therefore, no hearing is required.

17. For the foregoing reasons, we conclude that Cagal's application was acceptable as originally filed, that its corrective amendment contained permissible minor amendments to its application, that Cagal had reasonable assurance of site availability at the time it originally filed its application, and that a hearing was not required to resolve Singleton's allegations. Therefore, we find that the Bureau properly granted Cagal's application, affirm the *MSD Order*, and deny Singleton's Application for Review.

IV. ORDERING PARAGRAPH

18. Accordingly, IT IS ORDERED that the Application for Review filed by R. Grant Singleton IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] Additionally, Singleton has filed a motion for Leave to File Reply to Opposition to Application for Review ("Motion") and a Reply. Cagal in turn filed an Opposition to Motion for Leave to File Reply, a Motion for Leave to File Response to Reply, and a Response to Reply. Singleton also filed a Motion for Waiver of Section 1.115(d) of the Commission's rules, requesting permission to file a supplement to his Application for Review, and a Supplement to his Application for Review. Cagal thereafter filed an Opposition to Motion for Waiver and Reply to Supplement. We need not address Singleton's first Motion because Singleton's filing of a reply is authorized. *See* Ronald F. Trinchitella, 4 FCC Rcd 6360, 6362 n. 4 (1989). Moreover, in the interests of having a complete record for our consideration, we will consider all of the additional pleadings that have been submitted.

[2] *See* Public Notice, Mimeo No. 4024 (released April 23, 1986), which announced the results of the lottery.

[3] *See* Public Notice, Report No. CL-86-161 (released May 19, 1986).

[4] Cell A was amended to specify a higher tower and antenna placement, higher ERP, and a directional antenna. Cell B was amended in minor respects. Cell C was amended to lower ERP and top-mount the antenna on a shorter tower. Cell D was amended to specify lower ERP, utilize a different antenna, and top-mount the antenna on a shorter tower. The coordinates of all four cell sites were also slightly modified.

[5] Neither Roam-Tel nor U.S. Cellular has filed an application for review of the *MSD Order*. Cagal constructed its system and received a license to operate the system on January 11, 1989.

[6] Section 22.26(b) provides in pertinent part:

> Acceptance of an application for filing merely means that it has been the subject of a preliminary review as to completeness, Such acceptance will not preclude the subsequent return or dismissal of the application if it is found to be defective or not in accordance with the Commission's rules.

[7] Singleton states that Cagal's amendment shows that the latitude specified in the application, *i.e.*, 38^0 40' 55"N., was incorrect and that the correct latitude was 38^0 41' 18"N., and that the correct elevation was 560 feet, not 900 feet.

[8] Singleton states that Cagal contacted the site owners, determined where transmitters could be located, based on 7 1/2 minute maps that were not included in the original application, and supplied the new coordinates from the new site survey.

[9] Allen C. Moore d/b/a Moore's Service, 86 FCC 2d 787 (Com. Car. Bur. 1981).

[10] Section 22.918 relates to amendment of cellular applications. *See* note 14, *infra*.

[11] Cagal contends that Singleton's accusations are moot because Cagal determined prior to the filing of Singleton's Supplement that Cell site D should be relocated at a higher elevation and, thus, has obtained an option to lease a new location for cell site D. This contention is irrelevant to our determination of whether the applicant had a reasonable assurance of site availability at the time it originally filed its application, as required by the rules.

[12] Section 22.20(a) states in pertinent part that an application will be unacceptable for filing and returned to the applicant if:

> (1) The application is defective with respect to completeness of answers to questions, informational showings, execution or other matters of formal character, or

> (2) The application does not comply with the Commission's rules, regulations, specific requirements for additional information, or other requirements.

[13] It is far from clear that cases in the Low Power Television (LPTV) service are directly relevant in the cellular context. In any event, to the extent they are relevant, this case is unlike *Sainte* (cited by Singleton) in which there was an inconsistency in the antenna height data in the application that prevented further processing. Moreover, precise coordinate and antenna height data is crucial in the LPTV context which is licensed by sites, and not so important in the cellular context which is licensed on a system-wide basis using the CGSA concept.

[14] Sections 22.23 and 22.918 of our Rules relate to the amendment of appications. In particular, Section 22.23(c) discusses major and minor amendments and states that all amendments are classified as minor except that an amendment shall be deemed a major amendment if the amendment: (1) results in a substantial change in the engineering proposal such as (a) a change in, or addition of a radio frequency or (b) a change in the class of station; (2) enlarge the reliable service area of proposed base station facilities by more than a certain amount; (3) results in an increase in the Cellular Geographic Service Area ("CGSA"); or (4) specifies a substantial change in beneficial ownership or control of an applicant. Cagal's corrective amendment does not contain any changes that fall into any classification deemed a major amendment under Section 22.23(c), and was therefore a minor amendment. Section 22.918(b), which relates to cellular markets 91 and beyond and Rural Service Areas, permits minor amendments but no major amendments except those listed in Section 22.23(g).

[15] We accept Cagal's argument that its re-computation of its site coordinates was based on the site letters which were filed with the original application. (A cellular site letter is a letter that contains the name of the owner of a site and indicates the site's availability for the construction of cellular facilities.) We accept Cagal's statement in its corrective amendment that the original site owners were consulted to determine the corrected coordinates. Although the *MSD Order* erred when it stated that, "there is no defect insofar as the configuration of Cell A is concerned[.]" 2 FCC Rcd at 4271, we conclude that such error is not decisionally significant and, thus, nonprejudicial. The Commission does not return applications for such minor errors in describing a cell-site configuration. *Accord, Jacksonville Cellular Telephone Corporation*, 3 FCC Rcd 5386 (1988). As the *MSD Order* correctly found, the corrected coordinates and their associated elevations contained in the corrective amendment were minor changes. *Id.* In addition, the *MSD Order* correctly noted that other changes were permissibly made. Those changes (such as antenna designs, tower height, and ERP), while not specifically listed by the *MSD Order*, were made to maintain cell coverage as close as possible to the originally intended coverage.

[16] Singleton's reliance on *Offshore* is similarly misplaced. There, the applicant applied for a wireline frequency but was found not to be engaged in the business of providing public landline service and, thus, did not comply with Section 22.902(b)(2) of the Rules (which relates to eligibility for the assignment of frequencies, depending upon the nature of the applicant). Consequently, unlike Cagal's application, the *Offshore* application contained a fundamental defect, *i.e.*, the applicant was ineligible to apply for the frequency block it selected, which rendered the application unacceptable for filing.

[17] As *Florida Cellcom* correctly points out, our rules for cellular applications subject to lottery disposition went into effect several years after *Moore's Service* was decided. *Moore's Service* stands for the proposition that a fatally defective mutually exclusive application that has not been returned and is cured before the application is reached for processing will be retained on file and given comparative consideration. In contrast to the situation in *Moore's Service*, the errors in Cagal's original application were not serious enough to justify dismissing its application pursuant to Section 22.20 of our rules. Because Cagal's application did not contain fatal defects, even the *Moore's Service* case would not have required dismissal of Cagal's application.

[18] Because we are explicitly considering and rejecting Singleton's request for a hearing in this Order, we find the MSD's failure to do so to be non-prejudicial. In addition, it is not necessary to address Singleton's allegation that the MSD failed to discuss the acceptability for filing of Cagal's application because we here rule on the acceptability of Cagal's application under our filing standards.

[19] We note that the corrected coordinates differed only slightly (0.46 mile for cell site A; 0.45 mile for cell site B; 300 feet for cell site C; 0.33 mile for cell site D) from those stated in the application as originally filed. These discrepancies are not so great as to suggest that Cagal did not originally intend to use the cell sites for which it submitted site letters, and Singleton has proffered no evidence to contend otherwise.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Petition for Rule Making
to Modify the Commission's
Regulation of International
Common Carrier Services
Provided by Foreign Owned U.S.
Common Carriers

RM 7578

ORDER EXTENDING COMMENT PERIOD

Adopted: January 4, 1991; Released: January 7, 1991

By the Chief, International Facilities Division:

1. On December 12, 1990, the Commission issued a public notice of a petition for Rule Making in the above-captioned matter filed by Cable & Wireless Communications, Inc. (C&W). Comments on the petition are currently due to be filed by January 14, 1991.

2. On December 28, 1990, British Telecommunications plc (BT) filed a motion requesting an extension of time until January 28, 1991, for the submission of comments in the above-referenced petition for Rule Making. BT requests additional time because the comment period largely coincides with the holidays when key personnel are not available, particularly in the United Kingdom. In addition, BT believes the extension will serve the public interest by permitting a more adequate analysis of the issues raised and a better record upon which the Commission can base a decision. BT states that no parties will be prejudiced by this slight delay. C&W has indicated that it will not oppose the request so long as the Commission finds good cause to grant the extension request.

3. Extensions of time are not routinely granted. *See* 47 C.F.R. Section 1.46(a). The proximity of a filing date to a holiday is generally not a sufficient reason for an extension. In this case, however, we agree with BT that no parties will suffer any prejudice by this delay. We therefore find good cause to grant the requested extension of time.

4. Accordingly, IT IS ORDERED, pursuant to the authority set forth in Section 1.46(b) of the Commission's Rules and Regulations, 47 C.F.R. Section 1.46(b), that all interested parties will have until **January 28, 1991,** to file comments and until **February 12, 1991,** to file reply comments in the above-captioned matter.

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-500

In the matter of

Definition of Congested Areas in
the Broadcast Auxiliary Services and
the Cable Television Relay Service.

ORDER EXTENDING TIME FOR FILING COMMENTS AND REPLY COMMENTS

Adopted: January 3, 1991; Released: January 4, 1991

By the Chief, Mass Media Bureau:

1. On November 14, 1990, the Commission released a *Notice of Proposed Rule Making* ("NPRM") in MM Docket No. 90-500 that proposed a definition of geographical areas that are "subject to frequency congestion."[1] This definition is based on an area being within a Metropolitan Statistical Area (MSA) as determined by the Department of Commerce and will be needed to determine the appropriate antenna performance standards for fixed auxiliary and cable television relay stations. The antenna standards are scheduled to become effective for all stations on October 1, 1991.[2] The deadlines for filing comments and reply comments were, respectively, January 4, 1991 and January 18, 1991.

2. On December 27, 1990, the Society of Broadcast Engineers, Incorporated (SBE), requested an extension of the comment period. SBE indicates that it is conducting a survey of its affiliated frequency coordinating committees to develop a complete recommendation regarding MSAs that should be excluded from the "congested area" requirements and sites that are outside of any MSA that nevertheless should be included as a "congested area." In order to complete the survey, compile the results, and submit them in its comments, SBE requests that the filing deadlines be extended by 45 days.

3. SBE filed the petition for rule making that initiated this proceeding. Their continued participation by filing comprehensive comments on our proposal should provide valuable assistance in our effort to establish an effective definition. Accordingly, while we are reluctant to delay action in this proceeding, we are persuaded that the extension now under consideration should be approved.

4. Accordingly, IT IS ORDERED THAT the request to extend the comment date filed by the Society of Broadcast Engineers, Incorporated IS GRANTED. The date for filing comments in this proceeding IS EXTENDED to February 18, 1991 and the date for filing reply comments IS EXTENDED to March 11, 1991. No further extensions of these dates are contemplated.

5. This action is taken pursuant to authority found in Sections 4(i) and 303(r) of the Communications Act of 1934, as amended, and Sections 0.204(b), 0.283, 1.45 and 1.46 of the Commission's Rules.

6. Further information may be obtained from Hank VanDeursen, Mass Media Bureau, Engineering Policy Branch, (202) 632-9660.

FEDERAL COMMUNICATIONS COMMISSION

Roy J. Stewart
Chief, Mass Media Bureau

FOOTNOTES

[1] *See Notice of Proposed Rule Making,* MM Docket No. 90-500, Rcd 6687 (1990), 55 Fed. Reg. 48260, published November 20, 1990.

[2] *See* Sections 74.536, 74.641 and 78.105 of the Comission's Rules.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

CHARTER NETWORK COMPANY,
Complainant,

v. File No. E-90-283

CENTRAL TELEPHONE COMPANY OF ILLINOIS
Defendant.

ORDER

Adopted: January 4, 1991; Released: January 15, 1991

By the Chief, Enforcement Division, Common Carrier Bureau:

1. On May 18, 1990, Charter Network Company (hereinafter "Charter") filed with the Commission the above-captioned formal complaint against Central Telephone Company of Illinois (hereinafter "Central") seeking recovery of damages for Central's alleged overearnings on interstate access services for the period January 1, 1987 through December 31, 1988. In accordance with Commission rules governing formal complaint proceedings, Central filed an answer to the complaint.

2. The parties to the above-captioned complaint have conducted discussions aimed at settling the complaint. As a result of these negotiations, the parties state that a mutually agreeable settlement of all pending controversies was reached. On December 17, 1990, the parties filed a joint motion seeking dismissal of the complaint with prejudice. We are satisfied that dismissal of the complaint will serve the public interest by eliminating the need for further litigation and the expenditure of further time and resources of the parties and of this Commission.

3. Accordingly, IT IS ORDERED, pursuant to authority delegated by Section 0.291 of the Commission's Rules, 47 C.F.R. 0.291, that the Joint Motion to Dismiss the above-captioned complaint IS GRANTED and that the proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Mary Beth Richards
Chief, Enforcement Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

COM SYSTEMS, INC.,
Complainant,

v. File No. E-90-192

CONTEL OF CALIFORNIA, INC.,
Defendant.

ORDER

Adopted: January 4, 1991; Released: January 15, 1991

By the Chief, Enforcement Division, Common Carrier Bureau:

1. On May 18, 1990, Com Systems, Inc. (hereinafter "Com Systems") filed with the Commission the above-captioned formal complaint against Contel of California, Inc. (hereinafter "Contel") seeking recovery of damages for Contel's alleged overearnings on interstate access services for the period January 1, 1987 through December 31, 1988. In accordance with Commission rules governing formal complaint proceedings, Contel filed an answer to the complaint.

2. The parties to the above-captioned complaint have conducted discussions aimed at settling the complaint. As a result of these negotiations, the parties state that a mutually agreeable settlement of all pending controversies was reached. On December 14, 1990, the parties filed a joint motion seeking dismissal of the complaint with prejudice. We are satisfied that dismissal of the complaint will serve the public interest by eliminating the need for further litigation and the expenditure of further time and resources of the parties and of this Commission.

3. Accordingly, IT IS ORDERED, pursuant to authority delegated by Section 0.291 of the Commission's Rules, 47 C.F.R. 0.291, that the Joint Motion to Dismiss the above-captioned complaint IS GRANTED and that the proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Mary Beth Richards
Chief, Enforcement Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

LITEL TELECOMMUNICATIONS CORP.,
Complainant,

v.

CENTRAL TELEPHONE COMPANY OF ILLINOIS and — File No. E-90-338
CENTRAL TELEPHONE COMPANY OF NEVADA, — File No. E-90-339
Defendants.

ORDER

Adopted: January 4, 1991; Released: January 15, 1991

By the Chief, Enforcement Division, Common Carrier Bureau:

1. On May 18, 1990, Litel Telecommunications Corp. (hereinafter "Litel") filed with the Commission formal complaints against Central Telephone Company of Illinois and Central Telephone Company of Nevada (hereinafter the "Defendants") seeking recovery of damages for Defendants' alleged overearnings for the period January 1, 1987 through December 31, 1988. In accordance with Commission rules governing formal complaint proceedings, the Defendants filed answers to the complaints.

2. The parties to the above-captioned complaints have conducted discussions aimed at settling the complaints. As a result of these negotiations, the parties state that a mutually agreeable settlement of all pending controversies was reached. On December 17, 1990, the parties filed a joint motion seeking dismissal of the complaints with prejudice. We are satisfied that dismissal of the complaints will serve the public interest by eliminating the need for further litigation and the expenditure of further time and resources of the parties and of this Commission.

3. Accordingly, IT IS ORDERED, pursuant to authority delegated by Section 0.291 of the Commission's Rules, 47 C.F.R. 0.291, that the Joint Motion to Dismiss the above-captioned complaints IS GRANTED and that the proceedings ARE TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Mary Beth Richards
Chief, Enforcement Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: January 9, 1991

PLEADING CYCLE ESTABLISHED FOR COMMENTS ON UNITED'S PETITION FOR WAIVER OF COMMISSION'S EQUAL ACCESS IMPLEMENTATION REQUIREMENTS FOR INDEPENDENT TELEPHONE COMPANIES

On November 30, 1990, United Telephone Company of Indiana and United Telephone Company of Ohio (United) filed a petition for waiver of the equal access implementation requirements for independent telephone companies. United requests that the Commission exempt United from implementing equal access for those offices with ITT 1210 switches. According to United, on March 15, 1988, it received a letter that could be construed as a request for an equal access conversion from MCI Telecommunications Corporation (MCI). Pursuant to Commission order, United is required to complete equal access conversion of stored-program-controlled switches within three years of the request date. *See MTS and WATS Market Structure*, CC Docket No. 78-72, Phase III, (Report and Order), 100 FCC 2d 860 (1985).

United characterizes MCI's initial letter regarding equal access as vague. United states that on May 26, 1988, it requested that MCI clarify its intent with regard to United's equal access conversion process. United asserts that MCI did not respond to its request until June 26, 1989, at which time MCI stated that it considered March 15, 1988 as the request date for equal access conversion. United states that in October 1989 it met with MCI to discuss the problems associated with equal access conversion. United contends that MCI stated that it considered the three-year conversion period to be flexible as long as United continued to work toward improving its equal access conversion schedules. However, according to United, during an August 1990 meeting, MCI inquired whether United would be meeting its equal access conversion deadline of March 1991. United argues that the three-year time period should expire in August 1993 since MCI did not request equal access until August 1990.

In addition, United claims that the characteristics of its stored-program-controlled switches make it financially infeasible to implement equal access because they require processor as well as software upgrades. United argues that the costs associated with equal access conversion for those offices with ITT 1210 switches outweigh the benefits to the users.

Interested parties should file comments on the petition by **January 22, 1991,** and reply comments by **February 1, 1991,** with the Secretary, FCC, 1919 M Street, N.W., Washington, D.C. 20554. A copy should also be sent to Peggy Reitzel, Common Carrier Bureau, FCC, Room 544, 1919 M Street, N.W., Washington, D.C. 20554, and to the Commission's contractor for public service records duplication: Downtown Copy Center, 1114 21st Street, N.W., Washington, D.C. 20037. Copies of the petition can be obtained from ITS at (202) 452-1422.

For further information contact Peggy Reitzel, Policy and Program Planning Division of the Common Carrier Bureau, at (202) 632-4047.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: January 9, 1991

PLEADING CYCLE ESTABLISHED FOR COMMENTS ON MONTROSE MUTUAL TELEPHONE COMPANY'S PETITION FOR WAIVER OF COMMISSION'S EQUAL ACCESS IMPLEMENTATION REQUIREMENTS FOR INDEPENDENT TELEPHONE COMPANIES

On December 14, 1990, Montrose Mutual Telephone Company (Montrose) filed a petition for waiver of the Commission's equal access implementation requirements for independent telephone companies. In March 1988, Montrose received a letter from MCI Telecommunications Corporation (MCI) requesting that Montrose convert its facilities to equal access. Pursuant to Commission order, end offices equipped with electromechanical switches should be converted to equal access as soon as practicable and are not held to a specific timetable, whereas end offices equipped with stored program-controlled switches are required to convert to equal access within three years of a reasonable request. *See MTS and WATS Market Structure,* CC Docket No. 78-72, Phase III, (Report and Order), 100 FCC 2d 860 (1985).

Montrose states that the three year time period will end in March 1991, and it seeks an additional fifteen months, until June 1, 1992, to complete the equal access conversion. Montrose states that its existing step-by-step switch is not capable of equal access, but it is in the process of taking bids on a digital switch. Montrose states that although it has an aggressive plan to implement equal access, the conversion of its four exchanges to digital technology will consume a substantial amount of time and resources of its personnel. Montrose anticipates that the new digital switch with equal access capability will be installed by June 1992. Montrose states that MCI has agreed to the new completion date.

Interested parties should file comments on this petition by **January 22, 1991,** and reply comments by **February 1, 1991,** with the Secretary, FCC, 1919 M Street, N.W., Washington, D.C. 20554. A copy should also be sent to Peggy Reitzel, Common Carrier Bureau, FCC, Room 544, 1919 M Street, N.W., Washington, D.C. 20554, and to the Commission's contractor for public service records duplication: Downtown Copy Center, 1114 21st Street, N.W., Washington, D.C. 20037. Copies of the petition can be obtained from Downtown Copy Center at (202) 452-1422.

For further information contact Peggy Reitzel, Policy and Program Planning Division of the Common Carrier Bureau, at (202) 632-4047.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

HUGHES COMMUNICATIONS GALAXY CORPORATION — File No. I-T-C-90-172

Application for authority to utilize the Galaxy VI domestic satellite (formerly Westar VI-S) for the provision of one-way transborder services from the United States) to Latin American and Caribbean locations, and one-way and two-way transborder services between the United States and Canada and Mexico.

SATELLITE TRANSPONDER LEASING CORPORATION — File No. I-T-C-90-173

Application for authority to provide one-way transborder services from the United States to Latin America and Caribbean locations, and one-way and two-way transborder services between the United States and Canada and Mexico via the SBS-4, SBS-5 and SBS-6 domestic satellite systems.

CONTEL FEDERAL SYSTEMS CORPORATION — File No. I-T-C-90-182

Application for authority to provide transborder services between the United States and any and all countries via any and all satellite systems that have been or will in the future be consulted under Article XIV(d) of the INTELSAT Agreement.

AMERICAN SATELLITE COMPANY d/b/a Contel ASC — File No. I-T-C-90-185

Application for authority to provide transborder services between the United States and any and all countries via any and all satellite systems that have been or) will in the future be consulted under Article XIV(d) of the INTELSAT Agreement.

GTE SPACENET CORPORATION — File No. I-T-C-91-016

Application for authority to utilize its GSTAR IV satellite for the provision of two-way transborder services between the U.S.) and Canada and Mexico and one-way service from the U.S. to Latin American/Caribbean locations

HUGHES NETWORK SYSTEMS CORPORATION — File No. CSG-90-040-ML

Application for authority to modify its license for a 7.6-meter fixed Ku-band transmit/receive hub earth station (Call Sign E881109) at Germantown, Maryland and 1,000 1.0-meter fixed Ku-band transmit/receive VSAT earth stations (Call Sign E900192) for the provision of one-way transborder services from the United States to Canada, Mexico, and Latin America, and two-way transborder services between the U.S. and Canada and Mexico via all satellites that have been or will in the future be consulted under Article XIV(d) of the INTELSAT Agreement.

CBS, INC. — File No. CSG-90-068-ML

Application for authority to modify its license for a 6.1-meter fixed Ku-band transmit/receive earth station (Call Sign E880111) at New York, New York for the provision of one-way transborder services between the United States and various countries and two-way transborder services between the U.S. and Canada and Mexico via any and all satellites that have been or will in the future be consulted under Article XIV(d) of the INTELSAT Agreement.

VASTARR BUSINESS SERVICES, INC. File No. CSG-90-083-(3)-ML

Application for modification of the license for its three 5.5-meter Ku-band antennas (Call Sign E2579) at Chicago, Illinois and network of 1.8-meter (Call Sign E880818) and 2.4-meter (Call Sign E880819) VSAT earth stations for the provision of transborder services between the U.S. and various locations via all satellites consulted under Article XIV(d) of the INTELSAT Agreement and to use antenna #2 of E2579 to communicate with the PAS-1 satellite for services to those countries PAS is authorized to serve

AMERICAN SATELLITE COMPANY d/b/a Contel ASC File No. CSG-90-095-ML

Application for authority to modify the license for its 12.0-meter and 13.0-meter fixed C-band transmit/receive earth stations (Call Sign E7465) at Ellenwood, Georgia for the provision of transborder services between the United States and various countries via any and all satellites that have been or will in the future be consulted under Article XIV(d) of the INTELSAT Agreement and to communicate with the PAS-1 satellite

CHEVRON INDUSTRIES, INC. File No. CSG-90-102-ML

Application for authority to modify its license for a Ku-band VSAT network consisting of a 6.1-meter hub station (Call Sign E900688) at San Ramon, California and up to 5000 1.0-meter (Call Sign E900691), 1.8-meter (Call Sign E900690) and 2.4-meter (Call Sign E900689) earth stations to provide transborder services between the U.S. and Canada and Mexico

VITACOM SATELLITE SERVICES CORPORATION File No. CSG-90-104-ML

Application for authority to modify the license for its 7.0-meter fixed Ku-band transmit/receive earth station (Call Sign E890989) at Mountain View, California to add as points of communication all U.S. domestic satellites and the Anik and Morelos satellites for the provision of transborder services

VITACOM SATELLITE SERVICES CORPORATION File No. CSG-90-105-ML

Application for authority to modify the license for its 3.7-meter fixed C-band transmit/receive earth station (Call Sign E900848) at Kennedale, Texas to add as points of communications all U.S. domestic satellites and the Mexican Morelos satellite system for the provision of transborder services between the U.S. and Mexico

PHAR-MOR, INC. File No. CSG-90-107-(3)-ML

Application for authority to modify the license for its Ku-band band VSAT network consisting of a 6.1-meter fixed hub station at Youngstown, Ohio and up to 1,000 1.8-meter and 2.4-meter earth stations to provide transborder services between the U.S. and various locations consulted under Article XIV(d) of the INTELSAT Agreement

AMERICAN SATELLITE COMPANY d/b/a CONTEL ASC File No. CSG-90-112-ML

Application for authority to modify the license for its 4.1-meter fixed Ku-band transmit/receive earth station (Call Sign E870520) at Washington, D.C. to provide transborder services between the U.S. and various locations consulted under Article XIV(d) of the INTELSAT Agreement

CONTEL FEDERAL SYSTEMS, INC. File No. CSG-90-114-ML

Application for authority to modify the license for its two 12.0-meter fixed C-band transmit/receive antennas (Call Sign E4373) at Ft. Meade, Maryland to add as points of communication all U.S.

domestic satellites and the Anik and Morelos satellites for the provision of transborder services between the U.S. and various locations consulted under Article XIV(d) of the INTELSAT Agreement

EQUATORIAL COMMUNICATIONS COMPANY File No. CSG-90-115-ML

Application for authority to modify the license for its 11.0-meter fixed C-band transmit/receive earth station at Mountain View, California to provide transborder data services between the U.S. and various countries consulted under Article XIV(d) of the INTELSAT Agreement

AMERICAN SATELLITE COMPANY d/b/a CONTEL ASC File No. CSG-90-118-ML

Application for authority to modify the license for its 9.0-meter fixed C-band transmit/receive earth station (Call Sign E880472) at Vallejo, California to provide transborder services between the U.S. and various countries via all satellites consulted under Article XIV(d) of the INTELSAT Agreement

AMERICAN SATELLITE COMPANY d/b/a CONTEL ASC File No. CSG-90-128-ML

Application for authority to modify the license for its 8.1-meter fixed C-band transmit/receive earth station (Call Sign E860593) at Staten Island, New York to provide transborder services between the U.S. and various countries via all satellites consulted under Article XIV(d) of the INTELSAT Agreement

TANDEM COMPUTERS INC. File No. CSG-91-007-ML

Application for authority to modify the license for its 7.0-meter fixed Ku-band transmit/receive earth station (Call Sign E890346) at Cupertino, California to provide transborder services between the U.S. and various locations via satellites consulted under Article XIV(d) of the INTELSAT Agreement for transborder services

DIGITAL EQUIPMENT CORPORATION File No. CSG-91-010-ML

Application for authority to modify its license for a 5.6-meter fixed Ku-band transmit/receive earth station (Call Sign E880049) at Bedford, Massachusetts for the provision of transborder services between the United States and Canada and Mexico via all U.S. domestic satellites.

COMPUTER POWER, INC. File No. CSG-91-012-ML

Application for authority to modify the license for its 8.1-meter fixed Ku-band transmit/receive earth station (Call Sign E873409) at Jacksonville, Florida to provide transborder services between the U.S. and Canada and Mexico via satellites consulted under Article XIV(d) of the INTELSAT Agreement

MEMORANDUM OPINION, ORDER AND AUTHORIZATION

Adopted: December 18, 1990; Released: January 17, 1991

By the Chief, International Facilities Division:

1. The Commission has under consideration the above-captioned applications requesting authority under Title II and Title III of the Communications Act of 1934, as amended, to establish channels of communications via domestic satellite facilities and modify existing domestic satellite earth station licenses to provide transborder services between the United States and Canada and Mexico, and one-way transborder services from the United States to Caribbean, Latin American and South American locations. The Commission also has under consideration applications requesting modification of existing earth station licenses to add the PAS-1 satellite as a point of communication for services to those countries which the Commission has authorized PAS-1 to serve. The applications were placed on the Commission's public notice. The Communications Satellite Corporation (Comsat) filed comments in response to the applications of American Satellite Company d/b/a Contel ASC and Contel Federal Systems, Inc. (CFS) which request blanket authority to provide two-way services to points other than Canada and Mexico. Contel ASC and CFS filed a joint response to Comsat's comments.

THE APPLICANTS

2. *HUGHES COMMUNICATIONS GALAXY, INC. (Hughes) (File No. I-T-C-90-172).* Hughes requests authority to utilize the Galaxy VI domestic communications satellite (formerly Westar VI-S) for the provision of: one-way service from the United States to Latin American and

Caribbean locations: and one-way and two-way services between the U.S. and Mexico and Canada consistent with consultations completed pursuant to Article XIV(d) of the INTELSAT Agreement. Hughes desires to use Galaxy VI for these services at both the 91^0 W.L. and the 99^0 W.L. locations.[1] Hughes notes that the Galaxy VI satellite has a switchable enhanced Caribbean coverage mode incorporated into six of its transponders. Although the Commission has granted conditional authority for the use of the enhanced coverage feature to provide one-way service to various Central American, Caribbean and South American locations, Hughes notes that the instant application seeks authority to provide one-way service with the enhanced coverage feature in the "off" position. Hughes states that the types of services include video, audio, data and business services.

3. *SATELLITE TRANSPONDER LEASING CORPORATION (STLC) (File No. I-T-C-90-173).* STLC requests authority to utilize the SBS-4, SBS-5 and SBS-6 domestic communications satellites for the provision of: one-way service from the United States to Latin American and Caribbean locations; and one-way and two-way services between the U.S. and Mexico and Canada consistent with consultations completed pursuant to Article XIV(d) of the INTELSAT Agreement. STLC desires to utilize the SBS-4 and SBS-5 satellites for these services at their respective 91^0 W.L. and 123^0 W.L. locations, and to utilize the SBS-6 satellite for these services at both the 72^0 W.L. and 99^0 W.L. orbital locations.

4. *GTE SPACENET CORPORATION (GTE Spacenet) (File No. I-T-C-91-016).* GTE Spacenet requests authority to utilize its GSTAR IV domestic satellite, as well as any replacement satellite for which it may be authorized, to provide two-way transborder services between the U.S. and Canada and Mexico and one-way transborder service from the U.S. to Caribbean and Latin American locations. GTE Spacenet notes that the instant authority is necessary to permit it to supplement its ability to provide transborder services through use of the GSTAR IV satellite in addition to its previously authorized in-orbit multi-satellite system. Although the GSTAR IV satellite has not been consulted under Article XIV(d) of the INTELSAT Agreement, GTE Spacenet requests that such consultation be undertaken as soon as possible.

5. *CONTEL FEDERAL SYSTEMS, INC. (CFS) (File No. I-T-C-90-182).* CFS requests authority to provide any and all transborder satellite telecommunications services that have been or will in the future be consulted under Article XIV(d) of the INTELSAT Agreement.[2] CFS also requests authority to serve any country and use any satellite that has been or will be consulted for transborder service under Article XIV(d) using any earth station that the Commission may authorize for the provision of such services. CFS states that grant of the requested authority would subsume and supersede its previous authorizations for transborder service. CFS indicates that it is requesting the more expansive authority in order to avoid having to seek additional authorizations under Section 214 of the Act each time it sells a service that is not covered by the original authorization.

6. *AMERICAN SATELLITE COMPANY d/b/a Contel ASC (File No. I-T-C-90-185).* Contel ASC requests authority to provide any and all transborder satellite telecommunications services that have been or will in the future be consulted under Article XIV(d) of the INTELSAT Agreement.[3] Contel ASC also requests authority to serve any country and use any satellite that has been or will be consulted for transborder service under Article XIV(d) using any earth station that the Commission may authorize for the provision of such services. Contel ASC states that grant of the requested authority would subsume and supersede its previous authorizations for transborder service. Contel ASC indicates that it is requesting the more expansive authority in order to avoid having to seek additional authorizations under Section 214 of the Act each time it sells a service that is not covered by the original authorization.

7. *HUGHES NETWORK SYSTEMS, INC. (HNS) (File No. CSG-90-040-ML).* HNS seeks to modify its license for a 7.6-meter fixed Ku-band transmit/receive hub earth station (Call Sign E881109, File No. 796-DSE-MP/L-90) at Germantown, Maryland and an additional 1,000 1.0-meter fixed Ku-band transmit/receive Very Small Aperture Terminal (VSAT) earth stations (Call Sign E900192, File No. 797-DSE-P/L-90) for the provision of transborder services. These additional facilities will expand HNS's current VSAT network which consists of 1,000 1.2-meter, 1.8-meter, and 2.4-meter fixed Ku-band transmit/receive earth stations located at various points. HNS seeks authority to operate these additional earth stations from the primary hub facility, a remote control point in Germantown, Maryland, for the provision of one-way and two-way transborder services between the United States and Canada and Mexico, and one-way transborder services from the United States to points in Latin America via all satellites that have been or will be consulted under Article XIV(d) of the INTELSAT Agreement. HNS will be providing extra high-speed data, video and digitized voice transmissions to various points in the above-mentioned countries. HNS certifies that the level of radio frequency radiation in and around the earth stations will never exceed the safety limitations set forth by the American National Standards Institute (ANSI), except in the region between the feed and the reflector. To ensure compliance with the ANSI limit, the earth stations will be turned off whenever maintenance and repair personnel are required to work near this potentially hazardous area. There are no technical modifications to the subject earth stations.

8. *CBS, INC. (CBS) (File No. CSG-90-068-ML).* CBS seeks to modify its license for a 6.1-meter fixed Ku-band transmit/receive earth station (Call Sign E880111, File No. 1188-DSE-MP/L-90) at New York, New York to add one analog video transmit/receive channel to provide one-way transborder services from the United States to various countries, and to add two-way transborder services between the U.S. and Canada and Mexico via all U.S. domestic satellites that have been or will be consulted under Article XIV(d) of the INTELSAT Agreement. CBS states that the instant modification will enable it to distribute and receive video programming in combination with existing communications services in support of CBS News' international and domestic operations. CBS certifies that the earth station will continue to comply with safety requirements for radio frequency radiation in and around the facility and that the earth station has no significant adverse environmental impact. there are no technical modifications to the subject earth station.

9. *VASTARR BUSINESS SERVICES, INC. (Vastarr) (File No. CSG-90-083-(3)-ML.* Vastarr requests authority to modify the licenses for its three 5.5-meter hub Ku-band earth stations (Call Sign E2579, File No. 1421-DSE-MP/L-90) and its network of 1.8-meter (Call Sign

E880818, File No. 1422 DSE-MP/L-90) and 2.4-meter (Call Sign E880819, File No. 1420-DSE-MP/L-90) VSAT earth stations to communicate with U.S. domestic satellites as well as the Anik and Morelos satellites that have been or will be consulted under Article XIV(d) of the INTELSAT Agreement for the provision of transborder services to various locations on a private, non-common carrier basis. Vastarr also requests authority to use antenna 2, the southernmost of its three 5.5-meter Ku-band antennas, to transmit and receive communications via the PAS-1 satellite on a private, non-common carrier basis. All tehcnical modifications shall be in accordance with Vastarr's subject application.

10. *AMERICAN SATELLITE COMPANY d/b/a Contel ASC (File No. CSG-90-095-ML).* Contel ASC seeks to modify its license for a 13-meter C-band transmit/receive earth station (Call Sign E7465, File No. 1570-DSE-MP/L-90) at Ellenwood, Georgia to add PAS-1 as a point of communication and to provide transborder services between the United States and various countries via all U.S. domestic satellites as well as the Anik and Morelos satellites that have been or will be consulted under Article XIV(d) of the INTELSAT Agreement. Contel ASC certifies that the channels Contel ASC has established on PanAmSat using this station have not been nor will be connected with the public switched network. In addition, Contel ASC requests authority to provide transponder testing on PAS-1 using all types of analog and digital signals as well as telemetry, tracking and control (TT&C) for PAS-1 on the frequency band 6420-6425 MHz. At this time, Contel ASC plans to take its 12-meter antenna, Call Sign KA-214, that is currently authorized to provide TT&C services to PanAmSat off of PAS-1 once the 13-meter antenna is placed into service. The 12-meter antenna will then be used to provide service via the ASC-2 satellite once it is launched in April, 1991. Since plans change frequently and the coordination work for this site is complete, Contel ASC would like to retain its PanAmSat authority for the 12-meter antenna. The technical modifications of the subject 13-meter antenna shall be consistent with ASC's application.

11. *CHEVRON INDUSTRIES INC. (Chevron) (File No. CSG-90-102-(4)-ML).* Chevron seeks authority to modify its licenses for a Ku- band fixed transmit/receive earth station network consisting of a 6.1-meter hub station (Call Sign E900688) at San Ramon, California and up to 4900 1.0-meter (Call Sign E900691), up to 80 1.8-meter (Call Sign E900690), and up to 20 2.4-meter (Call Sign E900689) VSAT earth stations located at various points to provide transborder services between the United States and various countries via all U.S. domestic satellites consulted under Article XIV(d) of the INTELSAT Agreement. In particular, Chevron intends to provide extra high- speed data, one-way video and digitized voice transmissions to Canada and Mexico and certain Latin American points, as well as two-way service between the United States and Canada and Mexico. Chevron states that the Chevron Satellite Network (CSN) will be integrated into its existing private telecommunications system to transmit and receive internally-generated voice and data traffic between various Chevron facilities. According to Chevron, the network will provide less expensive, more reliable and efficient sales credit authorization, and will link its exploration and drilling operations throughout the continental U.S. and U.S. coastal waters. Chevron certifies that the operation of the proposed network will have no adverse environmental impact, and that levels of radio frequency radiation are safe for continuous exposure of operating personnel and the general public. There are no technical modifications to the subject earth station.

12. *VITACOM SATELLITE SERVICES CORPORATION (Vitacom) (File No. CSG-90-104-ML).* Vitacom seeks to modify its license for a 7.0-meter fixed Ku-band transmit/receive earth station (Call Sign E890989, File No. 2072-DSE-P/L-89) at Mountain View, California to provide transborder services between the United States and various countries via all U.S. domestic satellites, as well as the Anik and Morelos satellite systems, which have been consulted under Article XIV(d) of the INTELSAT Agreement. Vitacom states that the instant modification will improve interconnection of geographically-dispersed network communication services for more efficient corporate communications. There will be no technical modifications to the subject earth station.

13. *VITACOM SATELLITE SERVICES CORPORATION (Vitacom) (File No. CSG-90-105-ML).* Vitacom seeks authority to modify its license for a 3.7-meter fixed C-band transmit/receive earth station (Call Sign E900848) in Kennedale, Texas to provide transborder services between the United States and Mexico via all U.S. domestic satellites and the Morelos satellite system consistent with consultations under Article XIV(d) of the INTELSAT Agreement. Vitacom states that it intends to utilize the instant facility to interconnect geographically-dispersed network communication services for more efficient corporate communications. Vitacom certifies that the earth station will not exceed safe levels of radio frequency radiation in and around the area, nor significantly affect the environment. There are no technical modifications to the subject earth station.

14. *PHAR-MOR, INC. (Phar-Mor) (File No. CSG-90-107-(3)-ML).* Phar-Mor seeks authority to modify its licenses for a Ku-band satellite fixed transmit/receive earth station network consisting of a 6.1-meter fixed hub earth station at Youngstown, Ohio and up to 800 1.8-meter and up to 200 2.4-meter fixed VSAT earth stations located at various points to provide transborder services between the United States and various countries via all satellites consulted under Article XIV(d) of the INTELSAT Agreement for transborder services. In particular, Phar-Mor seeks to provide extra high-speed data, one-way video and digitized voice transmissions to Canada and Mexico and certain Latin American points, as well as two-way service between the U.S. and Canada and Mexico. Phar-Mor states that the proposed Phar-Mor Satellite Network (PSN) will increase customer service and product availability by utilizing high-speed computers to control inventory and to promptly and accurately process customer orders. Phar-Mor certifies that construction and operation of the earth station will have no adverse environmental impact, and that levels of radio frequency radiation will be safe for continuous exposure of operating personnel and the general public. The are no technical modifications to the subject earth station.

15. *AMERICAN SATELLITE COMPANY d/b/a Contel ASC (ASC) (File No. CSG-90-112-ML).* Contel ASC requests modification of its license for a 4.1-meter fixed Ku-band transmit/receive earth station (Call Sign E870520, File No. 884-DSE-P/L-87) at Washington D.C. to provide transborder services between the United States and various countries via all U.S. domestic satellites, as well as the Anik and Morelos satellites, that have been or

will be consulted under Article XIV(d) of the INTELSAT Agreement. Contel ASC states that the provision of transborder services will better enable it to meet the needs of its customers. Contel ASC certifies that levels of radio frequency radiation in and around the facility are safe for continuous exposure of operating personnel and the general public. There will be no technical modifications to the subject earth station.

16. *CONTEL FEDERAL SYSTEMS, INC. (CFS) (File No. CSG-90-114-ML).* CFS seeks to modify its license for two 12.0-meter fixed C-band transmit/receive antennas (Call Sign E4373, File No. 103-DSE-MP/L-85) at Ft. Meade, Maryland to provide transborder services between the United States and various countries via all U.S. domestic satellites consulted under Article XIV(d) of the INTELSAT Agreement, as well as the Anik and Morelos satellite systems. CFS states that the instant modification will better enable it to meet the needs of its customers. CFS certifies that the levels of radio frequency radiation in and around the earth station are safe for continuous exposure of operating personnel and the general public. There will be no technical modifications to the subject earth station.

17. *EQUATORIAL COMMUNICATIONS COMPANY (ECC) (File No. CSG-90-115-ML).* ECC seeks to modify its license for an 11.0-meter fixed C- band transmit/receive earth station (Call Sign E4625, File No. 1827-DSE-P/L-82) at Mountain View, California to provide transborder data services between the United States and various countries via all U.S. domestic satellites that have been or will be consulted under Article XIV(d) of the INTELSAT Agreement. ECC states that the instant modification will enable it to provide needed data services for its customers. ECC certifies that levels of radio frequency radiation in and around the earth station are safe for continuous exposure of operating personnel and the general public. No technical modifications of the earth station are necessary.

18. *AMERICAN SATELLITE COMPANY d/b/a Contel ASC (File No. CSG-90-118-ML).* Contel ASC seeks to modify its license for a 9.0-meter fixed C-band transmit/receive earth station (Call Sign E880472, File No. 942-(DSE-P/L-88) at Vallejo, California to provide transborder services between the United States and various countries via all U.S. domestic satellites and Anik and Morelos satellites that have been or will be consulted under Article XIV(d) of the INTELSAT Agreement. Contel ASC states that such authorization will enable it to provide additional points of communication for its customers. Contel ASC certifies that it has analyzed the levels of radio frequency radiation in and around the station and found them to be safe for continuous exposure of operating personnel and the general public. There are no technical modifications to the subject earth station.

19. *AMERICAN SATELLITE COMPANY d/b/a Contel ASC (File No. CSG-90-128-ML).* Contel ASC seeks modification of its license for an 8.1-meter fixed Ku-band transmit/receive earth station (Call Sign E860593, File No. CSG-90-004-ML) at Staten Island, New York to provide transborder services between the United States and various countries via all U.S. domestic satellites, as well as the Anik and Morelos satellites, that have been consulted under Article XIV(d) of the INTELSAT Agreement. Contel ASC states that a grant of its application will enable it to provide additional points of communication to its customers and reflect already installed equipment. Contel ASC certifies that the levels of radio frequency radiation in and around the station are safe for continuous exposure of operating personnel and the general public. There will be no technical modifications to the subject earth station.

20. *TANDEM COMPUTERS INC. (Tandem) (File No. CSG-91-007-ML).* Tandem requests authority to modify the license for its 7.0-meter fixed Ku-band transmit/receive earth station (Call Sign E890346, File No. 750-DSE-MP/L-89) at Cupertino, California for the provision of authorized transborder services via all U.S. domestic satellites between the U.S. and Mexico and from the U.S. to Venezuela. Tandem states that it currently operates the subject earth station as part of a network providing video and voice communications to various manufacturing, maintenance and marketing locations throughout the U.S. In order to improve corporate efficiency, Tandem seeks to add to its network the offices of its subsidiaries and affiliates in Mexico and its business associates located in Mexico and Venezuela. Specifically, Tandem requests authority to provide receive-only T.V. and one-way and two-way video, voice and data services to locations in Mexico and receive-only T.V. services to locations in Venezuela. Tandem also requests authority to provide all transborder services previously consulted under Article XIV(d) of the INTELSAT Agreement for Canada, Mexico, the Caribbean and Latin American countries. There are no technical modifications to the subject earth station.

21. *DIGITAL EQUIPMENT CORPORATION (DEC) (File No. CSG-91-010-ML).* DEC seeks authority to modify its license for a 5.6-meter fixed Ku-band transmit/receive earth station (Call Sign E880049, File Nos. 390-DSE-AL-89 and 97-DSE-P/L-88) at Bedford, Massachusetts to provide transborder services between the United States and Canada and Mexico via all U.S. domestic satellites consulted under Article XIV(d) of the INTELSAT Agreement. DEC states that the instant modification will enable it to serve customers at various points in Canada and Mexico. No technical modifications to the earth station will be necessary.

22. *COMPUTER POWER, INC. (CPI) (File No. CSG-91-012-ML).* CPI seeks to modify its license for an 8.1-meter fixed Ku-band transmit/receive hub earth station (Call Sign E873409, File No. 4454-DSE-P/L-87) at Jacksonville, Florida to provide transborder services between the United States and Canada and Mexico via all U.S. domestic satellites consulted under Article XIV(d) of the INTELSAT Agreement. CPI states that the instant modification will enable it to provide high-speed data and one-way video services to Canada and Mexico, and two-way communications as well, expanding its current private domestic VSAT network to meet important customer requirements. CPI certifies that the levels of radio frequency radiation in and around the station are safe for continuous exposure of operating personnel and the general public. No technical modifications of the station are necessary.

DISCUSSION

23. In 1981, following consultations with the Department of State, the Commission established its Transborder policy which permits the use of U.S. domestic satellites for the transmission of certain public international telecommunications services to points within the footprint of those satellites. Under this policy, domestic satellites may

be used for these services where INTELSAT is incapable of providing the service or where it would be clearly uneconomical or impractical to use the INTELSAT system for the service. The Transborder policy also set forth procedures for final implementation of these services. Pursuant to these procedures, consultations under Article XIV(d) of the INTELSAT Agreement have been completed for transborder services between the United States and Canada, the United States and Mexico, and from the United States to Latin American/Caribbean locations.[4]

24. The subject applications request authority to provide services similar to those previously authorized under the Commission's Transborder policy and consulted under Article XIV(d) of the INTELSAT Agreement. For the most part, the applications involve the extension of existing or planned domestic networks to provide business and video services between the United States and Canada and Mexico using U.S. domestic satellites, as well as the Anik and Morelos satellites and receive-only services from the U.S. to Latin American/Caribbean locations.

25. Under these circumstances, we conclude that a grant of the subject applications involving transborder services is consistent with the Commission's Transborder policy and consultations completed under Article XIV(d) of the INTELSAT Agreement. The Commission has previously recognized that where the extension of existing domestic business networks is involved, use of the INTELSAT system would be both clearly impractical and uneconomical.[5] Specifically, the Commission has noted that maximum efficiency is gained through use of one satellite to link a customer's numerous business locations simultaneously. Use of the INTELSAT system would require the virtual duplication of a domestic network for each customer that wanted to add Canadian or Mexican business locations to its network.[6]

26. The same considerations also apply to the distribution of video services where the programming is already being transmitted throughout the United States and can be received in transborder locations on an incidental basis with the addition of small, receive-only earth stations with little or no additional cost.[7] The incidental reception of this programming in transborder locations is consistent with the Commission's Transborder policy and existing INTELSAT consultations. In addition, the Commission has found that use of INTELSAT facilities in such circumstances would be an inefficient use of the available radio frequency spectrum. With respect to point-to-point communications between the U.S. and Canada and the U.S. and Mexico, the Commission has recognized that these services traditionally have been provided by well-developed terrestrial networks and not by INTELSAT.

27. Comsat filed comments in response to the applications of Contel ASC (File No. I-T-C-90-182) and CFS (File No. I-T-C-90-185) which request blanket authority for, *inter alia*, two-way communications between the U.S. and points other than Canada and Mexico. Comsat views the "blanket" applications to provide transborder satellite telecommunications services, including the provision of two-way data services between the United States and the Caribbean, Latin America and South America, as failing to comply with the minimum legal standards established by the United States Court of Appeals in the *Jamaica Teleport* decision.[8] In particular, Comsat states that the use of domestic satellites for international communications can only be justified under two "exceptional circumstances"; where INTELSAT could not provide the service or could not do so economically or practically. Comsat claims that the subject "blanket" applications make no mention of "exceptional circumstances" that would justify authorization, relying instead on grounds of procedural efficiency unrelated to legal requirements. Further, Comsat argues that the essence of *Jamaica Teleport* regarding "exceptional circumstances" is that each request must be examined separately, and that a case-by-case demonstration of the merits of domestic satellite use must be made. Since it views the Contel ASC and CFS applications as requesting vague authority to unspecified points, Comsat asserts that no demonstration of "exceptional circumstances" has been made. Finally, Comsat notes that the applicants admit that the Commission has not yet authorized two-way transmissions (other than to Canada and Mexico) and that, in any event, there is no need to provide such services at this time. Thus, Comsat requests that the above-mentioned applications be denied.

28. In their reply, ASC and CFS state that the Commission has previously granted blanket licenses for two-way service between the U.S. and Canada and Mexico, and one-way service to the Caribbean, Central and South America. Thus, they assert that the Commission can grant their applications without further deliberations as they apply to two-way transborder service between the U.S. and Canada and Mexico. With respect to the provision of two-way transborder service between the U.S. and points in the Caribbean, Central and South America, Contel ASC and CFS contend that they are merely requesting an extension of existing domestic satellite business networks to transmit data traffic unconnected with the public switched network. The applicants argue that such authorization is clearly in accordance with the *Jamaica Teleport* decision because the Court concluded that the FCC could never find INTELSAT service anything other than "uneconomical and impractical" if the service was already being provided domestically and the transborder application was merely requesting to extend that service to another country without the duplication of facilities or multiple hops that would be necessary for INTELSAT to provide the service. Contel ASC and CFS state that their requests for two-way services to the Caribbean, Central and South America involve the expansion of existing networks to transmit/receive points and do not involve new hubs or network control facilities. They argue that under these circumstances, use of INTELSAT facilities would be clearly uneconomical and impractical. Although the applicants concede that they do not have any contracts to provide this type of service, they indicate that they have received numerous requests from existing and potential customers.

29. We reject Comsat's argument to the extent it suggests that the Commission should not grant "blanket" authority under any circumstances. We have previously dealt with this contention in our *Transborder V* decision. As we noted in that decision, the "exceptional" circumstances language set forth in the Buckley letter does not refer to the number of applications or countries. We also noted in *Transborder V* that if one prong of the Buckley criteria is met with respect to a particular type of service (i.e. receive-only video) the service can be authorized on a blanket basis. The *Jamaica Teleport* decision provides no support for Comsat's resurrection of this argument here. In the *Jamaica Teleport* decision, the Court conducted an exhaustive review of the Commission's Transborder policy

as implemented in several decisions, many involving blanket authorizations. In discussing the Commission's processing of Transborder applications, the Court noted that the "transborder cases are typically consolidated decisions on numerous applications from various companies."[9] It is clear from this statement that the Court did not find fault with the manner in which the Commission processed its applications. It is equally clear from its analysis of the Transborder policy that the Court placed emphasis on the the specific service involved and whether it satisfied the Buckley criteria. For example, the Court recognized that where incidental service is involved "it is hard to imagine that the FCC could ever find INTELSAT service to be anything other than 'uneconomical and impractical.'[10] Thus, to the extent that one-way, receive-only services are requested on a blanket basis from the U.S. to Latin American/Caribbean and locations, we find that the Buckley criteria is satisfied. Contrary to Comsat's assertion, the Contel ASC and CFS applications do not merely request vague authority to unspecified points. The applications clearly limit the services, countries and satellites to those that have been consulted under Article XIV(d) of the INTELSAT Agreement. (*See* Attachments 1 and 2).

30. Comsat is correct, however, in asserting that there is currently no basis upon which the Commission can authorize two-way services to points other than Canada and Mexico. Although the Commission initially determined in its *Transborder XIII* decision[11] that the conditional grant of two-way services between the U.S. and Latin American/Caribbean locations was consistent with the Transborder policy, the decision was later remanded in light of the *Jamaica Teleport* decision. The Commission subsequently sought further information from applicants for two-way services to determine if their proposals could satisfy the Buckley criteria.[12] The Commission received comments from several applicants and Comsat with respect to the extent to which two-way services could be provided between the U.S. and Latin American/ Caribbean locations consistent with the Buckley criteria. Although the arguments of Contel ASC and CFS are in accord with many of the comments submitted in response to the Commission's inquiry, no decision has been reached on this issue. Until a decision is reached, there is no basis for authorizing two-way services between the U.S. and points other than Canada and Mexico. Accordingly, we will defer action on those portions of the Contel ASC and CFS applications which propose two-way services between the U.S. and Latin American/Caribbean locations.[13]

31. We also note that Hughes and STLC request authority to provide transborder services over satellites consulted under Article XIV(d) of the INTELSAT Agreement from different orbital locations than were consulted. Specifically, Hughes requests authority to use its Galaxy VI satellite at the 99^0 W.L. orbital location in addition to the 91^0 W.L. orbital location consulted under Article XIV(d). Similarly, STLC seeks to operate the SBS-6 satellite at both the 72^0 W.L. orbital location consulted under Article XIV(d) and the 99^0 W.L. orbital location which has not been so consulted. While the operation of these satellites at the additional locations requested may not, in fact, cause technical problems with the INTELSAT system, the determination must be made by INTELSAT. Thus, we defer action on the Hughes and STLC requests to provide transborder services from the orbital locations which were not consulted under Article XIV(d) for the particular satellite involved.

32. Finally, we find that the applications of Contel ASC (File No. CSG-90-095-ML) and Vastarr (File No. CSG-90-083-(3)-ML) which propose to access the PAS separate satellite system, are consistent with the Commission's *Separate Systems* decision.[14] On several occasions the Commission has authorized PAS to operate its facilities for communications between the U.S. and specified countries once it was determined that U.S. obligations under Article XIV(d) of the INTELSAT Agreement had been fulfilled.[15] The instant applications seek authority to access the PAS system to provide services to those countries which PAS is authorized to serve subject to the conditions placed on the use of separate satellite systems.

33. Accordingly, IT IS ORDERED that the applications of Hughes (File No. I-T-C-90-172), STLC (File No. I-T-C-90-173), CFS (File Nos. I-T-C-90-182 and CSG-90-114-ML), Contel ASC (File Nos. I-T-C-90-185, CSG-90-095- ML, CSG-90-112-ML, CSG-90-118-ML and CSG-90-128-ML), HNS (File No. CSG- 90-040-ML), CBS (File No. 90-068-ML), Vastarr (File No. CSG-90-083-(3)-ML), Chevron (File No. CSG-90-102-ML), Vitacom (File Nos. CSG-90-104-ML and CSG-90-105-ML), Phar-Mor (File No. CSG-90-107-(3)-ML), ECC (File No. CSG-90-115-ML), Tandem (File No. CSG-91-007-ML), DEC (File No. CSG-91-010-ML) and CPI (File No. CSG-91-012-ML) ARE GRANTED and the applicants are authorized to establish channels of communications and/or modify the licenses for their existing earth station facilities to provide the transborder services requested in their applications.

34. IT FURTHER ORDERED that GTE Spacenet's application File No. I-T-C-91-016 is authorized conditionally, subject to completion of the INTELSAT Article XIV(d) consultation process. Upon completion of such consultation, GTE Spacenet will be authorized to use its GSTAR IV satellite for transborder services without any further action by this Commission.

35. IT IS FURTHER ORDERED that the authorization to Hughes and STLC only include the use of satellites at the specific orbital locations consulted under Article XIV(d) of the INTELSAT Agreement. Upon completion of the requisite INTELSAT consultation for the additional orbital locations, Hughes and STLC will be authorized to use the subject satellites for transborder services without any further action by this Commission.

36. IT IS FURTHER ORDERED that the modification of licenses for U.S.-based VSAT networks to access the Anik and Morelos satellite systems does not permit the use of these systems to provide purely U.S. domestic service.

37. IT IS FURTHER ORDERED that this authorization should not be construed as permitting the provision of common carrier services over facilities used for private communications. Any common carrier use will require the filing of a Section 214 application.

38. IT IS FURTHER ORDERED that the applications of Vastarr (CSG-90-083-(3)-ML) and Contel ASC (File No. CSG-90-095-ML) ARE GRANTED and the existing earth station licenses of Vastarr and Contel ASC ARE HEREBY MODIFIED to add the PAS-1 satellite as a point of

communication for service between the United States and those countries that PAS is now or in the future may be authorized to serve.

39. IT IS FURTHER ORDERED that Vastarr and Contel ASC are restricted in their operation of the subject earth stations communicating with the PAS-1 satellite to the provision of capacity through the sale or long- term lease (of at least one year) of transponder capacity for communications not interconnected with the public-switched message networks (except for emergency restoration service).

40. IT IS FURTHER ORDERED that the authorizations of Vastarr and Contel ASC are subject to Commission jurisdiction over the use of all space segment within the PAS system and operation of the proposed earth stations to ensure compliance with the restrictions placed on the operation of separate satellite systems.

41. IT IS FURTHER ORDERED that Vastarr and Contel ASC are restricted to operation of the proposed earth station in accordance with the parameters summarized and conditions described in Attachment No. 1 to AP- 11-10E, "Report by the Board of Governors to the Eleventh Assembly of Parties Pursuant to Article XIV(d) on the PanAmSat Network" (February 1987), and all conditions placed on the PAS-1 system by the Commission.

42. IT IS FURTHER ORDERED that as further conditions to these authorizations, the relevant earth stations shall comply with the technical parameters in the Commission's orders concerning Domestic services entitled *Routine Licensing of Earth Stations in the 6 GHz and 14 GHz Bands Using Antennas Less than 9 Meters and 5 Meters in Diameter, Respectively, for Both Full Transponder and Narrowband Transmissions.*

43. This authorization constitutes the final step with respect to the provision of transborder services only insofar as the U.S. regulatory process is concerned. It does not, however, dispense with any requirements that may be imposed by other countries involved.

44. This order shall not be construed as authorizing the distribution of programming where the appropriate copyright clearances have not been obtained.

45. This order is issued under Section 0.291 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International
Facilities Division
Common Carrier Bureau

FOOTNOTES

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[1] Galaxy VI was launched into its assigned 91^0 W.L. location in October, 1990. In addition, Hughes is authorized to locate Galaxy VI at the 99^0 W.L. location on an interim basis to provide continuous service upon the end-of-life of the Westar IV satellite. After Galaxy VI's interim operation at 99^0 W.L., it will return to either the 91^0 W.L. location, or to another assigned orbital location. Hughes notes that Galaxy VI has already been consulted under Article XIV(d) of the INTELSAT Agreement for transborder services at the 91^0 W.L. location. In addition, Hughes notes that Galaxy VI's amplifiers are lower-powered than the Galaxy IV-R which has already been consulted with INTELSAT. Accordingly, Hughes believes that no additional technical consultation with INTELSAT is necessary to permit the Galaxy VI satellite to provide transborder services from the 99^0 W.L. orbital location. Hughes notes that the footprint of the satellite at both locations will allow service to the countries covered by the instant application.

[2] Included in CFS's proposed services are two-way services between the U.S. and Latin American/Caribbean locations. CFS recognizes that the Commission currently does not authorize two-way communications between the U.S. and Latin American/Caribbean locations. Although CFS states that it does not need the service at this time, it requests that any such authorization in the future take into account the instant request.

[3] Contel ASC concedes that the Commission currently does not authorize two-way communications between the U.S. and Caribbean locations. Although Contel ASC states that it does not need the service at this time, it requests that any such authorization in the future take into account the instant request.

[4] *See* Attachments 1 and 2.

[5] Satellite Business Systems, 88 FCC 2d 195 (1981).

[6] We note that many of the applications proposing to extend VSAT networks also seek to provide service "between" the U.S. and Latin American/Caribbean locations. Any service provided via these networks to Latin American/Caribbean locations is limited to the provision of one-way, receive- only audio, video and data services consistent with existing consultations under Article XIV(d) of the INTELSAT Agreement.

[7] Transborder Satellite Video Services, 88 FCC 2d 258 (1981). The same considerations are applicable where Canadian and Mexican domestic video services are received in the U.S.

[8] *Communications Satellite Corporation v. FCC*, 836 F.2d 623 (D.C.Circuit 1988).

[9] 836 F.2d at 631, n. 13.

[10] *Id.*

[11] *GTE Spacenet Corp., et al.*, 2 FCC Rcd 2477 (Com. Car. Bur. 1987); *remanded*, 4 FCC Rcd 2071 (1989).

[12] Letter dated 1989 from George S. Li, Chief, International Facilities Division to Gerald Oberst, Esq. *et al.*, Attorneys for *Transborder XIII* applicants.

[13] We also note that other applications request authority to provide service "between" the U.S. and transborder locations. Unlike the Contel ASC and CFS applications, we have not construed these applications, despite their broad service descriptions, as proposing to provide two-way services between the U.S. and points other than Canada and Mexico. As we have noted in past Transborder decisions, the authority granted herein must be read as being consistent with current consultations under Article XIV(d) of the INTELSAT Agreement. Thus, to the extent that such service was intended, those requests are also deferred.

[14] *Establishment of Satellite Systems Providing International Communications*, 101 FCC 2d 1046 (1985); on *recon.*, 61 R.R. 2d 649 (1986); *further recon.*, 1 FCC Rcd 439 (1986).

[15] *See* Alpha Lyracom, d/b/a Pan American Satellite, 4 FCC Rcd 8649 (1989). PAS-1 is authorized to provide service via its Ku-band capacity between the United States and the Bahamas, Denmark, Federal Republic of Germany, France, Ireland, Italy, Luxembourg, Monaco, the Netherlands, Portugal, Sweden, and

ATTACHMENT 1

U.S. Satellites Consulted Pursuant to Article XIV(d)

Satellites

AURORA (SATCOM V)
COMSTAR D-4
CONTEL ASC-I
CONTEL ASC-II
GALAXY I
GALAXY II
GALAXY III
GALAXY IV-R
GALAXY V-R
GALAXY VI (WESTAR VI-S)
GSTAR I
GSTAR II
GSTAR III
SATCOM IR
SATCOM IIR
SATCOM IIIR
SATCOM IV
SATCOM V
SATCOM K-1
SATCOM K-2
SBS I
SBS II
SBS III
SBS IV
SBS V
SBS VI
SPACENET I
SPACENET II
SPACENET III
TELSTAR 301 (TELSTAR 3A)
TELSTAR 302
TELSTAR 303
WESTAR IV
WESTAR V

ATTACHMENT 2

SUMMARY OF INTELSAT CONSULTATIONS

Country	Service[s]	Satellite[s]
Anguilla	T.V., audio and data receive-only	all satellites listed in Attachment 1
Bahamas	T.V., audio and data receive-only	all satellites listed in Attachment 1
Barbados	T.V. receive-only	all Galaxy, Satcom and Westar satellites listed in Attachment 1
Bermuda	T.V., audio and data receive-only	all satellites listed in Attachment 1
British Virgin Islands	T.V., audio and data receive-only	all satellites listed in Attachment 1
Canada	occasional pt.-to-pt. and full time video services and business services (including data and electronic document distribution, video teleconferencing and voice communications)	all satellites listed in Attachment 1 plus Anik C1, C2, C3, D1, D2, E-A and E-B (*see* note 4)
Cayman Islands	T.V., audio and data receive-only	all satellites listed in Attachment 1
Mexico	Full-time and occasional T.V. services, receive-only audio and business services (including data and electronic document distribution, video teleconferencing and voice communications)	all satellites listed in Attachment 1 plus the Morelos I and II satellites
Montserrat	T.V., audio and data receive-only	all satellites listed in

		Attachment 1
Netherlands Antilles	T.V. receive-only	Galaxy I, Satcom III-R and IV, Westar IV and V and Comstar D4
Turks & Caicos	T.V., audio and data receive-only	all satellites listed in Attachment 1
Venezuela	T.V. receive-only	all satellites listed in Attachment 1

Notes

1) All services authorized to Latin American/Caribbean locations are receive-only (i.e. can be received as a by-product of or incidental to U.S. domestic transmissions). All services (i.e. T.V., audio and data receive-only) can be provided to any Latin American/Caribbean point over any of the satellites listed in Attachment 1 even though only certain services and satellites were initially requested. This can be accomplished through notifying INTELSAT with no additional consultation required.

2) Attachment 1 contains only those satellites that have been technically consulted with INTELSAT.

3) Attachment 2 does not contain all of the Latin American/Caribbean countries which have been included in previous charts. Attachment 2 contains only those countries that associated with the most recent INTELSAT Article XIV(d) consultation in October 1989 (AP-15-23E). Other countries will be added to the list once they associate with that consultation.

4) No final authority will be granted for the use of the Anik E-A and E-B satellites until an applicant submits an operating agreement and the Commission determines that the agreement is in the public interest and consistent with the Commission's Transborder Policy.

the United Kingdom. PAS-1 is authorized to provide service via its C-band capacity between the United States and Argentina, Bahamas, Bolivia, Brazil, Chile, Colombia, Costa Rica, Dominican Republic, Ecuador, Guatemala, Honduras, and Peru.

Before the
Federal Communications Commission
Washington, D.C. 20554

PR Docket No. 90-26

In the Matter of

Amendment of the Maritime Services Rules (Part 80) to require that VHF ship station transmitters automatically cease operation after a predetermined period of operation. RM-6770

REPORT AND ORDER
(Proceeding Terminated)

Adopted: January 2, 1991; Released: January 16, 1991

By the Commission:

I. INTRODUCTION

1. By a *Notice of Proposed Rule Making* (*Notice*), 5 FCC Rcd 647 (1990), the Commission proposed to amend Part 80 of the Rules, 47 C.F.R. Part 80, to require that VHF ship station transmitters be equipped with (1) an automatic timing device that deactivates the transmitter after an uninterrupted transmission period of more than three minutes and (2) a device that provides an indication that the timer has deactivated the transmitter. This *Report and Order* adopts the rule amendments substantially as proposed.

II. BACKGROUND

2. VHF channels in the 156-162 MHz band are used in the maritime mobile service by ship stations to communicate with other ship stations or with coast stations. Channels are available for safety communications, calling,[1] operational and navigational purposes. *See* Section 80.373(f) of the Commission's Rules, 47 C.F.R. § 80.373(f). Additionally, channels are available for public correspondence communications.

3. Channel 16 (156.800 MHz) is the international safety, distress and calling channel. The United States Coast Guard (USCG) maintains an aural watch on channel 16 and responds to distress calls made on this channel. Cargo ships over 300 gross tons and ships that carry more than six passengers for hire must be equipped with VHF stations and maintain a watch on channel 16 for compliance with the Communications Act of 1934, as amended, the International Convention for the Safety of Life at Sea, 1974, T.I.A.S. 9700, or the Agreement Between the United States of America and Canada for the Promotion of Safety on the Great Lakes by Means of Radio, T.I.A.S. 7837, amended T.I.A.S. 9352. Any United States ship that is voluntarily equipped with a VHF station is required to maintain a watch on channel 16 when the station is turned on and not being used for other traffic. While VHF channels may be used to meet a variety of communications requirements, the primary purpose of these channels is to provide for the safety of life and property at sea. Thus, it is extremely important to minimize interference on these channels.

4. As we stated in the *Notice*, a "stuck carrier," a continuous signal radiated by the inadvertent operation of a marine VHF transmitter, can cause significant interference to the maritime service. For example, the Commission's Field Operations Bureau (FOB) reported in its 1987 Boston Regional Marine Safety Project Report that it had located thirty "stuck carriers" on channel 16 in 1987, twenty-nine of which were caused by unintentional activation of the transmitters. The Boston region estimates, however, that only a small percentage of the total number of "stuck carriers" are reported.

5. To minimize the problem of "stuck carriers," we proposed to require that transmitters be equipped with an automatic timeout timing device and a device that provides an indication that the timer has deactivated the transmitter. We also proposed equipment phase-out periods. Along with our proposals we asked for comments on certain issues such as the time period before deactivation, additional manufacturing costs, and the effect of our proposal on public correspondence and duplex operations. Comments were filed by Southern California Marine Radio Council (SCMRC), Radio Technical Commission for Marine Services (RTCM), North Pacific Marine Radio Council (NPMRC), National Party Boat Owners Alliance, Inc. (Alliance), Uniden America Corporation (Uniden), Stephens Engineering Associates (SEA), Mr. Bradford D. Carey (Carey), United States Coast Guard (USCG), and Tandy Corporation (Tandy). Reply comments were filed by Tandy.

III. DISCUSSION

6. The commenters all agree that a signal time-out timer incorporated into VHF transmitters will help alleviate the problem of "stuck carriers." We believe, therefore, that the public would benefit in terms of increased marine safety by a requirement that signal time-out timers be incorporated into VHF ship transmitters.

7. In the *Notice* we proposed to require deactivation after three minutes of continuous uninterrupted operation. Four of the commenters felt that the three minute proposal was reasonable. SEA, however, commented that three minutes was too short a period of time, particularly for public correspondence channels, and suggested they have a ten minute time-out timer. Carey asserted that the Commission's proposed three minute interval seemed to be the minimum acceptable amount of time and that a longer period such as five, six or even ten minutes would be more appropriate. Uniden proposed a tolerance of plus or minus 20 per cent on the required deactivation period to allow for variation in the supply voltage as well as for environmental considerations. Also, Uniden, RTCM and Tandy proposed that portable marine VHF radios that operate with an output power of 5 watts or less be excluded from the automatic deactivation requirement. They asserted that, due to the limited power used by these radios, their transmissions do not significantly contribute to the problem. Additionally, they argued that these handheld transceivers are battery-operated and would quickly lose power if they remained in the "talk" mode for any extended period of time.

8. We are adopting five minutes as the time period before deactivation is required. We agree with SEA and Carey that three minutes could in some cases interrupt communications. A five minute time out period represents a reasonable compromise. A five minute time out period minimizes both the "stuck carrier" problems and the potential for impairing effective maritime communications. We agree with Uniden that a tolerance on the deactivation period is appropriate. The 20 per cent tolerance suggested by Uniden, however, is excessive given current manufacturing technical capabilities. We have modified our proposal to incorporate a plus or minus 10 per cent tolerance. In regard to exempting low power portables, we have previously exempted hand-held equipment from other requirements applicable to marine VHF transmitters.[2] Because their low power minimizes their interference potential, we are exempting hand-held VHF ship transmitters from the time-out timer requirements adopted herein.

9. In the *Notice* we proposed to require any VHF ship station transmitter manufactured in or imported into the United States after July 31, 1992, or installed after July 31, 1993, to be equipped with an automatic time-out timer. We also proposed that VHF ship station transmitters installed on or before July 31, 1993, be grandfathered indefinitely while located at the same ship station or coast station. We requested comments on whether the proposed phase-out periods are sufficient to minimize the impact on manufacturers, dealers and consumers. SEA, Alliance, and NPMRC supported the Commission's proposed implementation schedule. Uniden argued that a one year separation between the manufacture and import date of July 31, 1992, and installation date of July 31, 1993, is not sufficient time for those users that purchase complying devices just prior to July 31, 1992. It submitted that substitution of the word "purchased" for the word "installed," as it pertains to this issue, would provide a more equitable requirement for these users. Uniden also contended that tying the application of the proposed rule change to the transceiver installation date could lead to significant enforcement problems, and that the proposed language places unfair restrictions on boaters who use portable VHF radios or boaters who remove their radio equipment from their boats prior to placing them in storage. Uniden contended that these users would be unable, under the proposed language, to "re-install" the equipment in their boats. Tandy proposes a two year phase-out period to begin only after the final rules have been adopted and released by the Commission, and that any reference to installation in the Rules should be deleted. Carey supports a July 31, 1991, date for manufacture or importation, and a July 31, 1992, date for installation.

10. In general, we believe the phase-out periods proposed in the *Notice* are appropriate. As suggested by Tandy, however, we are modifying our original proposals to take into account the date these rules are actually adopted. Uniden suggested tying the application of the rule to the purchase date rather than the installation date. We have used the installation date before as a cutoff and see no reason why it cannot be used here, particularly in view of the modification of the proposed dates discussed above. [3] As to Uniden's question concerning portable radios, it appears that Uniden may have misunderstood this aspect of our proposal. We proposed to grandfather VHF transmitters that are initially installed on or before July 31, 1993, to minimize the economic burden on the boating community. These rules are not intended to restrict owners from removing and subsequently re-installing at the same maritime station VHF radio equipment after storage or other non-operational periods. Accordingly, as noted above, we are modifying the proposed phase out periods to require VHF ship station transmitters manufactured or imported into the United States after July 31, 1993, or initially installed after July 31, 1994, to be equipped with an automatic time-out timer. Further, VHF ship station transmitters installed on or before July 31, 1994, are grandfathered indefinitely while located at the same ship station or coast station.

11. The *Notice* also requested comments on the effect a time-out timer would have on public correspondence and duplex operations. RTCM commented that it has received no information to indicate that transmitter deactivation would create a serious problem for duplex operation in the United States, but acknowledged that it could cause a problem for public correspondence callers and foreign coast stations on full duplex public correspondence channels. It suggested that provisions might be examined to by-pass automatic deactivation when selecting frequencies employed for full duplex public correspondence operation. Carey and SEA also expressed concern over the proposal's effect on public correspondence or other duplex channels. We agree with the commenters that time-out timers could cause problems to marine operator assisted telephone calls on duplex channels. Such calls could exceed three or even five minutes in length and an automatic disconnect could be disruptive and expensive. Therefore, we will not require time-out timers to be activated when the transmitter is operating on public correspondence channels.[4]

12. The *Notice* proposed requiring a device to indicate clearly when the time-out timer deactivates the transmitter and requested comments on whether the particular deactivation device should be a matter of manufacturer discretion, as proposed, or specifically required to be visual, aural, or both. Tandy, which proposed an aural deactivation alarm device, was the only commenter expressing any preference for whether an aural or visual device should be required. Other commenters said to leave it up to the manufacturer. Accordingly, we are adopting rules requiring a device to clearly indicate when the time-out timer deactivates the transmitter. Absent a clear preference, we are leaving the particulars of this device up to the manufacturer.

13. SEA and RTCM suggested that transceivers be required to revert to the receiving mode after the timer has deactivated the transmitter. Our intent in the *Notice* was to have the receiver activated when the transmitter is deactivated. We have explicitly provided for this in the Rules.

IV. PAPERWORK REDUCTION ACT STATEMENT

14. The decision contained herein has been analyzed with respect to the Paperwork Reduction Act of 1980 and found to contain no new or modified form, information collection and/or record keeping, labeling, disclosure, or record retention requirements, and will not increase or decrease the burden hours imposed on the public.

FINAL REGULATORY FLEXIBILITY ACT ANALYSIS

I. Need and purpose of this action:

This action is taken to incorporate into the Commission's Rules a requirement to eliminate prolonged inadvertent keying of VHF shipboard transmitters operating in the maritime mobile service. The rules require manufacturers of VHF shipboard radio equipment to design the transmitters to include a timing device that automatically deactivates the transmitter when operating on private communications frequencies after a predetermined period of time and a device that indicates that the carrier has been turned off by the timer. The objective is to phase out the prolonged inadvertent keying of VHF shipboard transmitters. These new rules enhance maritime safety and conserve enforcement resources.

II. Issues raised by the public in response to the Initial Regulatory Flexibility Act Analysis:

No comments were received addressing the Initial Regulatory Flexibility Analysis.

III. Significant alternatives considered and rejected:

The questions raised in this proceeding address the sufficiency of the proposed phase-out period for the manufacture and installation of newly type-accepted VHF ship station transmitters to minimize the impact on manufacturers, dealers and consumers. Significant alternatives considered and rejected were: (1) a one year separation between the manufacture and import date of July 31, 1992 and a "purchase" date of July 31, 1993; (2) a two year phase out period for existing VHF equipment in stock to begin only after the final rules have been adopted and released by the Commission; and (3) tying the application of the rule to the purchase date rather than to the installation date. These alternatives were rejected for the reasons discussed in the text of the Report and Order.

ORDERING CLAUSES

Accordingly, IT IS ORDERED that pursuant to the authority contained in Sections 4(i) and 303(f) and (r) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154 (i) and 303(f) and (r), Part 80 of the Commission's Rules ARE AMENDED as set forth in the Appendix below.

IT IS FURTHER ORDERED that this Report and Order will be effective on **March 4, 1991.**

IT IS FURTHER ORDERED that a copy of this Report and Order shall be sent to the Chief Counsel for Advocacy of the Small Business Administration.

IT IS FURTHER ORDERED that this proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX

Part 80 of Chapter 1 of Title 47 of the Code of Federal Regulations is amended as follows:

A. Part 80 - STATIONS IN THE MARITIME SERVICES

1. The authority citation for Part 80 continues to read as follows:

AUTHORITY: Secs. 4, 303, 48 Stat. 1066, 1082, as amended; 47 U.S.C. 154, 303, unless otherwise noted. Interpret or apply 48 St at. 1064-1068, 1081-1105, as amended; 47 U.S.C. 151-155, 301-609; 3 UST 3450, 3 UST 4726, 12 UST 2377, unless otherwise noted.

2. In Section 80.203, the first sentence in paragraph (a) is revised, paragraphs (c) through (k) are redesignated as paragraphs (d) through (l), and new paragraphs (c) and (c)(1) are added to read as follows:

§ 80.203 Authorization of transmitters for licensing.

(a) Each transmitter authorized in a station in the maritime services after September 30, 1986, except as indicated in paragraphs (g), (h) and (i) of this section, must be type accepted by the Commission for Part 80 operations.

* * *

* * * * *

(c) All VHF ship station transmitters capable of operation on frequencies contained in § 80.373(f) that are either manufactured in or imported into the United States, on or after August 1, 1993, or are initially installed on or after August 1, 1994, must be equipped with an automatic timing device that deactivates the transmitter and reverts the transmitter to the receive mode after an uninterrupted transmission period of five minutes, plus or minus 10 per cent. Additionally, such transmitters must have a device that indicates when the automatic timer has deactivated the transmitter. VHF ship station transmitters initially installed before August 1, 1994, are authorized for use indefinitely at the same maritime station.

(1) Hand-held transmitters are not required to comply with the requirements in paragraph (c) above.

* * * * *

FOOTNOTES

[1] Channel 16 serves as the gateway channel for establishing contact with, or "calling" other ships.

[2] *See*, for example, 47 C.F.R. § 80.215(g) exempting portable transmitters from the requirement to maintain a carrier power of at least 8 but not more than 25 watts; and 47 C.F.R. §

80.215(g)(4) exempting portable transmitters from the requirement to automatically reduce carrier power to one watt or less when the transmitter is tuned to 156.375 MHz or 156.650 MHz.

[3] *See,* for example 47 C.F.R. §§ 80.203(b) and 80.209(a).

[4] Public correspondence channels, which are separately described in Section 80.371 of the Commission's Rules, 47 C.F.R. § 80.371, are not affected by this rule change.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

IDB COMMUNICATIONS GROUP, INC — FILE NO. CSG-89-123-ML

Application for authority to modify its license for a 5.5-meter fixed C-band transmit-only earth station at Buffalo, New York (Call Sign E890937) for the provision of services between the United States and Canada, Mexico, the Caribbean, Central America and South America via all U.S. domestic satellites and the Anik and Morelos systems

IDB COMMUNICATIONS GROUP, INC — FILE NO. CSG-89-124-ML

Application for authority to modify its license for a 5.5-meter fixed C-band transmit-only earth station at Baltimore, Maryland (Call Sign E890936) for the provision of services between the United States and Canada, Mexico, the Caribbean, Central America and South America via all U.S. domestic satellites and the Anik and Morelos systems

IDB COMMUNICATIONS GROUP, INC — FILE NO. CSG-89-125-ML

Application for authority to modify its license for a 5.5-meter fixed C-band transmit-only earth station at Kansas City, Missouri (Call Sign E890938) for the provision of services between the United States and Canada, Mexico, the Caribbean, Central America and South America via all U.S. domestic satellites and the Anik and Morelos systems

IDB COMMUNICATIONS GROUP, INC — FILE NO. CSG-89-126-ML

Application for authority to modify its license for a 5.5-meter fixed C-band transmit-only earth station at Waipahu, Hawaii (Call Sign E890935) for the provision of services between the United States and Canada, Mexico, the Caribbean, Central America and South America via all U.S. domestic satellites and the Anik and Morelos systems.

IDB COMMUNICATIONS GROUP, INC — FILE NO. CSG-89-127-ML

Application for authority to modify its license for a 5.5-meter fixed C-band transmit-only earth station at Sacramento, California (Call Sign E890939) for the provision of services between the United States and Canada, Mexico, the Caribbean, Central America and South America via all U.S. domestic satellites and the Anik and Morelos systems.

IDB COMMUNICATIONS GROUP, INC — FILE NO. CSG-89-133-ML

Application for authority to modify its license for a 5.5-meter C-band transmit/receive fixed earth station at Colorado Springs, Colorado (Call Sign E890929) for the provision of services between the United States and Canada, Mexico, the Caribbean, Central America and South America via all U.S. domestic satellites and the Anik and Morelos systems.

IDB COMMUNICATIONS GROUP, INC — FILE NO. CSG-89-134-ML

Application for authority to modify its license for a 5.5-meter C-band transmit-only fixed earth station at Charlotte, North Carolina (Call Sign E890984) for the provision of services between the United States and Canada, Mexico the Caribbean, Central America and South America via all U.S. domestic satellites and the Anik and Morelos systems.

IDB COMMUNICATIONS GROUP, INC FILE NO. CSG-89-135-ML

Application for authority to modify its license for a 2.4-meter Ku-band transmit/receive fixed earth station at Culver City, California (Call Sign E860811) for the provision of services between the United States and Canada, Mexico, the Caribbean, Central America and South America via all U.S. domestic satellites.

IDB COMMUNICATIONS GROUP, INC FILE NO. CSG-90-030-ML

Application for authority to modify its license for a 5.5-meter fixed C-band transmit-only earth station at Plymouth, Massachusetts (Call Sign E900181) for the provision of services between the United States and Canada, Mexico, the Caribbean, Central America and South America via all U.S. domestic satellites and the Anik and Morelos systems.

IDB COMMUNICATIONS GROUP, INC FILE NO. CSG-90-058-ML

Application for authority to modify its license for a 5.5-meter fixed C-band transmit-only earth station at Dallas, Texas (Call Sign E900219) for the provision of services between the United States and Canada, Mexico, the Caribbean, Central America and South America via all U.S. domestic satellites and the Anik and Morelos systems.

MEMORANDUM OPINION, ORDER AND AUTHORIZATION

Adopted: December 31, 1990; Released: January 17, 1991

By the Chief, International Facilities Division:

1. The Commission has under consideration the above-captioned applications, filed by IDB Communications Group, Inc., (IDB) requesting authority under Title III of the Communications Act of 1934, as amended, to modify existing domestic satellite earth station licenses to establish channels of communications to provide transborder services between the United States and Canada, Mexico, Latin America and the Caribbean. These applications were placed on the Commission's public notice. No comments were received. None of the applications involve technical modifications.

THE APPLICATIONS

2. In file Nos. File Nos. CSG-89-123-ML, CSG-89-124-ML, CSG-89-125-ML, CSG-89-126-ML, CSG-89-127-ML, CSG-89-134-ML, CSG-90-030-ML, and CSG-90-058-ML, IDB seeks authority to modify its licenses for seven 5.5-meter fixed C-band transmit-only earth stations at Buffalo, New York, Baltimore, Maryland, Kansas City, Missouri, Waipahu, Hawaii, Sacramento, California, Charlotte, North Carolina, Plymouth, Massachusetts, and Dallas, Texas (Call Signs E890937, E890936, E890938, E890935, E890939, E890984, E900181, and E900219) for the provision of transborder service. Additionally in File No. CSG-89-133-ML, IDB seeks authority to modify its license for a 5.5-meter C-band transmit/receive fixed earth station at Colorado Springs, Colorado (Call Sign E890929) to permit the provision of transborder service. The earth stations are currently used for the nationwide distribution via satellite of radio programming. IDB now proposes to use these earth stations for the provision of services from the United States to Canada, Mexico, the Caribbean, Central America and South America via all U.S. domestic satellites and the Anik and Morelos satellite systems.

3. In File No. CSG-89-135-ML IDB seeks authority to modify its license for a 2.4-meter Ku-band transmit/receive fixed earth station at Culver City, California (Call Sign E860811) for the provision of transborder service. The earth station will be used for the provision of services between the United States and Canada, Mexico, the Caribbean, Central America and South America via all U.S. domestic satellites. This earth station is currently used to transmit audio, and/or data communications and to distribute such programming through national satellite distribution channels.

DISCUSSION

4. In 1981, following consultations with the Department of State, the Commission established its Transborder policy which permits the use of domestic satellites for the transmission of certain public international telecommunications services to points within the footprint of those satellites.[1] Under this policy, domestic satellites may be used for these services where INTELSAT is incapable of providing the service or where it would be clearly uneconomical or impractical to use the INTELSAT system for the service. The Transborder policy also set forth procedures for final implementation of these services. Pursuant to these procedures, consultations under Article XIV(d) of the INTELSAT Agreement have been completed for transborder services between the United States and Canada, the United States and Mexico, and from the United States to Latin American Caribbean locations.[2]

5. The subject applications request authority to provide services similar to those previously authorized under the Commission's Transborder policy and consulted under Article XIV(d) of the INTELSAT Agreement. The subject earth stations were initially authorized to facilitate the nationwide distribution by satellite of radio programming. The instant applications involve the modification of IDB's domestic earth station licenses for the subject stations to extend the existing distribution of programming in the United States to various transborder locations.

6. Under these circumstances, we conclude that a grant of the subject applications involving transborder services is consistent with the Commission's Transborder policy

and consultations completed under Article XIV(d) of the INTELSAT Agreement. The Commission has previously recognized that where the extension of existing domestic networks is involved, use of the INTELSAT system would be both clearly impractical and uneconomical. [3] This is particularly the case where, as here, the programming is already being transmitted throughout the United States and can be received in transborder locations on an incidental basis with the addition of small, receive-only earth stations for little or no additional cost.[4] In addition, the Commission has found that use of INTELSAT facilities in such circumstances would be an inefficient use of the available radio frequency spectrum.

7. Accordingly, IT IS ORDERED that the applications of IDB Communications Group, Inc. (IDB): File Nos. CSG-89-123-ML, CSG-89-124-ML, CSG-89-125-ML, CSG-89-126-ML, CSG-89-127-ML, CSG-89-133-ML, CSG-89-134-ML, CSG-89-135-ML, CSG-90-030-ML, and CSG-90-058-ML., ARE GRANTED and the applicant is authorized to modify the licenses for its existing earth station facilities to establish channels of communication to provide the transborder services requested in their applications consistent with Attachments 1 and 2.

8. This authorization constitutes the final step with respect to the provision of transborder services only insofar as the U.S. regulatory process is concerned. It does not, however, dispense with any requirements that may be imposed by other countries involved.

9. This order shall not be construed as authorizing the distribution of programming where the appropriate copyright clearances have not been obtained.

10. This order is issued under Section 0.291 of the Commission's Rules and is effective upon release. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

FOOTNOTES

[1] In addition to U.S. domestic satellites, the Transborder policy also encompasses the use of Canadian and Mexican domestic satellites.

[2] *See* Attachments 1 and 2.

[3] *Satellite Business Systems*, 88 FCC 2d 195 (1981).

[4] *Transborder Satellite Video Services*, 88 FCC 2d 258 (1981). The same considerations are applicable with respect to the provision of receive-only data as proposed in IDB's application File No. CSG-89-135-ML.

ATTACHMENT 1

U.S. Satellites Consulted Pursuant to Article XIV(d)

Satellites

AURORA (SATCOM V)
COMSTAR D-4
CONTEL ASC-I
CONTEL ASC-II
GALAXY I
GALAXY II
GALAXY III
GALAXY IV-R
GALAXY V-R
GALAXY VI (WESTAR VI-S)
GSTAR I
GSTAR II
GSTAR III
SATCOM IR
SATCOM IIR
SATCOM IIIR
SATCOM IV
SATCOM V
SATCOM K-1
SATCOM K-2
SBS I
SBS II
SBS III
SBS IV
SBS V
SBS VI
SPACENET I
SPACENET II
SPACENET III
TELSTAR 301 (TELSTAR 3A)
TELSTAR 302
TELSTAR 303
WESTAR IV
WESTAR V

ATTACHMENT 2

SUMMARY OF INTELSAT CONSULTATIONS

Country	Service[s]	Satellite[s]
Anguilla	T.V., audio and data receive-only	all satellites listed in Attachment 1
Bahamas	T.V., audio and data receive-only	all satellites listed in Attachment 1
Barbados	T.V. receive-only	all Galaxy, Satcom and Westar satellites listed in Attachment 1
Bermuda	T.V., audio and data receive-only	all satellites listed in Attachment 1
British Virgin Islands	T.V., audio and data receive-only	all satellites listed in Attachment 1
Canada	occasional pt.-to-pt. and full time video services and business services (including data and electronic document distribution, video teleconferencing and voice communications)	all satellites listed in Attachment 1 plus Anik C1, C2, C3, D1, D2, E-A and E-B (*see* note 4)
Cayman Islands	T.V., audio and data receive-only	all satellites listed in Attachment 1
Mexico	Full-time and occasional T.V. services, receive-only audio and business services (including data and electronic document distribution, video teleconferencing and voice communications)	all satellites listed in Attachment 1 plus the Morelos I and II satellites
Montserrat	T.V., audio and data receive-only	all satellites listed in

		Attachment 1
Netherlands Antilles	T.V. receive-only	Galaxy I, Satcom III-R and IV, Westar IV and V and Comstar D4
Turks & Caicos	T.V., audio and data receive-only	all satellites listed in Attachment 1
Venezuela	T.V. receive-only	all satellites listed in Attachment 1

Notes

1) All services authorized to Latin American/Caribbean locations are receive-only (i.e. can be received as a by-product of or incidental to U.S. domestic transmissions). All services (i.e. T.V., audio and data receive-only) can be provided to any Latin American/Caribbean point over any of the satellites listed in Attachment 1 even though only certain services and satellites were initially requested. This can be accomplished through notifying INTELSAT with no additional consultation required.

2) Attachment 1 contains only those satellites that have been technically consulted with INTELSAT.

3) Attachment 2 does not contain all of the Latin American/Caribbean countries which have been included in previous charts. Attachment 2 contains only those countries that associated with the most recent INTELSAT Article XIV(d) consultation in October 1989 (AP-15-23E). Other countries will be added to the list once they associate with that consultation.

4) No final authority will be granted for the use of the Anik E-A and E-B satellites until an applicant submits an operating agreement and the Commission determines that the agreement is in the public interest and consistent with the Commission's Transborder Policy.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

MCI
TELECOMMUNICATIONS
CORPORATION

File No. I-T-C-90-193

Application for authority to acquire
and operate facilities for service
between the U.S. and Czechoslovakia.

ORDER, AUTHORIZATION AND CERTIFICATE

Adopted: January 10, 1991; Released: January 17, 1991

By the Chief, International Facilities Division:

1. The captioned application, filed on September 25, 1990 by MCI Telecommunications Corporation (MCI), requests authority pursuant to Section 214 of the Communications Act of 1934, as amended, to lease and operate satellite and connecting facilities for provision of direct service between the U.S. and Czechoslovakia. The application was placed on public notice on October 4, 1990. No comments were received. Upon consideration of the application, IT IS HEREBY CERTIFIED that the present and future public convenience and necessity require the provision of direct service between the U.S. and Czechoslovakia by MCI.

2. Accordingly, IT IS ORDERED that application File No. I-T-C-90-193 IS GRANTED, and MCI is authorized to.

> a. lease from Comsat and operate 24 voice-grade satellite half-circuits between the Etam, West Virginia earth station and an appropriate satellite over the Atlantic Ocean, connecting with similar circuits between the satellite and an earth station in Czechoslovakia, furnished by MCI's correspondent in Czechoslovakia:
>
> b. lease from AT&T and operate 24 voice-grade circuits in the Etam, West Virginia earth station;
>
> c. lease and operate 24 voice-grade circuits between the Etam, West Virginia earth station and MCI's West Orange, New Jersey operating center; and
>
> d. use said facilities to provide MCI's regularly authorized services, including switched voice services, between the U.S. and Czechoslovakia and beyond.

3. The Commission retains jurisdiction over this matter to reallocate circuits in the satellite system among the various international common carriers and other authorized users as required to ensure nondiscriminatory use of, and equitable access to, the communications satellite system.

4. No material changes inconsistent with this or any other relevant Commission order shall be made before final execution of an operating agreement between MCI and its correspondent in Czechoslovakia, and a copy of the agreement shall be filed with the Commission within 30 days of its execution.

5. IT IS FURTHER ORDERED that the applicant shall file the annual reports of overseas telecommunications traffic required by Section 43.61 of the Commission's Rules, 47 C.F.R. §43.61 (October 1, 1989).

6. This order is issued under Section 0.291 of the Commission's rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's rules may be filed within 30 days of the date of public notice of this order (*See* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

MCI
TELECOMMUNICATIONS
CORPORATION

Application for authority to acquire and operate facilities for direct service between the U.S. and Hungary.	File No. I-T-C-91-001
Application for authority to acquire and operate facilities for direct service between the U.S. and U.S.S.R.	File No. I-T-C-91-002

ORDER, AUTHORIZATION AND CERTIFICATE

Adopted: January 10, 1991; Released: January 17, 1991

By the Chief, International Facilities Division:

1. The captioned applications, filed by MCI Telecommunications, Corporation (MCI), request authority pursuant to Section 214 of the Communications Act of 1934, as amended, to lease and operate satellite and connecting facilities for the provision of direct service between the U.S. and Hungary and the U.S.S.R. The applications were placed on public notice on October 10, 1990. No comments were received. Upon consideration of the applications, IT IS HEREBY CERTIFIED that the present and future public convenience and necessity require the provision of direct service between the U.S. and Hungary and the USSR by MCI.

2. Accordingly, IT IS ORDERED that applications File Nos. I-T-C-91-001 and I-T-C-91-002 ARE GRANTED, and MCI is authorized to:

> a. lease from Comsat and operate 84 voice-grade satellite half-circuits between the Etam. West Virginia earth station and an appropriate satellite over the Atlantic Ocean;
>
> b. lease from AT&T and operate 84 voice-grade circuits in the Etam, West Virginia earth station;
>
> c. lease and operate 84 voice-grade circuits between the Etam, West Virginia earth station and MCI's West Orange, New Jersey operating center: and
>
> d. use these facilities to provide MCI's regularly authorized services, including switched voice service, between the U.S., on the one hand, and Hungary - 36 voice-grade circuits, and the U.S.S.R - 48 voice-grade circuits, on the other hand, and beyond.

3. The Commission retains jurisdiction over this matter to reallocate circuits in the satellite system among the various international common carriers and other authorized users as required to ensure nondiscriminatory use of, and equitable access to, the communications satellite system.

4. No material changes inconsistent with this or any other relevant Commission order shall be made before final execution of operating agreements between MCI and its correspondents in Hungary and the U.S.S.R, and copies of the agreements shall be filed with the Commission within 30 days of its execution.

5. IT IS FURTHER ORDERED that the applicant shall file the annual reports of overseas telecommunications traffic required by Section 43.61 of the Commission's Rules, 47 C.F.R. §43.61 (October 1, 1989).

6. This order is issued under Section 0.291 of the Commission's rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's rules may be filed within 30 days of the date of public notice of this order (*See* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-560

In re Applications of

WHITE CONSTRUCTION CO., INC. (hereafter "White")	File No. BPH-880816NY
JOHN K. MCCANLESS (hereafter "McCanless")	File No. BPH-880816OG
JOHN NORMAN & DONALD LESKO (hereafter "Norman")	File No. BPH-880816OU

For Construction Permit
for a New FM Station
in Chiefland, Florida
Channel 247A (97.3 MHz)

HEARING DESIGNATION ORDER

Adopted: October 26, 1990; Released: January 17, 1991

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.

2. *Preliminary Matter*. The captioned applicants have each proposed transmitting antenna sites short-spaced to sites involved in pending petitions for reconsideration concerning Channel 247C2 in Micanopy, Florida and Channel 300A in Chiefland. Accordingly, the applicants will be allowed to proceed to comparative hearing but, in the event of grant of any of the captioned applicants, such grant will be made contingent on the final action regarding the noted petitions.

3. *Other matters*. McCanless and Norman propose to locate their antennas on an existing tower situated near the intersection of US 19, 98 and State Road 345 in Chiefland. The tower data submitted in their respective applications is inconsistent with that contained in the Commission's Records. Where our Antenna Survey Branch records reveal clearance (FAA Study 86-ASO-985-OE) for a tower 152.4 meters above ground level (AGL)/ 157 meters above mean sea level (AMSL), both applicants list these heights as 122 meters AGL and 133 meters AMSL. The applicants propose to locate on an existing tower licensed to an existing Commission licensee, and specific reference is made to these towers. Since use of either data would not cause the proposals to violate any Commission Rule, the discrepancies do not affect either applicant's acceptability. However, both will be required to clarify and/or correct these discrepancies by submitting the appropriate amendment to the presiding Administrative Law Judge.

4. Section II, Item 4 of FCC Form 301 (October 1986) requires that an applicant specify its address (number, street, city, state) as well as the home address of each of its principals. Neither White nor McCanless have completed Item 4 correctly. White's application merely gives a city and state as the residence address for its principals; McCanless lists a post office box as his residence address. Accordingly, White and McCanless must submit an amendment which gives all the information required by Section II, Item 4 to the presiding Administrative Law Judge after this Order is released.

5. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

6. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

> 1. To determine which of the proposals would, on a comparative basis, better serve the public interest.
>
> 2. To determine, in light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

7. IT IS FURTHER ORDERED, That in the event of grant of any of the captioned applicants, such grant will be conditioned upon the disposition of petitions for reconsideration concerning Channel 247C2 in Micanopy, Florida and Channel 300A in Chiefland, Florida.

8. IT IS FURTHER ORDERED, That McCanless and Norman must submit an amendment clarifying and/or correcting the tower height discrepancies specified in paragraph 3 hereinabove to the presiding Administrative Law Judge within 30 days of the release of this Order.

9. IT IS FURTHER ORDERED, That White and McCanless shall submit amendments containing the information required by Section II, Item 4 of FCC Form 301, to the presiding Administrative Law Judge within 30 days after the release of this Order.

10. IT IS FURTHER ORDERED, That a copy of each document filed in this proceeding subsequent to the date of adoption of this Order shall be served on the counsel of record in the Hearing Branch appearing on behalf of the Chief, Mass Media Bureau. Parties may inquire as to the identity of the counsel of record by calling the Hearing Branch at (202) 632-6402. Such service shall be addressed to the named counsel of record, Hearing Branch, Enforcement Division, Mass Media Bureau, Federal Communications Commission, 2025 M Street, N.W., Suite 7212, Washington, D.C. 20554. Additionally, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall also be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Federal Communications Commission, Room 350, 1919 M Street, N.W., Washington, D.C. 20554.

11. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

12. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-573

In re Applications of

CLOVER COMMUNICATIONS, INC. (hereafter "Clover")	File No. BPH-880713MH
STEPHEN E. POWELL (hereafter "Powell")	File No. BPH-880714MJ
SNAPP BROADCASTING, INC. (hereafter "Snapp")	File No. BPH-880714MY
TBM LIMITED PARTNERSHIP (hereafter "TBM")	File No. BPH-880714NC
S&J ASSOCIATES, INC. (hereafter "S&J")	File No. BPH-880713MM (Previously Returned)

For Construction Permit
for a New FM Station on Channel 293A
(106.5 MHz) in Farmington,
New Hampshire

HEARING DESIGNATION ORDER

Adopted: October 26, 1990; Released: January 17, 1991

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.

2. *Preliminary Matters.* Staff review of S&J's application, as originally filed, determined that the application did not include a site-availability certification. Consequently, on November 22, 1988, S&J's application was returned because it was found not sufficient for tender. On December 20, 1988, S&J filed a petition for reconsideration of this action along with the required site-availability certification.

3. S&J's application had been found untenderable because it lacked the requisite site-availability certification. This information is required pursuant to Item 2, Appendix D, *Report and Order* in Docket MM 84-750, 50 Fed Reg. 19936 (1985). The *Report and Order* indicates that failure to provide the requisite certification in the form set forth in Appendix B of the *Report and Order* in Docket MM 84-750, *supra*, will result in the application being deemed not substantially complete.

4. A petition for reconsideration must be based upon newly discovered evidence or upon errors of fact or law in the action for which reconsideration is sought. *See* 47 C.F.R. Sections 1.106(c) and (d). In the absence of such a showing, reconsideration will not be granted for the purpose of reviewing matters which the Commission has already considered and resolved. *WWIZ, Inc.*, 37 FCC 685, 686 (1964), *affd. sub nom. Lorain Journal Co. v. FCC*, 351 F 2d 824 (D.C. Cir. 1965), cert den. 383 U.S. 967 (1966); *Employment Practices of Charlotte, North Carolina Stations*, 77 FCC 2d 1 (1980). Furthermore, in accordance with the *Report and Order, supra*, the only basis for reversing an earlier finding of untenderability is demonstration that the Commission erred in its earlier determination. *See* specifically, Appendix D to the *Report and Order, supra*.

5. The S & J petition for reconsideration does not demonstrate that the finding of untenderability of the subject application as originally filed was erroneous. Rather, it appears to admit that the application as originally filed was unacceptable and merely submits the corrected data. Therefore, reconsideration is not warranted. Accordingly, the amendment will be returned, and the petition for reconsideration denied.

6. *Clover.* Mary Buckwald, Raymond Garon and Christopher Sluicer, the principals of Clover, are each employed at WCNL-AM/FM, Newport, NH. Each has indicated his intent to terminate his relationship with WCNL-AM/FM in the event of grant of the referenced application. Accordingly, in the event of grant of Clover's application, Buckwald, Garon and Sluicer will each be required to sever all connections with WCNL-AM/FM prior to the commencement of program test authority.

7. *Powell.* Powell was an applicant for a construction permit for a new television station in Memphis, Tennessee, mutually exclusive with RKO General, WHBQ-TV's renewal application. *See* MM Docket Nos. 84-1213 through 84-1225. The presiding Administrative Law Judge in the Memphis proceeding specified the following issue against Powell (*See, Memorandum Opinion and Order*, FCC 85M-858, released February 27, 1985):

> To determine whether Stephen E. Powell made misrepresentations to the Commission or lacked candor when he stated in his testimony in the Berlin (New Hampshire, WMOU-FM) proceeding that Robert R. Powell, Sr. would not be employed at WMOU-FM and that Stephen Powell would serve as Sales Manager, and to determine the impact of these misrepresentations and lack of candor, if any, on the basic and/or comparative qualifications of Stephen E. Powell to be a licensee in this proceeding.

Subsequently, Powell's application was dismissed in the Memphis proceeding for failure to prosecute. Consequently, the issue was not resolved. This unresolved issue calls into question Powell's qualification to be a Commission licensee. Therefore, the unresolved issue will be specified and tried against Powell in this proceeding.

8. Powell petitioned for leave to amend his application on May 5, 1989. The accompanying amendment was filed after December 29, 1988, the last date for filing minor

amendments as of right. Under Section 1.65 of the Commission's Rules, the amendment is accepted for filing. However, an applicant may not improve its comparative position after the time for filing amendments as of right has passed. Therefore, any comparative advantage resulting from the amendment will be disallowed.

9. *Snapp*. An applicant for a construction permit is required to certify that it is financially qualified to construct and operate its proposed facility for three months with revenue. Snapp's response to Section III, FCC Form 301 (Financial Qualifications), indicates that it was unable to certify its financial qualifications at the time it filed its application. To date, no amendment has been received which indicates that the applicant is now able to certify that it is financially qualified. Accordingly an appropriate issue will be specified.

10. The antenna data filed by Snapp does not agree with the data which was submitted to the FAA. Accordingly, Snapp will be required to refile with the FAA or amend its application to agree with the data filed with the FAA. Moreover, Snapp will be required to either notify the presiding Administrative Law Judge that it has refiled with the FAA or submit the appropriate amendment to the presiding Administrative Law Judge within 30 days after this Order is released.

11. Since no determination has been made as to whether the antenna proposed by Snapp would constitute a hazard to air navigation, an issue with respect thereto will be included and the FCC made a party to the proceeding.

12. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

13. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

> 1. To determine whether Stephen E. Powell made misrepresentations to the Commission or lacked candor when he stated in his testimony in the Berlin (New Hampshire, WMOU-FM) proceeding that Robert R. Powell, Sr. would not be employed at WMOU-FM and that Stephen Powell would serve as Sales Manager, and to determine the impact of these misrepresentations and lack of candor, if any, on the basic and/or comparative qualifications of Stephen E. Powell to be a licensee in this proceeding.
>
> 2. To determine with respect to Snapp whether the applicant is financially qualified.
>
> 3. To determine whether there is a reasonable possibility that the tower height and location proposed by Snapp would constitute a hazard to air navigation.
>
> 4. To determine which of the proposals would, on a comparative basis, best serve the public interest.
>
> 5. To determine, in light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

14. IT IS FURTHER ORDERED, That the petition for reconsideration filed by S&J IS DENIED, and the corresponding amendment IS HEREBY RETURNED.

15. IT IS FURTHER ORDERED, That, in the event of grant of Clover's application, Mary Buckwald, Raymond Garson and Christopher Sluicer will each divest all interest in and sever all connection with Stations WCNL-AM/FM prior to the commencement of program test authority.

16. IT IS FURTHER ORDERED, That the petition for leave to amend filed by Powell IS GRANTED, and the corresponding amendment IS ACCEPTED to the extent indicated herein.

17. IT IS FURTHER ORDERED, That Snapp shall file an amendment as prescribed in paragraph 10, above, with the presiding Administrative Law Judge within 30 days after this Order is released.

18. IT IS FURTHER ORDERED, That the Federal Aviation Administration IS MADE A PARTY to this proceeding with respect to the air hazard issue only.

19. IT IS FURTHER ORDERED, That a copy of each document filed in this proceeding subsequent to the date of adoption of this Order shall be served on the counsel of record in the Hearing Branch appearing on behalf of the Chief, Mass Media Bureau. Parties may inquire as to the identity of the counsel of record by calling the Hearing Branch at (202) 632-6402. Such service shall be addressed to the named counsel of record, Hearing Branch, Enforcement Division, Mass Media Bureau, Federal Communications Commission, 2025 M Street, N.W., Suite 7212, Washington, D.C. 20554. Additionally, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall also be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Federal Communications Commission, Room 350, 1919 M Street, N.W., Washington, D.C. 20554.

20. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

21. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2), of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-572

In re Applications of

SUSAN H. BAY (hereafter "Bay")	File No. BPH-890111MA
LOUIS M. ANZEK AND LEISA M. ANZEK (hereafter "Anzek")	File No. BPH-890112MJ
POINTE BROADCASTING, INC. (hereafter "Pointe")	File No. BPH-890112ML
NATIVE AMERICAN BROADCASTERS, INC. (hereafter "Native")	File No. BPH-890112MM
HIGH LEVEL VENTURES (hereafter "Ventures")	File No. BPH-890112MN

For Construction Permit
for a New FM Station on
Channel 225A in Lebanon, Tennessee

HEARING DESIGNATION ORDER

Adopted: October 26, 1990; Released: January 17, 1991

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.

2. *Native*. At the time the instant application was filed, Native principal Fritz R. Niggeler was an officer, director, and 33 1/3% shareholder in American Indian Broadcast Group, Inc. (AIBG).[1] AIBG then had on file with the Commission some 13 FM broadcast applications.[2] The following issues were designated against AIBG in the *Hearing Designation Order* for Topeka, Kansas, MM Docket 89-293, DA 89-669, 4 FCC Rcd 5204 (released June 27, 1989):

> 1. To determine: (a) whether [AIBG's] filing of the instant application constituted a violation of the Commission's multiple ownership rules, 47 C.F.R. § 73.3555; and
>
> (b) if so, whether the filing of [AIBG's] application constituted a violation of the Commission's inconsistent application rule, 47 C.F.R. § 73.3518 which, if so, would warrant dismissal of the application.

AIBG presented evidence that Mr. Niggeler and Mr. Jack Bursack, another officer, director, and 33 1/3% shareholder, were of American Indian extraction and thus AIBG qualified as a minority controlled entity. *See* AIBG Exhibit 4 in MM Docket 89-293, received into evidence at hearing of January 20, 1990, at p. 186 of the hearing transcript. However, AIBG dismissed its application prior to the resolution of the issue. *See Memorandum Opinion and Order*, FCC 90M-1466, released June 4, 1990. Thus, no formal finding was made regarding Mr. Niggeler's minority status.

3. A violation of the inconsistent application rule occurs *at the time of filing* of the application in question. Thus, if Mr. Niggeler is not, as is claimed, an American Indian, his filing of this application without an appropriate request for waiver of the multiple ownership rules would mandate return of the application as unacceptable for filing under Section 73.3518. *See Big Wyoming Broadcasting Corp.*, 2 FCC Rcd 3492 (1987). It does not matter for purposes of this issue that Mr. Niggeler is no longer connected with AIBG as the violation, if any, occurred with the filing of this application due to Mr. Niggeler's cognizable interest in the 13 other AIBG applications. Because we have no evidence here that Mr. Niggeler is indeed an American Indian, and because the Topeka application did not resolve the issue of Mr. Niggeler's (and, for that matter, Mr. Bursack's) heritage, we will designate identical issues in this proceeding.

4. The Commission requires that if there will be five or more fulltime station employees, the applicant must complete and file Section VI of Form 301 and supply a statement detailing hiring and promotion policies for women and each minority group whose representation in the available labor force is five percent or greater in the proposed service area. Although Pointe has filed such statement, it is deficient. Pointe has not listed any specific local recruitment sources for women. Accordingly, Pointe will be required to file an amended EEO program with the presiding Administrative Law Judge, or an appropriate issue will be specified by the Judge.

5. Ventures petitioned for leave to amend its application on January 10, 1990 and on June 26, 1990. The accompanying amendments were filed after May 11, 1989, the last date for filing minor amendments as of right. Under Section 1.65 of the Commission's Rules, the amendments are accepted for filing. However, an applicant may not improve its comparative position after the time for filing amendments as of right has passed. Therefore, any comparative advantage resulting from the amendments will be disallowed.

6. Attempts to obtain FAA clearance through the Commission's Antenna Survey Branch and Ventures have been unsuccessful. Accordingly, since no determination has been received as to whether the antenna proposed by Ventures would constitute a hazard to air navigation, an issue with respect thereto will be included and the FAA made a party to the proceeding.

7. Data submitted by the applicants indicate there would be significant difference in the size of the areas and populations which would receive service from the propos-

als. Consequently, the areas and populations which would receive FM service of 1 mV/m or greater intensity, together with the availability of other primary aural services in such areas, will be considered under the standard comparative issue for the purpose of determining whether a comparative preference should accrue to any of the applicants.

8. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

9. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. (a) To determine whether Native's filing of the instant application constituted a violation of the Commission's multiple ownership rules, 47 C.F.R. § 73.3555; and

   (b) if so, whether the filing of Native's application constituted a violation of the Commission's inconsistent application rule, 47 C.F.R. § 73.3518 which, if so, would warrant dismissal of the application.

2. To determine whether there is a reasonable possibility that the tower height and location proposed by Ventures would constitute a hazard to air navigation.

3. To determine which of the proposals would, on a comparative basis, best serve the public interest.

4. To determine, in light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

10. IT IS FURTHER ORDERED, That within 30 days of the release of this Order, Pointe shall submit Section VI information in accordance with the requirement of Section 73.2080(c) of the Commission's Rules to the presiding Administrative Law Judge.

11. IT IS FURTHER ORDERED, That the petitions for leave to amend filed by Ventures ARE GRANTED, and the corresponding amendments ARE ACCEPTED to the extent indicated herein.

12. IT IS FURTHER ORDERED, That the Federal Aviation Administration IS MADE A PARTY to this proceeding with respect to the air hazard issue only.

13. IT IS FURTHER ORDERED, That a copy of each document filed in this proceeding subsequent to the date of adoption of this Order shall be served on the counsel of record in the Hearing Branch appearing on behalf of the Chief, Mass Media Bureau. Parties may inquire as to the identity of the counsel of record by calling the Hearing Branch at (202) 632-6402. Such service shall be addressed to the named counsel of record, Hearing Branch, Enforcement Division, Mass Media Bureau, Federal Communications Commission, 2025 M Street, N.W., Suite 7212, Washington, D.C. 20554. Additionally, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall also be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Federal Communications Commission, Room 350, 1919 M Street, N.W., Washington, D.C. 20554.

14. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

15. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

FOOTNOTES

[1] On May 3, 1989, Mr. Niggeler left the company.

[2] These were for Hartford, Michigan (BPH-870820MB); Alamogordo, New Mexico (BPH-870820MC); Atlantic City, New Jersey (BPH-970827MQ); Lawton, Oklahoma (BPH-870827NG); Germantown, Tennessee (BPH-870908MQ); DeWitt, Michigan (BPH-870914MC); State College, Pennsylvania (BPH-870916MB); San Angelo, Texas (BPH-870921MB); Windsor, Virginia (BPH-870928MC); South Yarmouth, Massachusetts (BPH-990107NI); Topeka, Kansas (BPH-871124MM); Vero Beach, FLorida (BPH-880523MF); and Post, Texas (BPH-870803MC).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-602

In re Applications of

THOMAS A. RUSK (hereafter "Rusk")	File No. BPH-890208MA
LITTLE ROCK RADIO, INC. (hereafter "Little Rock")	File No. BPH-890209MA
NORTH LITTLE ROCK BROADCASTING, LTD. (hereafter "North Little Rock")	File No. BPH-890209MB

For Construction Permit
for a New FM Station on Channel 266A
in North Little Rock, Arkansas

HEARING DESIGNATION ORDER

Adopted: November 20, 1990; Released: January 17, 1991

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.

2. *Rusk*. An engineering study of Rusk's application reveals a discrepancy with respect to the indicated values for the proposal's site elevation above mean sea level (AMSL). Specifically, in Section V-B, Item 7(a)(1) of the application, the listed site elevation AMSL is 116 meters. However, the site elevation depicted on the site map submitted as Exhibit 5 to the application indicates a site elevation AMSL of 110 meters. Since neither of these values results in a violation of any Commission rule, the discrepancy is neither a tenderability nor an acceptability defect. However, Rusk will be required to file an amendment to correct the problem.

3. *Little Rock*. Alan H. Potamkin, principal of Little Rock, has an ownership interest in the following non-communications entities, against which the following complaints alleging equal employment opportunity (EEO) complaints are pending: (i) *Thomas Gilmore v. Potamkin Chevrolet* (Philadelphia) - EEOC - Charge No. 170890020, October 12, 1988; (ii) *Eva Sieberling v. Potamkin Auto Mall* (Philadelphia) Philadelphia Commission on Human Rights - Charge No. 17G890035, October 19, 1988; (iii) *Gale L. Schuber v. Potamkin Ford* (Atlanta) - EEOC August 17, 1987 - U. S. District Court for the Northern District of Georgia (Atlanta Division) - Case No. 1:88-CV-952-LV, April 29, 1988; and, (iv) *Raymond Angulo v. Potamkin Toyota* (Miami) - Metro Dade Co. Fair Housing and Equal Opportunity Appeals Board - EEOC - Charge No. 150890127, October 24, 1988. An appropriate condition will therefore be specified below.

4. The engineering data submitted by Rusk, Little Rock and North Little Rock do not clearly demonstrate that it provides a 3.16 mV/m signal to the entire proposed city of license, as required by Section 73.315(a) of the Commission's Rules. However, the FM Branch does not require waiver of this requirement unless the proposed 3.16 mV/m coverage falls below 80% of the area of the principal community. *See John R. Hughes*, 50 Fed. Reg. 5679 (February 11, 1985). *See* also *Southwest Communications, Inc.*, released July 16, 1986 (Letter from the Chief, FM Branch, reference 8920-HVT). Engineering study reveals that the 3.16 mV/m contour of each of these applicants is in substantial compliance with this requirement in that it will cover over 80% of the community of license. Accordingly, no waiver is required.

5. North Little Rock petitioned for leave to amend its application on September 13, 1989 and April 5, 1990. The accompanying amendments were filed after July 3, 1989, the last date for filing minor amendments as of right. Under Section 1.65 of the Commission's Rules, the amendments are accepted for filing. However, an applicant may not improve its comparative position after the time for filing amendments as of right has passed. Therefore, any comparative advantage resulting from the amendments will be disallowed.

6. Data submitted by the applicants indicate there would be significant difference in the size of the areas and populations which would receive service from the proposals. Consequently, the areas and populations which would receive FM service of 1 mV/m or greater intensity, together with the availability of other primary aural services in such areas, will be considered under the standard comparative issue for the purpose of determining whether a comparative preference should accrue to any of the applicants.

7. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

8. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

> 1. To determine which of the proposals would, on a comparative basis, best serve the public interest.
>
> 2. To determine, in light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

9. IT IS FURTHER ORDERED, That Rusk shall submit an amendment correcting its proposed site elevation AMSL to the presiding Administrative Law Judge within 30 days of the release of this Order.

10. IT IS FURTHER ORDERED, That in the event a construction permit is awarded to Little Rock as a result of this proceeding, its grant will be subject to whatever

action, if any, the Commission may deem appropriate, in light of the outcome of the complaint proceedings listed in paragraph 3 above.

11. IT IS FURTHER ORDERED, That the requests for waiver of 47 C.F.R. § 73.315(a) by Rusk, Little Rock and North Little Rock ARE DISMISSED AS MOOT.

12. IT IS FURTHER ORDERED, That the petitions for leave to amend filed by North Little Rock ARE GRANTED, and the corresponding amendments ARE ACCEPTED to the extent indicated herein.

13. IT IS FURTHER ORDERED, That a copy of each document filed in this proceeding subsequent to the date of adoption of this Order shall be served on the counsel of record in the Hearing Branch appearing on behalf of the Chief, Mass Media Bureau. Parties may inquire as to the identity of the counsel of record by calling the Hearing Branch at (202) 632-6402. Such service shall be addressed to the named counsel of record, Hearing Branch, Enforcement Division, Mass Media Bureau, Federal Communications Commission, 2025 M Street, N.W., Suite 7212, Washington, D.C. 20554. Additionally, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall also be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Federal Communications Commission, Room 350, 1919 M Street, N.W., Washington, D.C. 20554.

14. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

15. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-605

In re Applications of

DORSEY EUGENE NEWMAN (hereafter "Newman")	File No. BPH-890216MA
FM RADIO, INC. (hereafter "FRI")	File No. BPH-890217MM
CAROLYN E. MCMILLAN (hereafter "McMillan")	File No. BPH-890217MN
DR. NORMA J. FISHER (hereafter "Dr. Fisher")	File No. BPED-890217MA (Dismissed Herein)

For Construction Permit
for a New FM Station on Channel 291A
in Hartselle, Alabama

HEARING DESIGNATION ORDER

Adopted: November 20, 1990; Released: January 17, 1991

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.

2. *Dr. Fisher*. Engineering analysis of Dr. Fisher's application reveals a short-spacing of 5.2 kilometers between the applicant's proposed facilities and the allotment to Sheffield, Alabama, as well as a short spacing of 7.0 kilometers to an application filed by WBTG-FM (BPH-890628IE) Sheffield, AL. The WBTG-FM application proposes to upgrade the facility from Channel 292A to Channel 292C2 pursuant to the *Report and Order* in Docket No. 87-451, 3 FCC 2d 6849 (1988). The required distance in this instance is 105 kilometers; Dr. Fisher's application only results in an actual distance of 98 kilometers to the application and 99.8 kilometers to the Sheffield allotment.

3. Dr. Fisher failed to timely request a waiver of 47 C.F.R. § 73.207, the minimum mileage separation requirement. 47 C.F.R. § 73.3566(a) states, in pertinent part, that applications "patently not in accordance with FCC rules, regulations, or other requirements, unless accompanied by an appropriate request for a waiver will not be accepted for filing, or if inadvertently accepted for filing will be dismissed". Thus, Dr. Fisher's application must be dismissed as inadvertently accepted for filing because it is not in compliance with the spacing rules and she failed to include a request for waiver of these rules. *See Donovan Burke*, 60 RR 2d 110 (1986).

4. Data submitted by the applicants indicate there would be significant difference in the size of the areas and populations which would receive service from the proposals. Consequently, the areas and populations which would receive FM service of 1 mV/m or greater intensity, together with the availability of other primary aural services in such areas, will be considered under the standard comparative issue for the purpose of determining whether a comparative preference should accrue to any of the applicants.

5. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

6. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

> 1. To determine which of the proposals would, on a comparative basis, best serve the public interest.
>
> 2. To determine, in light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

7. IT IS FURTHER ORDERED, That, the application filed by Dr. Fisher IS DISMISSED AS INADVERTENTLY ACCEPTED FOR FILING.

8. IT IS FURTHER ORDERED, That a copy of each document filed in this proceeding subsequent to the date of adoption of this Order shall be served on the counsel of record in the Hearing Branch appearing on behalf of the Chief, Mass Media Bureau. Parties may inquire as to the identity of the counsel of record by calling the Hearing Branch at (202) 632-6402. Such service shall be addressed to the named counsel of record, Hearing Branch, Enforcement Division, Mass Media Bureau, Federal Communications Commission, 2025 M Street, N.W., Suite 7212, Washington, D.C. 20554. Additionally, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall also be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Federal Communications Commission, Room 350, 1919 M Street, N.W., Washington, D.C. 20554.

9. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

10. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Application of

HYE CREST MANAGEMENT, INC. File No. 10380-CF-P-88

For License Authorization in the
Point-to-Point Microwave Radio
Service in 27.5 - 29.5 GHz Band
and Request for Waiver of the Rules

MEMORANDUM OPINION AND ORDER

Adopted: January 3, 1991; Released: January 18, 1991

By the Commission:

1. Hye Crest Management, Inc. ("Hye Crest") has filed the above-captioned application to construct and operate a new fixed station in the Point-to-Point Microwave Radio Service to be located in Brooklyn (Brighton Beach), New York. It also requests a waiver of Sections 21.108 and 21.700 of the Commission's Rules, 47 C.F.R. §§ 21.108, 21.700, to use frequencies in the 27.5 - 29.5 GHz range ("28 GHz band") as a non-common carrier, for the provision of video service via a network of broadbeam and omni-directional transmitting antennas within the New York Standard Metropolitan Statistical Area ("SMSA").[1]

2. Comments and objections regarding Hye Crest's proposal have been filed by The Mountain States Telephone and Telegraph Company, Northwestern Bell Telephone Company and Pacific Northwest Bell Telephone Company ("U.S. West"); The National Spectrum Managers Association, Inc. ("NSMA"); The Bell Atlantic Telephone Companies (collectively referred to as "Bell Atlantic"); BellSouth Corporation, South Central Bell Telephone Company and Southern Bell Telephone and Telegraph Company (collectively referred to as "BellSouth"); New York Telephone Company and New England Telephone and Telegraph Company ("NYNEX"); Southwestern Bell Telephone Company ("SWBT"); Pacific Bell; Congressman Matthew J. Rinaldo; and Microband Companies Incorporated ("Microband").[2] The parties filing comments and objections in this proceeding are collectively referred to as "the Commenters".

APPLICATION

3. Hye Crest seeks authority to establish a network of omni-directional microwave radio transmitters operating in an unoccupied portion of the 28 GHz band to be used to distribute 24 channels of video service to apartments, hotels, and private homes throughout the New York City metropolitan area. According to Hye Crest's proposal, if authorized, the licensee would implement a multicell configuration video distribution system within its designated service area. The size of each cell would be 6 to 8 miles in diameter.

4. Hye Crest asks that the frequencies it requests be granted on a "designated service area basis" to be confined to the New York PMSA. A designated service area is requested because the short propagation range associated with the 28 GHz band requires frequency reuse, which can best be accomplished with a designated service area licensing scheme. [3] It proposes that the notification procedures of Section 21.711 of the Commission's Rules, 47 C.F.R. § 21.711, would be used for licensing each station beyond the first. It claims this licensing scheme will effectively avoid competing, mutually exclusive applications for each of its transmitters within its service area. Hye Crest proposes to achieve frequency reuse through the use of cross-polarization isolation at adjacent cell transmitter sites with alternately polarized low powered transmitters[4] that will serve each cell. One-half of the transmitters would use vertical polarization and the other half would use horizontal polarization, with adjacent cells employing opposite polarization.

5. Hye Crest requests that it be allowed to provide its service offering on a non-common carrier basis to enable it to use portions, or all of its transmission time and capacity for its own purposes.[5] It believes non-common carrier status will provide it with maximum flexibility to implement its proposed video service, to stimulate technological innovation, to increase competition in the video entertainment marketplace, and to provide it additional diversity and freedom to meet the particular communications needs of its customers.

6. Finally, Hye Crest declares that the public interest would be well served by the grant of its application because it will transform a frequency band now lying fallow into one that is commercially useful to provide an innovative and competitive source of video programming.[6]

COMMENTS AND OBJECTIONS

7. The Commenters generally submit that the omnidirectional service proposed by Hye Crest is incompatible with the point-to-point microwave radio service for which the frequencies in the 28 GHz band are allocated; that because Hye Crest's proposal would require 1000 MHz of spectrum, or one-half of the band's frequencies, a grant of its proposal would constitute a *de facto* reallocation of the 28 GHz band; that future demands for the band should be fully considered; and that the issue of reallocation should be considered in the context of a Rule Making proceeding, rather than a waiver request.

8. Although U.S. West interposes no objection to the use of the 28 GHz band in the manner proposed, it argues that Hye Crest has not demonstrated an actual need for the anticipated video service and has not included a showing of projected circuit growth and orders for service from each customer as required by the Commission's Rules.[7] Moreover, it believes that existing spectrum allocations to the Multipoint Distribution Service ("MDS"), Private Operational Fixed Service ("OFS"), and other means of distributing over-the-air programming will adequately meet consumer demand for video services. U.S. West is also concerned that Hye Crest's proposal to treat the addition of transmitters within its proposed designated service area to its system as "minor facility modifications" not subject to Public Notice procedures may result in interference to other users of the 28 GHz band. It con-

tends it is imperative that all nearby licensees and applicants be made aware of what changes are contemplated so that interference-free operation can be ensured.

9. NSMA states that Hye Crest has mischaracterized its application as an application for regular authorization, rather than as a request for developmental authority. NSMA further states that Hye Crest's proposal to operate the facilities as a non-common carrier is inconsistent with Commission policy to grant developmental authorizations only to common carriers.

REPLIES

10. Hye Crest maintains that there is an unfulfilled need for competitive offerings of multichannel video service in the New York City area, and that the service it proposes will be able to meet that demand and to effectively compete with cable television and other forms of video delivery systems. It states competition with cable television will provide numerous benefits to the viewing public. First, the proposed 36 channel system[8] will be able to compete head-to-head with the facilities currently provided by cable television to approximately 2 million New York PMSA households in terms of diversity of programming and lower rates for service. Second, as to the approximately 1.6 million households currently unserved by cable, Hye Crest believes its system will encourage the expansion of cable television systems into these unwired areas. Because they do not have its channel capacity, Hye Crest says that none of the alternative video services mentioned by the Commenters can compete effectively with cable television in the New York City area.

11. Hye Crest defends its selection of the 28 GHz band on the grounds that it is the most suitable band available for providing 24 video channels. Hye Crest argues the 28 GHz band contains sufficient spectrum, is unoccupied, and equipment is currently available. Frequencies below 13.25 GHz[9] and above 40 GHz, according to Hye Crest, are not available. The 18 GHz and 23 GHz bands, even though not congested, are unsuitable because both bands are widely used in and around New York City, thereby making it impossible to find a contiguous band to support 24 video channels. Similarly, lack of sufficient bandwidth is a drawback to the use of the 31 GHz band. Hye Crest further explains that the 40 GHz band is not as wide as the 28 GHz band and is shared with broadcast television station operators that use portable transmitters, making long term frequency coordination difficult. Most importantly, the 40 GHz band has greater atmospheric attenuation.

12. Hye Crest believes its request to use 1000 MHz of spectrum is reasonable. It explains that its technical design is based on the use of frequency modulation ("FM") to transmit each video channel. Its design of 40 MHz channels is compatible with the standard FM video bandwidth currently utilized in consumer electronic products, thereby making it economically feasible to build low cost receivers. Hye Crest submits that, if an unforeseen demand for the 28 GHz band by point-to-point microwave radio carriers were to develop, it appears that co-channel operations of omni-directional and point-to-point microwave radio systems would be technically feasible, although problematic, in New York City, but that point-to-point microwave radio use in adjacent areas (*i.e.*, New Jersey, Connecticut) would be unaffected. In any event, states Hye Crest, commenting telephone companies have neither a need, nor the equipment, to operate in the 28 MHz band. Spectrum at 18 GHz, 23 GHz, and 1000 MHz at 28 GHz, remains available for point-to-point users.

13. Hye Crest states that developmental authority is neither appropriate nor necessary. It argues that it is proposing to provide a commercial communication service, not an experiment. Hye Crest observes that the usual license term for developmental authority runs only for a period of one year. In order to provide a competitive, viable alternative to cable television, Hye Crest insists that regular authority is necessary to ensure the public continued service, to permit it to amortize its construction costs and start-up expenses sufficiently to lower subscription rates to competitive levels, and to attract the amount of venture capital needed to cover the system's construction and initial operation costs.[10]

14. Hye Crest refutes the Commenters' claims that the better approach to spectrum management would be to initiate a Rule Making proceeding to consider Hye Crest's proposal. A Rule Making proceeding, says Hye Crest, is a long and cumbersome process requiring a minimum of two years to complete, with no guarantee that the public needs ultimately will be served. Hye Crest believes the waiver approach is an efficient and appropriate means of addressing the opportunities for a new and innovative service for the citizens of New York City that generally takes less time for Commission action than does a Rule Making initiative.

15. NSMA replies that its analysis shows that Hye Crest's proposal would result in probable harmful interference to any point-to-point microwave radio licensees wishing to operate in the 28 GHz band. Furthermore, NSMA submits that its technical analysis shows that Hye Crest's system proposal is not technically feasible because its receivers would be subject to harmful interference from nearby point-to-point transmissions, and consequently, cannot share the band with point-to-point systems. NYNEX replies that Hye Crest's application does not support its contention that its system would be economically viable in that it would likely serve only 14.03 percent of the households in the area it wishes to offer service.

16. Hye Crest replies that the Commenters' technical allegations are fatally flawed. For example, the Commenters erroneously assume that a point-to-point microwave radio station operating in the 28 GHz band would require an effective isotropic radiated power ("EIRP") of 55 dBW rather 28 dBW, which it would actually need. In addition, Hye Crest states that the Commenters fail to take into consideration numerous mitigating factors such as terrain blockage, noise floor, and polarization diversity. Hye Crest contends that if these mitigating factors had been included in the Commenters' interference calculations they would have seen that point-to-point and Hye Crest's point-to-multipoint systems can both operate without mutual interference, provided that reasonable and good engineering practices are employed. Hye Crest continues, stating that it has demonstrated that its transmitters have a statistically insignificant potential for interfering with any conventional point-to-point system. Consequently, says Hye Crest, some of the Commenters have been forced to argue that Hye Crest's application should be denied because of a possibility that an unbuilt and unplanned point-to-point station may some day interfere with the reception of Hye Crest's

communication services. If such a station were made operational, it is highly doubtful that it would cause any objectional interference within Hye Crest's service area. Hye Crest notes that since the frequencies in the 28 GHz band have very narrow beamwidths any point-to-point signal that should enter one of Hye Crest's receive antennas, even a few degrees off the main axis, would be greatly suppressed.

DISCUSSION

17. The initial issue to be resolved is whether the merits of Hye Crest's proposal should be considered in the context of its waiver request or in the context of a notice and comment Rule Making proceeding.

18. Section 7 of the Communications Act of 1934, as amended, 47 U.S.C.§ 157, charges the Commission to "encourage the provision of new technologies" in communications services offered to the public. We concur with Hye Crest that, under the circumstances of this proceeding, the waiver approach offers the most efficient and expeditious means available for accommodating Section 7 and allowing the introduction of this new communications service to New York City. The proposal is limited in scope to the New York PMSA, and there have been no additional proposals for other areas. A formal Rule Making proceeding to inquire as to the feasibility of permanently reallocating the 28 GHz band and establishing regulatory policies for the provision of a nationwide point-to-multipoint video service utilizing these frequencies would be premature. Although Hye Crest has indicated that its proposal is viable, and its proposal may well prove to be an innovative means to deliver video services to consumers, this will not be confirmed until it is actually implemented and subjected to the rigors of the marketplace. Should the proposal prove to be a success and the public benefits anticipated become a reality, a general investigation into alternate uses of the 28 GHz band would then be appropriate for consideration.

19. Furthermore, contrary to the claims made by many of the Commenters, grant of the waiver request does not establish a precedent that will ultimately lead to the *de facto* reallocation of the 28 GHz band. This same claim was made in previous proceedings where waivers to use frequencies for services other than those for which they were assigned have been sought. *See, e.g., Big Bend Telephone Company*, 2 FCC Rcd 2413 (1986). Our subsequent approval of the requests, however, did not "open the floodgates" to multitudes of similar waiver requests as was predicted.[11] Consequently, based on our experience, we do not anticipate that our action today will result in an onslaught of waiver requests, particularly in light of the unproven nature of the service proposed and the construction and operation milestones established as conditions to Hye Crest's authorization.

20. Traditionally, the Commission has granted requests for waivers to use frequencies for purposes other than those for which they are allocated where an applicant demonstrated that (1) the existing frequency allocation is not suited or insufficient to accommodate the applicant's requirements; (2) the frequencies requested are under-utilized; (3) the proposed use of the frequencies will not be detrimental to their assigned users; and (4) the public interest will be served by a grant of the waiver.[12] The Commission has denied waiver requests where these criteria have not been met. *See, e.g., Leaco Rural Telephone Cooperative, Inc.*, note 11, *supra*.

21. In applying these criteria to the instant case, we find that Hye Crest has met the required showing for waiver. First, it has demonstrated that the 28 GHz band is the most suitable frequency band available for providing the proposed omni-directional video distribution service because the other bands allocated to common carriers and private operational fixed licensees are too narrow in bandwidth, not sufficiently contiguous, or not adequately protected to support 24 video channels.

22. Second, Hye Crest has shown that the proposed frequencies are under-utilized. Its frequency coordination survey reveals that there is no other entity within 125 miles of New York City that holds or has applied for an authorization for facilities in the 28 GHz band. Nor has there been a demonstration that any party, other than Hye Crest, has developed equipment capable of utilizing this band. Therefore, based on the record, it is reasonable to conclude that no party, other than Hye Crest, has imminent plans to use these frequencies.[13]

23. Third, Hye Crest has shown that the foreseeable demand by point-to-point microwave radio carriers for use of the 28 GHz band in New York City is practically non-existent. The 28 GHz band is one of five frequency bands allocated for short-haul microwave use.[14] Only two of these bands, 17.7-19.7 GHz ("18 GHz band") and 21.2-23.6 GHz ("23 GHz band") are presently utilized in New York City, and there has been no evidence presented to suggest that either band is approaching saturation. The 18 and 23 GHz bands contain a significant amount of spectrum (4,400 MHz). Hye Crest has shown that should the 18 and 23 GHz bands become congested, other spectrum alternatives for point-to-point microwave radio services would still be available. For instance, Hye Crest notes that techniques such as rechannelization, tighter frequency stability and the imposition of a "bits per/second/per Hertz" spectral efficiency standard could be employed to increase capacity for point-to-point microwave radio services. Moreover, if a demand to use the 28 GHz band were to materialize, 1000 MHz of spectrum would still be available for use by point-to-point microwave radio carriers, and the employment of reasonable and good engineering practices will enable these point-to-point carriers and Hye Crest to both operate without mutual interference. In view of the foregoing, we find that Hye Crest has adequately demonstrated that its proposed use of the 28 GHz band will not be detrimental to the band's assigned users.

24. Finally, it is clear Hye Crest's proposal offers public interest benefits. We note that none of the parties to this proceeding disputes that public benefits would be realized through increased competition and greater diversity in programming distribution and sources in the video marketplace.[15] Hye Crest's proposal seeks to provide such competition. Hye Crest has demonstrated that its proposal will facilitate the introduction of a novel and innovative use of previously unused spectrum. That spectrum would be used to bring a new and needed multichannel video service to the New York City market in competition with cable television and other video delivery and distribution services, with no foreseeable harm to the 28 GHz band's assigned users.[16] Hye Crest has shown that nearly one-half of the households in this market are not wired for cable television service, and those that are wired may benefit

from the lower costs and increased programming choices that increased competition can offer. Furthermore, our action comports fully with the Commission's recent report to Congress which stated that the development of alternative multichannel video services has the potential to encourage significant competition to established cable television systems. *See Cable Television Report*, para. 111, *supra*.

25. In order to provide Hye Crest with a sufficient opportunity to succeed in its attempt to develop a competitive video service, we will also grant its remaining requests for regular (i.e., non-developmental) authority, non-common carrier status and a designated service area. Developmental authority is not appropriate for Hye Crest, which has conducted technical tests for two years and is now seeking authority for commercial application of its service. *See* 47 C.F.R. §§ 21.400, 21.401. Furthermore, as Hye Crest points out, regular authority is necessary to ensure the public continued service, to permit it to amortize its construction costs and start-up expenses sufficiently to lower subscription rates to competitive levels, and to attract the amount of venture capital needed to cover the system's construction and initial operation costs. Under these circumstances, developmental authority would be inappropriate.

26. Furthermore, the proposal will be only one of several video services available to consumers in the New York City area. Hye Crest will not hold itself out as serving all customers indiscriminately; nor do we find a public interest need to require that it comply with the obligations attendant to common carrier operation, such as circuit growth projections and orders for service. 47 C.F.R. § 21.706(a)(3). Accordingly, Hye Crest's request to provide service as a non-common carrier, and thereby rely upon the marketplace rather than direct Commission regulation to dictate the terms and conditions of its video service offerings, is consistent with precedent. *See* NARUC *v. FCC*, 525 F.2d 630 (D.C. Cir.), *cert. denied*, 425 U.S. 992 (1976). *Multipoint Distribution Service*, 2 FCC Rcd 4251 (1987) and *Domestic Fixed - Satellite Transponder Sales*, 90 FCC 2d 1238 (1982).

27. Finally, we will license Hye Crest to provide service throughout the proposed designated service area, the New York PMSA. This designated service area licensing scheme is consistent with that allowed in the Digital Electronic Message Service (DEMS) and in the Cellular Radio Telecommunications Service. In view of the propagation characteristics of the 28 GHz frequency band, only a designated service area licensing scheme will provide the licensee with the necessary flexibility to select and timely establish antenna locations to facilitate efficient frequency re-use, and thereby, assure continuous signal coverage.

28. In summary, we grant Hye Crest's proposal to construct a 24 channel video distribution system comprised of multiple, low power transmitters. Each station will provide service through transmitters within a 6 to 8 mile cell and be capable of offering discreet programming within its individual service area. We believe that Hye Crest's proposal is imaginative, technically feasible, and consistent with the statutory mandate of Section 7 of the Communications Act, which charges the Commission to encourage the provision of new technologies and service to the public. However, there is no guarantee of success for Hye Crest's proposal[17], and we are concerned that licensed spectrum not remain unused. Consequently, in order to ensure that the spectrum licensed to Hye Crest is utilized fully, we have concluded that Hye Crest's authorization requires the imposition of certain conditions. Specifically, Hye Crest will be issued an authorization to construct the Brighton Beach facility within 12 months. Upon completion of construction of the facility, Hye Crest must file with the Commission a "Certification of Construction Completion" (FCC Form 494A) certifying that the facility has been constructed within the maximum 12 month construction period and that the station is ready to operate. Furthermore, because Hye Crest will operate its system as a non-common carrier, we expect that at the time the Form 494A is filed it shall commence its provision of video service to customers. Failure to timely file the certification of construction completion will subject the authorization to the automatic forfeiture provisions of Section 21.44 of the Commission's Rules, 47 C.F.R. § 21.44.

29. Given the unique nature of Hye Crest's proposal, and our stated concern with spectrum utilization, we will exercise our descretion to limit the term of the license to 5 years rather than authorizing a full 10 year term.[18] After construction of the initial Brighton Beach station, Hye Crest may file applications to add additional transmitter stations within its designated service area for the duration of the 5 year license term by filing an "Application for a New and Modified Microwave Radio Station License" (FCC Form 494), for each additional transmitter station. Each application will be subject to the 30-day notice period. During that time, all interested parties will have an opportunity to file objections to the additional transmitter application. However, no competing applications may be filed for the additional transmitting facilities.[19] If authorized, each additional transmitter must be constructed within a maximum period of 12 months and its license term shall not exceed that of the Brighton Beach facility. This authorization is also subject to the Commission's discontinuance and reduction of service procedures set forth in Section 21.303 of the Commission's Rules, 47 C.F.R. § 21.303.

30. Accordingly, IT IS ORDERED, that the objections filed by the Commenters ARE DENIED.

31. IT IS FURTHER ORDERED, that the captioned application and attendant waiver request filed by Hye Crest Management, Inc. ARE GRANTED consistent with this Order.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] We note that SMSAs were eliminated by the Office of Management and Budget, effective June 30, 1983. The New York Primary Metropolitan Statistical Area ("PMSA") is the successor to the New York SMSA.

[2] Congressman Rinaldo by letter informally supported the proposal. Microband filed untimely informal objections which have been considered but will not be specifically discussed. *See* 47 C.F.R. § 21.30.

[3] Under this concept a carrier has the freedom to select multiple transmitter sites within the boundaries of a particular statistical area. *See* 47 C.F.R. § 21.500.

[4] Each cell is served by a single station, apparently using multiple transmitters, which will transmit at an output power level of 5 watts per channel with an omni-directional antenna at either vertical or horizontal polarization.

[5] In support of its request, Hye Crest cites Domestic Fixed-Satellite Transponder Sales, 90 FCC 2d 1238 (1982) and Multipoint Distribution Services, 2 FCC Rcd. 4251 (1987).

[6] Initially, Hye Crest also requested a waiver of Section 21.120 of the Rules, to enable it to employ temporarily non-type accepted equipment. This request was subsequently withdrawn because the equipment was granted an equipment authorization (FCC ID: HVFJA1).

[7] 47 C.F.R. § 21.706(a)(3).

[8] Hye Crest says it will couple its 24 programmed channels with 12 off-the-air (VHF and UHF) broadcast channels provided via rooftop or master antenna system and reception equipment of each subscriber.

[9] The below 13.25 GHz frequencies include the 2.6 GHz band which has been allocated primarily for MDS and Instructional Television Fixed Service ("ITFS"). These frequencies are widely used in the New York City area.

[10] Licenses for stations in the Point-to-Point Microwave Radio Service are generally issued for a term of 10 years. *See* 47 C.F.R. § 21.45.

[11] In Nevada Bell, 3 FCC Rcd 7217 (1988), for example, a waiver was granted to Nevada Bell to use frequencies allocated to the Instructional Television Fixed Service ("ITFS") for the provision of basic telephone service to its subscribers. To date, we have received only three other similar waiver requests, one of which was denied for failure to demonstrate a lack of harm to the band's assigned users (Leaco Rural Telephone Cooperative, Inc., 4 FCC Rcd 5341 (1989)); the second was withdrawn (Applications of The Rye Telephone Company (File Nos. 1660-CF-P-89 through 1683-CF-P-89) dismissed January 26, 1990); and the third is pending (Applications of Nevada Bell to add seven stations to its system. File Nos. 7486-CF-P-90 through 7492-CF-P-90).

[12] Big Bend Telephone Company, Inc., *supra*. Tele-Media Company of Key West, 74 FCC 2d 554 (1979). *See also* Bangor and Aroostook Railroad Company, 5 FCC Rcd 1199 (1990); Satellite Television Service, Inc., 87 FCC 2d 598 (1981); American Microlert, Inc., 77 FCC 2d 183 (1980); Television Enterprises, Inc., 68 FCC 2d 1268 (1978); and Teleprompter of Ukiah, 68 FCC 2d 866 (1978).

[13] The 28 GHz band was made available for point-to-point use in 1959, and since that time, little use of the band has been made.

[14] In addition to the 28 GHz band the remaining frequency bands are: 17.7 - 19.7 GHz; 21.2 - 23.6 GHz; 31.0 - 31.3 GHz; and 38.6 - 40.0 GHz. Taken together, the five bands total 8.1 GHz of available spectrum.

[15] The Commission consistently has found such competition and diversity is desirable. *See, e.g.*, Notice of Proposed Rule Making and Notice of Inquiry ("Wireless Cable"), 5 FCC Rcd 971 (1990); Report and Order, *id.*, 5 FCC Rcd 6410 (1990); Notice of Inquiry in MM Docket No. 89-600 ("Cable Television Inquiry"), 5 FCC Rcd 362 (1989); Report in MM Docket No. 89-600 ("Cable Television Report"), FCC 90-276 (released July 31, 1990).

[16] In reaching this decision, we also find Hye Crest's requested waiver meets the standard set forth in WAIT Radio v. FCC, 418 F.2d 1153, 1157 (D.C. Cir. 1969), wherein the court held that in judging a request for waiver, the Commission must determine whether such grant would serve the public interest and whether grant would undermine the policy which the rule is intended to serve. As discussed above, the requested waiver would serve the public interest. Moreover, Section 21.108 is intended to ensure sufficient spectrum availability for fixed common carrier microwave operations (other than temporary fixed stations, Multipoint Distribution Service stations, and Digital Termination Service nodal stations) operating at frequencies of 2,500 MHz or higher. Hye Crest has demonstrated that there is no current or reasonably foreseeable use of the 28 GHz band by its assigned users. Therefore, our action in granting Hye Crest's request will not undermine the policy Section 21.108 is intended to serve. *See also* 47 C.F.R. §§ 1.3, 21.19.

[17] As NYNEX points out, Hye Crest may be able to offer service to only a small percentage of the households in the New York PMSA. Even with such a small percentage, we believe there is a sufficient likelihood that the service will be successful to justify waiver.

[18] 47 C.F.R. § 21.45(b).

[19] Similar treatment was accorded to DEMS nodal stations in a designated service area. *See* Revision of Part 21 of the Commission's Rules (CC Docket No. 86-128), 2 FCC Rcd 5713 (1987).

Before the
Federal Communications Commission
Washington, D.C. 20554

PR Docket No. 90-100

In the Matter of

Amendment of the Amateur Service Rules to Relocate the Novice and Technician Operator Class Frequency Segment within the Amateur Service 80 Meter Band. RM-6594

REPORT AND ORDER

Adopted: January 4, 1991; Released: January 18, 1991

By the Commission:

I. INTRODUCTION

1. On February 26, 1990, we adopted a *Notice of Proposed Rule Making (Notice)* [1] in the above-captioned proceeding. In the *Notice*, we proposed to relocate Novice and Technician Operator Class control operator frequency privileges in the 80 meter (m) amateur service band from the 50 kHz segment at 3700-3750 kHz to the segment at 3675-3725 kHz.[2] We proposed the relocation of the segment (80 m Novice segment) with the objective of relieving interference. This *Report and Order* adopts the relocation as proposed.

II. BACKGROUND

2. Sections 97.301(e) and 97.307(f)(9) of the Commission's Rules, 47 C.F.R. §§ 97.301(e) and 97.307(f)(9), authorize an amateur station having a control operator holding a Novice or Technician Operator Class license to transmit telegraphy on the 80 m Novice segment. The Novice segments generally are intended for beginning amateur radiotelegraphers to gain actual experience in sending and receiving telegraphy messages. [3] In Canada, however, the frequencies in the upper half of the 80 m Novice segment are used by amateur stations for telephony transmissions. Thus, mutual interference in the 3725-3750 kHz segment can occur when a United States station, especially one located in a northern state, transmits telegraphy on the same channel and at the same time as a Canadian station transmits telephony. The proposal to move the 80 m Novice segment to 3675-3725 kHz was offered as a solution to this mutual interference problem. Four supporting comments and one opposing comment to the proposal were filed.[4]

3. Bruce Balog and Mark Widrick support the proposal,[5] as does Philip Galasso.[6] Although the ARRL states that the proposal has merit, it suggests that the 80 m Novice segment be expanded by 25 kHz to 3675-3750 kHz. The ARRL notes that the principal means that Technician Class licensees have for upgrading to General Class operator licenses is by increasing their proficiency in telegraphy skills, and the high frequency Novice segments are an important element in this process. To compensate General, Advanced, or Amateur Extra Class Operators for the loss of exclusive use of the suggested expansion frequencies, ARRL requests that those stations be authorized high power transmissions in the 80 m Novice segment.[7]

4. Robert A. Scupp opposes moving the 80 m Novice segment. He believes that such a move may be premature in light of a proposal in Canada to allow the amateur community to determine its own emission type subbands. He suggests that, if the proposal is finalized, the Canadian amateur service community could expand its telephony segment, thus causing an increase in the interference potential between Canadian and United States amateur stations.[8] The ARRL also notes that the pending Canadian proposal to deregulate the amateur service emission types may lead to the development of different operating patterns.[9]

III. DISCUSSION

5. The high frequency Novice segments provide beginning amateur radiotelegraphers with an opportunity to polish their skills at slow speed before they engage in communicating with higher speed operators. We agree with ARRL that this experience provides training that can be valuable to a person preparing to upgrade to a higher class of operator license. The comments confirm that mutual interference occurs in at least a part of the 80 m Novice segment. Mr. Galasso characterizes such interference as intolerable. Mr. Widrick observes that only half of the 80 m Novice segment is usable because of the interference. In light of these comments, we believe that some relief should be afforded Novice and Technician Class licensees using frequencies in the 80 m Novice segment. Beginning radiotelegraphers are much less able to cope with such interference than are veteran operators. If interference increases as a result of the implementation of the Canadian deregulatory proposals mentioned by both Mr. Scupp and ARRL, we can evaluate the situation at that time and propose whatever adjustments are needed.

6. In addition to our proposal to move the 80 m Novice segment 25 kHz down the band, we have considered the suggestion made by ARRL to expand the segment by 25 kHz. Under the ARRL approach, however, stations having Novice and Technician Class control operators would have to share the entire enlarged 80 m Novice segment, 3675-3750 kHz, with United States amateur stations[10] that transmit emission types CW, RTTY, and data using higher power.[11] They would also have to continue to share the 3725-3750 kHz segment with the Canadian telephony stations.[12] Although the Novice and Technician Class operators would have access to a larger frequency segment in the 80 m band, they would have to share it with large numbers of United States stations transmitting with much higher power. Rather than less interference to stations operated by Novice and Technician Class operators, it is likely that there would be more. Because such an outcome is directly contrary to our objective, we decline to adopt ARRL's suggestion.

IV. CONCLUSION

7. We will adopt the rule change proposed in the *Notice* to relocate the 80 m Novice segment to 3675-3725 kHz.[13] This rule change will serve to reduce the amount of mutual interference between United States amateur stations and Canadian amateur stations. In addition, it will provide Novice and Technician Class control operators with more opportunities to improve their telegraphy skills.

V. PAPERWORK REDUCTION ACT

8. The proposal contained herein has been analyzed with respect to the Paperwork Reduction Act of 1980, 44 U.S.C. § 3501-3520, and found to contain no new or modified form, information collection and/or record keeping, labeling, disclosure, or record retention requirements and will not increase or decrease burden hours imposed on the public.

VI. ORDERING CLAUSES

9. Accordingly, IT IS ORDERED that effective **March 16, 1991,** Part 97 of the Commission's Rules, 47 C.F.R. Part 97, IS AMENDED as set forth in the Appendix below. Authority for this action is found in Sections 4(i) and 303(c) and (r) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i) and 303(c) and (r).

10. IT IS FURTHER ORDERED that this proceeding is terminated.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX

Part 97 of Chapter I of Title 47 of the Code of Federal Regulations is amended as follows:

1. The authority citation for Part 97 continues to read as follows:

Authority: 48 Stat. 1 066, 1082, as amended; 47 U.S.C. §§ 154, 303. Interpret or apply 48 Stat. 1064-1068, 1081-1105, as amended; 47 U.S.C. §§ 151-155, 301-609, unless otherwise noted.

2. The line entry for the 80 meter band in the table in Section 97.301(e) is revised to read as follows:

§ 97.301 Authorized frequency bands.

* * * * *

(e) * * *

Wavelength band	ITU Region 1	ITU Region 2	ITU Region 3	Sharing Requirements. See § 97.303, (Paragraph)
HF	**MHz**	**MHz**	**MHz**	
80 m	3.675-3.725	3.675-3.725	3.675-3.725	(a)

* * * * *

3. Section 97.313(c)(1) is revised to read as follows:

§ 97.313 Transmitter power standards.

* * * * *

(c) * * *

(1) The 3.675-3.725 MHz, 7.10-7.15 MHz, 10.10-10.15 MHz, and 21.1-21.2 MHz segments;

* * * * *

FOOTNOTES

[1] 5 FCC Rcd 1276 (1990).

[2] The full 80 m amateur service band is 3500-3750 kHz. Its propagation characteristics facilitate communications over paths of several hundred miles. During the hours of darkness, worldwide contacts are possible. The higher classes of amateur operator license are authorized more extensive privileges in the 80 m band. They also share the frequencies of the Novice and Technician Class operators.

[3] In addition to the 80 m Novice segment, there are also Novice telegraphy segments in the 40, 15, and 10 m bands.

[4] The commenters are: Bruce Balog, Philip E. Galasso, Robert Scupp, The American Radio Relay League, Inc. (ARRL), and Mark Widrick.

[5] Comments of Bruce Balog at 1 and comments of Mark Widrick at 1.

[6] Comments of Philip E. Galasso at 1 and 2. Mr. Galasso also suggests that Amateur Extra Class control operators be authorized additional emission privileges. His suggestion is outside the scope of this proceeding.

[7] Comments of ARRL at 3. While amateur stations having Technician, General, Advanced or Amateur Extra Class control operators may generally transmit with a transmitter power not exceeding 1500 watts, no station may transmit with a transmitter power exceeding 200 watts in the 80, 40, and 15 m band Novice segments. *See* Section 97.313 of the Commission's Rules, 47 C.F.R. § 97.313.

[8] Comments of Robert A. Scupp at 1-4.

[9] Comments of ARRL at 3.

[10] As of June 1, 1990, there were 191,410 Novice and Technician Class licensees and 260,468 higher class licensees.

[11] *See* Section 97.3(c) of the Commission's Rules, 47 C.F.R. § 97.3(c), for the numerous specific emission types covered by these terms. In general, they include various international Morse code telegraphy emission types, telemetry, telecommand and computer communications emission types, and narrow-band direct printing telegraphy emission types.

[12] *Callbook Magazine* indicates there are 27,322 amateur operators in Canada.

[13] The appendix to the *Notice* only proposed to revise Section 97.301. The 80 m Novice segment, however, is also listed in Section 97.313. Consequently, the attached appendix also revises this rule section.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-536

In the Matter of

Augusta Radio
Fellowship
Institute
d/b/a SOUTH CAROLINA
RADIO FELLOWSHIP

File No. BPED-871008MS

For Construction Permit for a New FM
Broadcast Station on Channel 231A at
Kingstree, South Carolina

In the Matter of

WILLIAMSBURG COUNTY
BROADCASTING CORP.
Licensee of Station WKSP(AM)
Kingstree, South Carolina

Order to Show Cause Why the License
for Station WKSP(AM), Kingstree, South
Carolina, Should Not Be Revoked

Appearances

Allyn Knop and *Linda L. Knop*, pro se, on behalf of Williamsburg County Broadcasting Corp.; *Gary P. Schonman*, on behalf of the Chief, Mass Media Bureau.

INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE JOSEPH CHACHKIN

Issued: January 8, 1991; Released: January 18, 1991

PRELIMINARY STATEMENT

1. By *Order to Show Cause and Order Requiring Consolidation*, FCC 90-181 (released May 8, 1990) (*Show Cause Order)*, at ¶ 19, the Commission directed Williamsburg County Broadcasting Corp. (County), licensee of Station WKSP(AM), Kingstree, South Carolina, to show cause why the license for WKSP(AM) should not be revoked, based upon findings to be made upon the following issues:

> (a) whether County misrepresented facts or was lacking in candor in its application for a new FM station at Kingstree, South Carolina (File No. BPH-871008MC), in failing to provide full disclosure of the felony charges pending against Gregory Knop.
>
> (b) whether County violated Section 1.65 of the rules by failing to report the felony conviction of Gregory Knop and changes in the composition of the applicant.
>
> (c) whether, in light of the felony drug trafficking conviction of Gregory Knop and the evidence adduced under (a) and (b) above, County is qualified to remain the licensee of Station WKSP(AM).

2. The *Show Cause Order*, at ¶ 20, ordered that the WKSP(AM) revocation proceeding be consolidated with the ongoing proceeding in MM Docket No. 88-536 for a construction permit for a new FM station on Channel 231A at Kingstree, South Carolina, in which County was, at that time, one of two mutually exclusive applicants.[1]

3. The *Show Cause Order*, at ¶ 21, placed the burden of proceeding with the introduction of evidence and the burden of proof with respect to the above issues on the Bureau. Additionally, the *Show Cause Order*, at ¶ 22, ordered that the evidentiary record developed in the FM proceeding may be considered as part of the evidentiary record in the revocation proceeding. The *Show Cause Order*, at ¶ 23, also ordered that County have the opportunity to present relevant evidence in mitigation of revocation of its license for WKSP(AM).

4. The issues specified against County in the *Show Cause Order* are, with the exception of references to County principal Allyn Knop, substantively identical to those that were added by the Presiding Judge against County in the FM proceeding.[2] In its *Show Cause Order*, the Commission held that Gregory Knop's felony drug trafficking conviction raises a serious question as to County's fitness to remain a licensee. The Commission further held that the issues specified in the FM proceeding concerning misrepresentation, lack of candor, and violation of reporting requirements are also relevant to County's qualifications as licensee of WKSP(AM). ¶ 18.

5. Hearings on the issues specified in the FM proceeding were held on June 27, 1989, through June 29, 1989, and on July 3, 1989. On September 27, 1989, the Bureau filed Proposed Findings of Fact and Conclusions of Law with respect to the issues specified against County in the FM proceeding. County also filed Proposed Findings. In addition, the Bureau and County filed Replies on October 11, 1989. At a prehearing conference in the revocation proceeding on May 18, 1990, the Bureau represented that it would meet its burdens by relying on the existing evidentiary record developed in the FM proceeding (Tr. 765). The Bureau affirmed this at a further prehearing conference on June 25, 1990 (Tr. 785).

6. By *Memorandum Opinion and Order*, FCC 90M-2878 (released September 12, 1990), the Presiding Judge established October 9, 1990, as the deadline for County to file a statement in writing whether it intended to present evidence in mitigation of revocation of its license for WKSP(AM). By *Order*, FCC 90M-3244 (released October 16, 1990), citing County's failure to file a written statement on its intention, the Presiding Judge closed the record in the revocation proceeding and established a procedural schedule for the filing of Proposed Findings of Fact and Conclusions of Law as well as replies thereto. The Bureau filed Findings on November 1, 1990. County did not file Findings.

FINDINGS OF FACT

BACKGROUND

7. County is a family-operated, for-profit corporation formed under the laws of the State of South Carolina (County Ex. 2). It is the licensee of Station WKSP(AM), Kingstree, South Carolina, a daytime-only facility (County Ex. 2). County purchased WKSP(AM) in 1979 (Tr. 107). At that time, Gregory Knop and his father, Kenneth Knop, were equal (50%) voting shareholders in the company (Tr. 107). Gregory Knop was President and a Director; Kenneth Knop was Secretary-Treasurer and a Director; Gregory Knop's wife, Linda Knop, was a Director; and Kenneth Knop's wife, Mildred Knop, also was a Director.

8. Several ownership changes were subsequently effected. In an Ownership Report, filed in July 1981, County reported that Linda Knop had replaced Kenneth Knop as Secretary-Treasurer (Tr. 152). In June 1987, Gregory Knop took positive control of County by acquiring an additional 1% of the voting stock from his father (Tr. 155-156). Later in 1987,[3] Kenneth and Mildred Knop resigned as Director, and Kenneth Knop relinquished his 49% ownership interest in County. At the same time, Gregory Knop's brother, Allyn Knop, and Allyn Knop's wife, Joan Knop, as tenants in the entireties, acquired a 49% ownership interest in County in the form of nonvoting shares; Gregory Knop increased his voting interest from 51% to 100% (Tr. 109, 186, 412).

GREGORY KNOP'S FELONY DRUG CONVICTION

9. Gregory Knop was arrested on drug trafficking charges on August 7, 1987, by agents of the Federal Drug Enforcement Agency. The federal indictment handed up against Gregory Knop contained six counts, each of which carried a maximum sentence of 20 years imprisonment and a $1,000,000 fine (Tr. 529; County Ex. 11, pp. 1-4).

10. On November 2, 1987 (after County had filed its application), pursuant to a plea bargain with federal prosecutors (Tr. 529), Gregory Knop pleaded guilty in United States District Court for the District of South Carolina, Florence Division, to one count of violating 21 U.S.C. Sections 841(a)(1), 841(b)(1)(A)(ii), and 846 (conspiracy to possess with intent to distribute and distribute cocaine) (County Ex. 10, p. 1). The remaining five counts, involving alleged possession and distribution of cocaine, were dropped as part of the plea bargain agreement (Tr. 530-531). Gregory Knop was sentenced on January 25, 1988, to five years imprisonment and ordered to pay a special assessment of $50 (County Ex. 10, p. 1). On March 21, 1988, Gregory Knop reported to Federal Prison Camp, Maxwell Air Force Base, Montgomery, Alabama (County Ex. 10, p. 1). At the time of the hearing in this proceeding, he was still incarcerated (Tr. 506).

11. Gregory Knop asserted he began trafficking in cocaine because WKSP(AM) was having financial difficulties (Tr. 564-567). WKSP(AM) experienced financial problems from the time County purchased the station in 1979 (Tr. 559). By early 1987 the problems at WKSP(AM) were continuing to escalate (Tr. 560). Although Gregory Knop was able to obtain a $10,000 loan for WKSP(AM) in early 1987 from the Exchange Bank in Kingstree, the daytime-only station remained financially strapped (Tr. 562-563). Gregory Knop decided to sell drugs to make money for his living expenses so that he would not have to take money out of the corporation for such purposes (Tr. 565). Gregory Knop also described himself as desperate to avoid being further obligated to his parents who had "foot[ed] the bill [for WKSP(AM)] since May of 1980" (Tr. 623).

12. Gregory Knop's testimony about obtaining a loan for WKSP(AM) from the Exchange Bank contradicted representations he made in a letter-petition to a federal judge requesting a reduction in the length of his prison sentence. Thus, writing from prison, in a letter, dated August 29, 1988, to United States District Judge Clyde Hamilton, Gregory Knop claimed that he turned to selling drugs only as a last resort after having been denied a loan from the Exchange Bank:

> In an effort to obtain local financial help, I approached Mr. Bobby Harrell at the Exchange Bank, Kingstree, and was told that they didn't know me. I had banked there for a number of years. This was the attitude toward outsiders. We want your money, but go away when you need them. Desperate not to lose everything that my family had worked for and had invested in, I resorted to foolish involvement into an area which I would not have considered under normal conditions. I had been introduced to local people boasting of to me about the large amount of cash that they had obtained by selling drugs to all types. The rest is history, except to say that desperate people do desperate things (Tr. 604).

13. When confronted with the apparent discrepancy in his testimony, Gregory Knop conceded that he had intentionally been less than candid in his letter to Judge Hamilton in order to bolster his chances of getting an early release from prison (Tr. 709-710).

14. Gregory Knop claimed that as a broadcaster he felt he had a special responsibility to be a good, substantial individual in the community (Tr. 567-568). Although he said it occurred to him that becoming involved in illegal drugs might have an impact on this special responsibility, he "didn't give it much thought . . . ." (Tr. 568). Gregory Knop considered illegal drugs as an option because he needed financial help, and it was "the easiest thing to grasp at at the time" (Tr. 566).

15. Gregory Knop became involved in drug trafficking after being introduced to an individual by the name of Marion Nelson Kinard (Kindard) (Tr. 671). Gregory Knop and Kinard entered into a joint venture in which Gregory Knop was to finance the purchase of cocaine for sale to Kinard's customers (Tr. 672-675). However, when asked why Kinard would have wanted him as a partner when he had no money to invest in the venture, Gregory Knop initially was less than candid in his responses. At first, Gregory Knop testified that Kinard may have wanted him as a partner because Kinard believed that he had information as to when there were going to be police raids. Gregory Knop claimed that Kinard's assessment of him in this regard was inaccurate (Tr. 690-691). However, Gregory Knop subsequently admitted that he indeed had access to inside information about upcoming police drug raids (Tr. 691) and that the information was leaked to him by an unnamed official in the Kingstree Police Department or the Williamsburg County Sheriff's Office (Tr. 712). Based on the information provided to him, Gregory Knop alerted Kinard in advance of two such raids (Tr. 693), the

result of which was that Kinard avoided arrest on both occasions (Tr. 713). Gregory Knop personally "reimbursed" the law enforcement official for the tips (Tr. 713).

16. Gregory Knop claimed that he never sold drugs to, or bought drugs from, any shareholders, directors, or officers of County (Tr. 582). The record is less clear with respect to whether Gregory Knop engaged in illegal drug activities with those who worked at WKSP(AM). Linda Knop testified that an individual by the name of Steve Richburg (Richburg) worked at WKSP(AM). His specific duties involved inserting commercial spots during breaks in the station's satellite music network transmission (Tr. 128-129). According to Linda Knop, Gregory Knop hired Richburg and then fired him after a month or two because his services were no longer needed (Tr. 129-130). In contrast to his wife's testimony, Gregory Knop maintained that Richburg never worked at WKSP(AM), but only hung around the radio station because he was helping him construct a liquor store nearby (Tr. 607-608). Gregory Knop also identified Richburg as an individual who, "for a while, did some [debt] collecting for me and for the scuba shop in Myrtle Beach, that I was partners with, plus other debts that were owed to me around the area" (Tr. 600). Gregory Knop claimed that he fired Richburg because he learned that Richburg was involved in illegal drugs and was bringing undesirable people to the radio station. These people rode motorcycles, had tatoos on their arms, and looked like they were mean (Tr. 614-616). Despite his claimed disdain for Richburg because of Richburg's involvement in drugs, Gregory Knop admitted purchasing a quantity of marijuana from Richburg before firing him (Tr. 617, 619). Gregory Knop said he bought the marijuana for his own consumption, but decided not to use it and threw it away (Tr. 618).

17. Although Gregory Knop testified that he did not deal drugs from WKSP(AM) (Tr. 583), he later admitted that on at least one occasion he used the radio station as a location where drug customers would meet him and then go elsewhere to execute a drug sale (Tr. 592). Also, drug users frequently called Gregory Knop at WKSP(AM) because he and Kinard gave them the radio station's telephone number[4] (Tr. 588). Gregory Knop claimed, however, that he did not place any telephone calls from WKSP(AM) regarding drug related business because he didn't want to involve the radio station in such activity (Tr. 589).

18. Gregory Knop was involved in drug trafficking for approximately eight or nine months before he was arrested (Tr. 573). During that period of time, Gregory Knop claimed that he sold a total of only three ounces of cocaine and made a total profit of only about $300 (Tr. 573-574).

19. On October 8, 1987, while felony drug charges were still pending against Gregory Knop, County filed its application for a construction permit for a new FM broadcast station in Kingstree. County represented in its application that Gregory Knop held 100% of the voting stock and was County's President and a Director (Tr. 508); Linda Knop was County's Secretary-Treasurer (Tr. 65, 151) and also a Director (Tr. 150); and Allyn Knop held a nonvoting equity interest (Tr. 187-188).

MISREPRESENTATION/LACK OF CANDOR ISSUE

20. The application (FCC Form 301), at Section II, Page 4 (Citizenship and Other Statutory Requirements), Item 10(b) inquired whether there was then pending in a court or administrative body a proceeding against the applicant or any party to the application involving "any felony; broadcast related antitrust or unfair competition; criminal fraud or fraud before another governmental unit; or discrimination" (County Ex. 5, p. 1). An affirmative response to Item 10(b) required the applicant to submit an exhibit giving full disclosure concerning:

> persons and matters involved, including an identification of the court or administrative body and the proceeding (by dates and file numbers), a statement of the facts upon which the proceeding is or was based or the nature of the offense alleged or committed, and a description of the current status or disposition of the matter (County Ex. 5, p. 1).

21. County responded "yes" to Item 10(b) (County Ex. 5, p. 1) and provided an accompanying exhibit which stated in its entirety:

> There is now pending in Federal Court a felony charge against Gregory A. Knop. The matters at issue are non-broadcast related and do not fall within the Commission's area of concern as expressed in its Policy Statement on Character Issues. Complete details will be provided to the Commission upon request (County Ex. 5, p. 2).

The exhibit did not provid any of the forementioned details about Gregory Knop's criminal activities required by the application (County Ex. 5, p. 2; Tr. 521-522).

22. Gregory Knop testified that he did not know the basis for his belief that details of a drug arrest did not have to be disclosed to the Commission (Tr. 522-523). However, it appears that Gregory Knop based this belief on his discussions with County's communications counsel, Jerrold Miller (Miller) (Tr. 539-540, 630). Although Gregory Knop initially said he spoke with Miller "at length" about how to respond to Item 10(b), he later testified, "I don't think that that was an area that we dwelled on either" (Tr. 516, 626). In any case, Gregory Knop claimed to have difficulty remembering details of his discussions with Miller about how to respond to Item 10(b) (Tr. 520, 523, 547).

23. Miller, however, recalled that Gregory Knop telephoned him in August 1987 shortly after his arrest to find out what effect the arrest would have on County's chances of being awarded the FM construction permit (Jt. Stip. 1, p. 1-2). Based on Miller's interpretation of the *Policy Regarding Character Qualifications in Broadcast Licensing*, 102 FCC 2d 1179 (1986), recon. denied, 1 FCC Rcd 421 (1986) (*Character Policy Statement)*, Miller advised Gregory Knop that, "a drug arrest and possible conviction would have no impact on the possibility of obtaining the FM license because it was outside the scope of what the Commission had said its concerns were" (Jt. Stip. 1, p. 2). It was Miller's view that FCC Form 301 "had in effect been modified" by the *Character Policy Statement* (Jt. Stip. 1, p. 8).

24. When the time came to prepare County's FM application, Miller first sent Gregory Knop a blank FCC Form 301. "so he would be familiar with it" (Jt. Stip. 1, p. 2). Thereafter, Miller and Gregory Knop, by telephone, together went over the application, question-by-question (Jt. Stip. 1, p. 3). According to Miller, when they reached Item 10(b) of the application, wherein details of the arrest and pending charges were required to be disclosed:

> Greg said he was really embarrassed about this; something he was not the least bit proud of. "Do I absolutely have to give all the facts on the form because, as we discussed, it is not something the Commission is interested in." (I am just paraphrasing here). I answered, "inasmuch as this is not a matter of concern to the Commission, I don't think it is improper to state this was a non-broadcast related felony you have been charged with, but I do think you should indicate strongly that you would want to give the details of it in an exhibit to the Commission if there was indication they wanted such." And he said, "of course he would if the Commission insisted upon it, just that it was a point of embarrassment to him to have it in the public file where people could see it." So I said, "okay, we will prepare the following exhibit," provided the answers which were in the application that we completed and sent down for your review to sign (Jt. Stip. 1, p. 4).

25. Even though Gregory Knop already had been subjected to intense public scrutiny because of his drug arrest (I had made every newspaper in the State of South Carolina) (Tr. 537), it was Miller's belief that the basis for Gregory Knop's claim of embarrassment had to do with "someone seeing his application at the Commission files and seeing details of it. He just felt embarrassed for . . . this to be put down and stay in a permanent file in Washington" (Jt. Stip. 1, p. 5).

26. After this discussion with Gregory Knop, Miller drafted the text of the exhibit to Item 10(b) (Jt. Stip. 1, p. 4). The completed application, including the exhibit to Item 10(b), ultimately was sent by Miller to Gregory Knop for final review, signature, and subsequent filing (Jt. Stip. 1, p. 4). Miller believed the Commission would not ask County for additional information about Gregory Knop's criminal activities, and he expressed that belief to Gregory Knop (Jt. Stip. 1, p. 8). Gregory Knop, however, denied there were any such discussions with Miller about the likelihood of the Commission requiring further details (Tr. 651).

SECTION 1.65 ISSUE

FAILURE TO REPORT DRUG CONVICTION

27. County first revealed details of Gregory Knop's criminal activities, including his conviction and sentence, in an amendment filed January 14, 1989, fourteen months after he pleaded guilty to trafficking in drugs. The amendment was in response to a specific request in the *HDO* for information about the felony charges referred to in County's exhibit to Item 10(b) of its application (Tr. 138-139).

28. Miller and Gregory Knop had fairly regular telephone conversations up until the time that Gregory Knop reported to federal prison on March 21, 1988 (Jt. Stip. 1, p. 9). Nevertheless, neither Gregory Knop nor anyone else associated with County advised Miller that Gregory Knop had been convicted until early or mid February 1988 (Jt. Stip. 1, p. 9). Even then, the conviction was not reported to the Commission in the FM proceeding because, according to Miller:

> I totally forgot about that there was another question on [FCC Form 301]. I knew [Gregory Knop] had disclosed he had been arrested, and I just forgot there was a question on convictions. It didn't come up at all. We just didn't go back over the form at that time . . . it was totally inadvertent (Jt. Stip. 1, pp. 9-10).

29. Although County did not reveal details in its FM application about the criminal activities of Gregory Knop, it did provide a reference to such matters in an exhibit to its application for renewal of license of WKSP(AM), filed on July 27, 1988. In the exhibit to its AM renewal application, County stated:

> Mr. Gregory Knop, in early 1988,[5] and Mr. Allyn Knop, in August 1984, were convicted of a non-broadcasting felony, if more information is needed, it will be furnished upon request (County Ex. 14, p. 2).

FAILURE TO REPORT OWNERSHIP CHANGES

30. On April 15, 1988 (shortly after Gregory Knop had reported to prison), Allyn and Joan Knop's 49% nonvoting interest was converted to a voting interest, and Gregory Knop's 100% voting interest was reduced to a 51% voting interest; Allyn Knop became Vice President; and Joan Knop became Secretary-Treasurer of County (Tr. 185). County first revealed these ownership changes eight months later in a January 4, 1989, amendment to its FM application.

31. Miller could not provide any reason why County did not timely report the April 15, 1988, ownership changes in this proceeding, even though the changes had been reported in an Ownership Report, filed with the Commission in June 1988 (Jt. Stip. 1, p. 13). Miller again attributed County's failure to inadvertence (Jt. Stip. 1, p. 13). Allyn Knop was unable to explain why, on April 15, 1988, his 49% nonvoting interest in County was converted to a voting interest (Tr. 320-321). He denied, however, that the fact that Gregory Knop had reported to federal prison just three weeks earlier to begin serving a lengthy prison sentence had anything to do with the decision to make Allyn Knop a voting shareholder (Tr. 322-325).

CONCLUSIONS

DRUG CONVICTION ISSUE

32. The *Character Policy Statement* "affords guidance as to the kinds of 'non-FCC offenses'[6] not involving dishonesty that might be deemed material to character qualifications." *Show Cause Order* at ¶ 13. The *Character Policy Statement* lists certain categories of non-FCC misconduct which it deems pertinent to an evaluation of an

applicant's character qualifications. However the Commission's *Policy Statement* also makes clear that there may be circumstances in which an applicant has engaged in other nonbroadcast misconduct so egregious as to shock the conscience and evoke almost universal disapprobation. 102 FCC 2d at n. 60. According to the *Character Policy Statement*, "[s]uch misconduct might, of its own nature, constitute prima facie evidence that the applicant lacks the traits of reliability and/or truthfulness necessary to be a licensee, and might be a matter of Commission concern even prior to adjudication by another body." *Id.*

33. Gregory Knop's conviction for drug trafficking falls "within the category of 'egregious' non-FCC offences entailing such callous disregard for the welfare of fellow citizens as to place at issue the perpetrator's qualifications to be or remain a broadcaster." *Show Cause Order*, at ¶ 14. This conclusion is further buttressed by *Public Notice*, 4 FCC Rcd 7533 (1989), in which the Commission clarified its policies regarding licensee participation in drug trafficking. Noting that drug trafficking "is a matter of the gravest concern," the Commission stated its intention to take all appropriate steps, including initiation of license revocation proceedings, where information comes to its attention that FCC licensees or their principals have been convicted of drug trafficking. The Commission unequivocally stated that "drug trafficking convictions fall within the scope of conduct the Commission may consider under existing policy in the broadcast area" (footnote omitted). *Id.* Although afforded an opportunity, County did not offer any evidence by way of mitigation for Knop's misconduct. Considering the recency of Knop's drug trafficking conviction and the "egregious" nature of the non-FCC offence involved here, revocation of County's license for station WKSP(AM) is mandated.

34. In addition, there are separate and independent grounds for revocation of County's license. The findings adduced under the misrepresentation and Section 1.65 issues also justify this sanction.

MISREPRESENTATION/LACK OF CANDOR ISSUE

35. Issue (a) calls for a determination whether County misrepresented facts or was lacking in candor in failing to provide full disclosure of the felony charges pending against Gregory Knop. The Commission has held that misrepresentation involves false statements of fact, while lack of candor involves concealment, evasion, and other failures to be fully informative. *Fox River Broadcasting, Inc.*, 93 FCC 2d 127, 129 (1983). Since lack of candor, like misrepresentation, represents a form of deceit, there can be no lack of candor unless there is shown to be an intent to deceive. *Id. See* also *Riverside Broadcasting Co., Inc.*, 104 FCC 2d 644 (1986). Lack of candor may result in the disqualification of applicants and the denial of applications for broadcast licenses. *See Las Americas Communications, Inc.*, 1 FCC Rcd 786, 790- 791 (Rev. Bd. 1986); *Mid - Ohio Communications, Inc.*, 104 FCC 1d 572, 589-599 (Rev. Bd. 1986); *Washington's Christian Television Outreach*, 99 FCC 2d 395, 400-401 (Rev. Bd. 1984), *modified on other grounds*, 59 RR 2d 787 (1985), *recon. denied*, 59 RR 2d 1679 (1986, *aff'd by judgment*, No. 85-1649 (D.C. Cir. Dec. 17, 1987); *Old Time Religion Hour, Inc.*, 95 FCC 2d 713, 719-723 (Rev. Bd. 1983): *recon. denied*, 96 FCC 2d 551 (Rev. Bd. 1985), *review denied*, 57 RR 2d 1147 (1985). On the basis of the findings discussed below, revocation of County's license for Station WKSP(AM) is required.

36. Item 10(b) of FCC Form 301 requires the disclosure of any pending proceeding against the applicant or any party to the application involving, *inter alia*, "any felony". For any felony disclosed, the applicant is required to identify the court and the proceeding; a statement of the facts; the nature of the offense; and a description of the current status or disposition of the matter. In response to Item 10(b), County disclosed in its FM application only that there was pending in Federal Court a felony charge against Gregory Knop that was not broadcast related. None of the details required by Item 10(b) was provided apparently because of counsel's alleged belief that Form 301 had been, in effect, modified by the *Character Policy Statement* so as not to require information about drug arrests; and to spare Gregory Knop the embarrassment of having to reveal his criminal activities in a public filing. While County's response to Item 10(b) did promise additional information if requested, the facts and circumstances of the felony charges were not disclosed as required.

37. The belief that the Commission's *Character Policy Statement* somehow modified the requirements for completing FCC Form 301 is without basis in fact or reason, and appears to be no more than an after-the-fact rationalization. Item 10(b) very clearly requested specific information about "any felony." Item 10(b) made no distinction between broadcast or nonbroadcast related felonies. Moreover, there is nothing in the *Character Policy Statement* that so much as even suggests that applicants are free to ignore the explicit directions contained in the Form. Thus, County clearly ignored its affirmative duty to provide specific information required by the application about the charges pending against Gregory Knop. Moreover, County cannot rely upon the advise of counsel as an excuse because it is well established that applicants are responsible for the accuracy of the representations made to the Commission in their submissions. *Wadeco Inc. v. FCC*, 628 F.2d 122 (D.C. Cir. 1980).

38. Moreover, Gregory Knop's expression of embarrassment is not even remotely credible. News of his arrest made every newspaper in his home state of South Carolina. Rather than being self conscious about exposing his illegal activities in an FCC filing, Gregory Knop's real motivation appears to have been his concern that his illegal activities might adversely affect County's chances of getting a new construction permit. Just as he would later do before Judge Hamilton when requesting a reduction in his prison sentence, Gregory Knop resorted to providing the Commission with only as much information as suited his personal needs at the moment. County had a motive to conceal basic qualifying information from the Commission, and Gregory Knop seized the opportunity by playing fast and loose with the Commission's requirements.

39. Although Gregory Knop was given every reasonable opportunity at the hearing to explain why County did not provide a complete and detailed response to Item 10(b) of its application, his testimony was vague and, in some instances, inconsistent. Furthermore, Gregory Knop's overall demeanor was that of a person interested more in providing narrow, self-serving answers, if at all, than being candid and forthcoming.

40. County's omission did not result from Gregory Knop's mere misinterpretation of a Commission policy or his feeling of embarrassment. It was a deliberate attempt to avoid disclosing potentially damaging information. County avoided outright misrepresentation by indicating that there were indeed pending criminal charges against Gregory Knop. However, the language provided by County in its exhibit to Item 10(b) evolved from discussions between applicant and counsel and was cloaked in terms designed to avoid drawing the staff's attention.[7] County's offer to provide further details was merely self-serving verbiage. Had Gregory Knop sincerely believed he had nothing to hide, he would have initially provided all the information required by the application, rather than trying to shift the burden to the Commission to ask for it.

41. The findings establish and it is concluded that County demonstrated a lack of candor by willfully concealing material information from the Commission about Gregory Knop's arrest. Coupled with Knop's unwillingness to be forthcoming at the hearing concerning such willful concealment, it is further concluded that County is not qualified to be a Commission licensee.

SECTION 1.65 ISSUE

42. Pursuant to Section 1.65 of the Commission's Rules, an applicant has the affirmative responsibility for ensuring "the continuing accuracy and completeness of information furnished in a pending application." 47 C.F.R. §1.65(a). Whenever the information is no longer "substantially accurate and complete in all significant respects" it must be amended as promptly as possible but no later than 30 days after the event. 47 C.F.R. §1.65(b).

43. The Commission has stated that it is not interested in trivial reporting failures. Rather, it will consider a reporting violation that involves: (a) unreported interests that are of decisional significance; (b) an intent to conceal; or (c) a pattern of carelessness or inattentiveness. *Merrimack Valley Broadcasting, Inc.*, 55 RR 2d 23, 25 (1983), *modified* 99 FCC 2d 681 (1984).

44. County repeatedly failed to keep its FM application complete and accurate. County did not report Gregory Knop's conviction to the Commission in this proceeding until fourteen months after the fact and only then because it was required to do so by the *HDO*. His conviction clearly constituted a matter of material significance because it impacted on his basic qualifications to be a Commission licensee under the Commission's *Character Policy Statement*. Similarly, significant ownership changes also were unreported to the Commission in this proceeding for eight months.

45. County had an affirmative obligation pursuant to Section 1.65 to report significant matters to the Commission. It deliberately and repeatedly shirked that duty in order to avoid an inquiry into matters that it knew would potentially impact on its qualifications to be a licensee. County's failure to disclose Gregory Knop's conviction, moreover, constituted a continuing course of conduct that began when County filed its FM application. As has been shown, County intentionally failed to report the nature of the crime for which Gregory Knop was arrested in its exhibit to Item 10(b). Later, County failed to report the nature of the crime for which he was convicted in its application for renewal of license of WKSP(AM). County's failure to disclose Gregory Knop's conviction in this proceeding, therefore, further demonstrates a pattern of behavior designed to hide from the Commission information that weighed heavily against the grant of a construction permit. Given the obvious motive as well as County's continuing course of conduct aimed at avoiding disclosure, the suggestion that County merely forgot to report information to the Commission must be rejected. It is concluded that County willfully and repeatedly violated Section 1.65 of the Commission's Rules. County's Section 1.65 violations provides a separate and independent basis for County's disqualification.[8]

46. In summary, Gregory Knop's drug conviction, County's demonstrated lack of candor in willfully concealing material information about Knop's arrest, and County's willful and repeated violation of Section 1.65 of the Rules compel the conclusion that County lacks the basic qualifications to remain a licensee. Pursuant to Sections 312(a)(1), 312(a)(2), and 312(a)(4) of the Communications Act of 1934, as amended, the license of Station WKSP(AM), Kingstree, South Carolina, is revoked. Accordingly, IT IS ORDERED, That unless an appeal from this Initial Decision is taken by a party, or it is reviewed by the Commission on its own motion in accordance with Section 1.276 of the Rules,[9] the license of Williamsburg County Broadcasting Corp., for Station WKSP(AM), Kingstree, South Carolina IS REVOKED.

FEDERAL COMMUNICATIONS COMMISSION

Joseph Chachkin
Administrative Law Judge

FOOTNOTES

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[1] Subsequently, for reasons unrelated to the revocation proceeding, the Presiding Judge, by *Memorandum Opinion and Order*, FCC 90M-2878 (released September 12, 1990), dismissed with prejudice County's FM application. In his *Memorandum Opinion and Order* dismissing County's FM application, the Presiding Judge also ordered that the remaining FM application of Augusta Radio Fellowship Institute d/b/a South Carolina Radio Fellowship be severed from the WKSP(AM) revocation proceeding. However, because the FM and revocation proceedings share a common docket number, the caption above retains the two proceedings in consolidated form for administrative convenience.

[2] In *Order*, FCC 89M-387 (released February 7, 1989), the Presiding Judge added the following issues against County in the FM proceeding:

> (a) To determine whether Williamsburg County Broadcasting Corp. misrepresented facts or was lacking in candor in its application in failing to provide full disclosure of the felony charges pending against Gregory Knop, and failing to disclose the conviction of Allyn Knop.
>
> (b) To determine whether Williamsburg County Broadcasting Corp. violated Section 1.65 of the rules by failing to report the felony conviction of Gregory Knop and changes in the composition of the applicant.

(c) To determine, in light of the felony convictions of Gregory and Allyn Knop and the evidence adduced under (a) and (b) above whether Williamsburg County Broadcasting Corp. is qualified to be a licensee of the Commission .

[3] The record does not disclose the exact date.

[4] The radio station shared the same telephone number as Gregory Knop's trailer home, which was located on the same property (MMB Ex. 2; Tr. 595). Thus, when the telephone rang at WKSP(AM), it also rang in his home (Tr. 584-585). Even when he was in his home, Gregory Knop answered the telephone by saying, "WKSP," thereby holding himself out to whomever was calling that it was the radio station that the caller was reaching (Tr. 585).

[5] As discussed, *supra*, Gregory Knop was convicted in November 1987, rather than early 1988. He was sentenced in January 1988.

[6] The *Character Policy Statement* describes misconduct as "non-FCC" if it was not in violation of the Communications Act or "a specific . . . rule or policy" of the FCC.

[7] This apparently succeeded with respect to County's application for renewal of license of WKSP(AM) which was routinely granted.

[8] As noted by the Bureau, Knop's admission that he twice bribed a law official for information about upcoming police drug raids and the evidence showing his lying to a federal judge in order to obtain a reduction in the length of his prison sentence raises additional reasons why County should not be permitted to hold a Commission license.

[9] In the event exceptions are not filed within 30 days after the release of this Initial Decision, and the Commission does not review the case on its own motion, this Initial Decision shall become effective 50 days after its public release pursuant to Section 1.276(d).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

COMSAT GENERAL CORPORATION File No. I-T-C-9-034

Application for authority to establish
channels of communication between an
international earth station at
Clarksburg, Maryland and INTELSAT
satellites for the provision of
INTELSAT Business Services and test
and monitoring functions.

Application for authority File No. CSG-90-011-ML
to modify and operate
the 10-meter C-band Torus
antenna (Call Sign WA-27)
at Clarksburg, Maryland
for the provision of INTELSAT
Business Services and test and
monitoring functions.

ORDER AND AUTHORIZATION

Adopted: December 11, 1990; Released: January 17, 1991

By the Chief, International Facilities Division:

1. The above-captioned applications, filed on December 13, 1989, and as amended on December 15, 1989; January 5, January 10, January 11, March 13, May 22, October 22, and October 30, 1990, by Comsat General Corporation (Comsat General), request authority pursuant to Section 214 of the Communications Act of 1934, as amended, to establish channels of communications between international earth station facilities at Clarksburg, Maryland and INTELSAT satellites for the provision of INTELSAT Business Services (IBS). Further, authority is requested pursuant to Title III of the Communications Act of 1934, as amended, and Sections 201(c)(4), (c)(6) and (c)(7) of the Communications Satellite Act of 1962, as amended, to modify its developmental license, Call Sign WA-27, to convert and operate the international earth station facilities at Clarksburg, Maryland, for the provision of IBS and INTELSAT monitoring in the Atlantic Ocean Region (AOR). The applications were placed on public notice on December 20, 1989. No comments were received.

2. The proposed earth station is located at Clarksburg, Maryland and consists of a 10-meter Multiple Beam Torus Antenna[1] which shall meet INTELSAT Standard B technical parameters. One horn of the antenna will operate with the INTELSAT AOR satellite located at 335.5 degrees East Longitude (E.L.) in the 6157-6166 MHz transmitting frequency band and the 3932-3941 MHz receiving frequency band in support of the Department of Defense Caribbean Area Regional Network. The earth station will be used to provide one 1.544 Mbps circuit between Clarksburg, Maryland and Pamerola Air Base, Honduras. Emissions are limited to 1M54G1W, the maximum effective isotropic radiated power (E.I.R.P.) per carrier shall not exceed 68.6 dBW, and the maximum E.I.R.P. density shall not exceed 42.7 dBW/4kHz. Another horn of the antenna will operate with the INTELSAT AOR satellite located at 341.5 degrees (E.L.) to permit periodic pre-installation testing of RF, IF and baseband equipment to be shipped overseas in connection with Comsat General's Voice of America (VOA) international network. On this satellite, the earth station will operate on the transmitting frequency 6230.4175 MHz and the receiving frequency 4005.7325 MHz. Emissions are limited to 320KG1W, the maximum E.I.R.P. per carrier shall not exceed 55.0 dBW, and the maximum E.I.R.P. density shall not exceed 79.0 dBW/4kHz. Additionally, the earth station will be used to monitor INTELSAT AOR satellites between 324.5 degrees E.L. and 342.0 degrees E.L. pursuant to a contractual arrangement between Comsat World System Division and Comsat General to verify that U.S. customers are receiving the proper signal power in the C-band.

3. Comsat General's legal, financial and technical qualifications to modify and operate the proposed earth station are established. Comsat General provides various international services and has been authorized to construct and operate other earth station facilities for IBS services. Comsat General has completed the necessary frequency coordination.

4. The proposed earth station is consistent with the Commission's policy on the ownership and operation of U.S. international earth stations[2] and its scope of operation will be the same as that permitted by the Commission in previous IBS authorizations. [3] We will limit the authorization to the provision of INTELSAT monitoring functions, IBS and those video services compatible with the station's digital format operation. To the extent that the applicant may seek to provide certain newly proposed INTELSAT services which fall within the IBS/television service category, we will not restrict operation of the proposed station. However, it may not provide any service which falls outside the IBS/television service category. Any use of the proposed station as a multipurpose earth station would require a separate application for the additional authority.

5. Upon consideration of the applications, we find that authorization of the requested services and modification of earth station facilities would serve the public interest, convenience and necessity.

6. Accordingly, IT IS ORDERED pursuant to Sections 214, 304, 309 and 319 of the Communications Act of 1934, as amended, and Section 201(c) of the Communications Satellite Act of 1962, as amended, that applications File Nos. I-T-C-90-034 and CSG-90-011-ML ARE GRANTED, and Comsat General is authorized to:

a. modify and operate its C-band 10-meter Multiple Beam Torus antenna (Call Sign WA-27) at Clarksburg, Maryland, to provide IBS and related digital video services,[4] to permit periodic pre-installation testing of RF, IF and baseband equipment to be shipped overseas in connection with Comsat General's VOA international network; and to monitor INTELSAT AOR satellites for Comsat World System Division to verify the proper receiving signal power in the C-band as specified in paragraph 2 above: and

b. establish channels of communication between the Clarksburg, Maryland earth station (Call Sign WA-27) and INTELSAT AOR satellites for the provision of IBS and related digital video services between the U.S. and those countries that now or hereafter will be listed in Comsat's tariff provisions for the space segment component of IBS or digital video services; to permit periodic pre-installation testing of RF, IF and baseband equipment to be shipped overseas in connection with Comsat General's VOA international network; and to monitor INTELSAT AOR satellites for Comsat World System Division to verify the proper receiving signal power in the C-band.

7. IT IS FURTHER ORDERED that before completion of equipment installation and facility activation, the applicant shall provide the Commission with a summary of equipment which was actually installed.

8. The Commission retains jurisdiction over this matter to reallocate circuits in the satellite system among the various international common carriers and other authorized users as required to ensure nondiscriminatory use of, and equitable access to, the communications satellite system.

9. No material changes inconsistent with this or any other relevant Commission order shall be made before final execution of an operating agreement between Comsat General and its correspondents, and copies of the agreements shall be filed with the Commission within 30 days of their execution.

10. This order is issued under Section 0.291 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of the date of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International
Facilities Division
Common Carrier Bureau

FOOTNOTES

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[1] Comsat has surrendered its authority for the 15 foot parabolic antenna and is supplanting its authority for the 10-meter Multiple Beam Torus antenna on its developmental license (Call Sign WA-27) with the authority in this application. The torus antenna may actually have several feed horns tracking different INTELSAT AOR satellites at the same. time.

[2] Earth Station Ownership, 100 FCC 2d 250 (1984).

[3] Upon grant of an IBS/television service application, the applicant will! be issued a combined Radio Station Construction Permit and License (FCC Form 456-P). While the Commission will limit the use of the authorized facilities to the provision of IBS and/or television services, carriers may seek additional authorization if they desire to use these facilities as multipurpose earth stations.

[4] This authorization is not to be construed as permitting the provision of IBS between earth stations located within the United States.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

C. C & S Telco. Inc.

State Long Distance
Telephone Company

Amery Telephone Company
Clear Lake Telephone Company
Dickeyville Telephone Corporation
Farmers Telephone Company
Lemonweir Valley Telephone Company
Price County Telephone Company
Southeast Telephone Company of
Wisconsin. Inc.
Union Telephone Company
Kendall Telephone. Inc.

Requests for Waiver of
the Commission's Equal Access
Implementation Plan for Independent
Telephone Companies

MEMORANDUM OPINION AND ORDER

Adopted: January 14, 1991; Released: January 18, 1991

By the Chief. Common Carrier Bureau

1. In this order we grant three petitions for waiver of the Commission's equal access rules filed by various independent telephone companies (ITCs). In the *ITC Equal Access Order*,[1] the Commission required ITCs to convert their end offices to equal access only if certain conditions were present. That order also established a timetable for conversion under certain circumstances. Strict timetables for conversion had been imposed upon the Bell Operating Companies (BOCs) under the Modification of Final Judgment (MFJ),[2] and upon the GTE operating companies (GTOCs) under the GTE Consent Decree. [3] The Commission recognized differences between the BOCs and ITCs with respect to the types of markets served. switching technologies employed. and financial resources available to undertake equal access conversion. Because of these differences. the Commission concluded that the timetables of the type imposed upon the BOCs and the GTOCs would not be appropriate for the ITCs.

2. Instead. the Commission required ITCs to convert end offices equipped with stored program controlled (SPC) switches within three years of a reasonable request for conversion to equal access by an OCC. The Commission directed ITCs to convert end offices with electromechanical switches as soon as practical but did not specify a timetable.[4] Moreover. the *ITC Equal Access Order* provided that ITCs may seek a waiver of the Commission's rules if they "can demonstrate that such a timetable. or the provision of such access features. is not feasible except at costs that clearly outweigh potential benefits to users of telecommunications services."[5]

3. In this order, we consider three petitions for waiver of the equal access implementation requirements filed by independent telephone companies.[6] All of these independent telephone companies received requests in March 1988 for equal access conversions from the same interexchange carrier. MCI Telecommunications Corporation (MCI).

4. C. C & S Telco. Inc. (CC&S) states that on March 3. 1988. it received a letter from MCI requesting that CC&S convert some of its facilities to equal access.[7] CC&S states that it is required to complete the conversion within three years of the request date. that is. by March 2, 1991. On May 19, 1990, CC&S filed a petition for a temporary waiver of the Commission's equal access conversion requirements. CC&S seeks an additional seven months, until October 1, 1991, to complete the equal access conversion.

5. CC&S states that at the time MCI submitted its request, all of CC&S's exchanges had electromechanical switches. but that it has since begun to convert all of its central offices to digital technology. CC&S states that it has completed the digital conversion process for eight of its Michigan exchanges, but that an additional seven months would permit CC&S to convert the remaining offices and to ensure that the equal access conversion process is conducted smoothly. In addition. CC&S argues that it would be cost effective to implement equal access in all of its facilities simultaneously because of the expenses associated with balloting, allocation. and marketing.

6. In March 1988. State Long Distance Telephone Company (State) received a letter from MCI requesting that State convert its facilities to equal access. State is required to complete the equal access conversion by March 1991. On May 18. 1990. State filed a waiver request seeking an additional three months. until June 1, 1991, to comply with the equal access implementation requirements. According to State. the implementation process involves replacing its existing NEC 61K switch with a NEC 61E switch. State asserts that the new switch will not be available from the switch manufacturer until February 1991. and this will not provide State with sufficient time to install and test the new equipment by March. According to State. equal access conversion should be completed by June 1. 1991. and MCI does not object to the new completion date.

7. The third petition for a waiver of the equal access implementation requirements was filed on May 18. 1990. on behalf of nine small Wisconsin independent telephone companies.[8] According to the petition. in March 1988. each of the companies received a letter from MCI requesting that the telephone company convert its facilities to equal access. Pursuant to the Commission's requirements, those companies are required to complete the equal access conversions by March 1991.[9] The petitioners state that. for various reasons. they require additional time to complete the equal access conversions. The petition states that MCI has agreed to the new completion dates.

8. Amery and Lemonweir each request an additional eighteen months. until September 1992. to implement equal access. Amery and Lemonweir state that their present switches require upgraded processors before they can provide equal access. but that the upgraded processors

are not yet available for commercial use. Both companies state that they have been assured by the vendor that the equipment will be delivered in time to be installed and tested by September 1992.

9. Farmers seeks an additional four and one-half years, until September 1995. Price seeks a one year extension, until March 1992. Southeast requests an additional fifteen months, until July 1992. These three companies state that they seek additional time to comply with the equal access implementation requirements because their NEC switches cannot be upgraded to provide equal access. The companies state that they intend to replace their NEC switches, but the switches will not be fully depreciated until after the three year conversion time period has expired. Farmers adds that it is already depreciating its NEC switch on an accelerated basis. The companies request the additional time to allow for the full depreciation of their existing switches and to avoid unreasonable revenue requirement burdens on their subscribers.

10. Clear Lake requests an additional three and one-fourth years, until June 1994, and Dickeyville requests an additional four and one-half years, until September 1995. Both companies state that upgrading their present switches for equal access within the required three years would not be financially feasible.[10] The companies state that their resources would be better used and their customers would be better served if the companies replace existing switches with "state-of-the-art" switches, once they have fully depreciated their existing switches.

11. Union seeks an additional year, until March 1992, to complete its equal access conversion. Union states that its existing Stromberg Carlson switching equipment will require upgrading in order to implement equal access, and that the conversion is not financially feasible by March 1991.

12. Based upon our review of the record, we conclude that the requested waivers are in the public interest. Each of the petitioners has set forth specific circumstances justifying its request, and no one has opposed any of the waiver requests.[11] In every case but one, MCI has agreed to the petitioner's proposed new completion date for equal access conversion. In the remaining case, CC&S has requested only seven months, which MCI has not opposed. Thus, we conclude that each of the companies has demonstrated that the timetable established by the Commission's rules is not feasible "except at costs that clearly outweigh potential benefits to users."[12]

13. Accordingly, IT IS ORDERED that these petitions for waiver of the equal access implementation requirements, are GRANTED to the extent described herein.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Firestone
Chief, Common Carrier Bureau

FOOTNOTES

[1] *MTS and WATS Market Structure*, CC Docket No. 78-72, Phase III, 100 FCC 2d 860 (1985) (*ITC Equal Access Order).*

[2] *United States v. American Tel. & Tel. Co.*, 552 F. Supp. 131 (D.D.C. 1982, *aff'd sub nom., Maryland v. United States*, 460 U.S. 1001 (1983).

[3] *United States v. GTE* Corp., 603 F. Supp. 730 (D.D.C. 1984).

[4] *See ITC Equal Access Order* at paras. 48-49.

[5] *Id.* at para. 50.

[6] We placed these requests on Public Notice on July 6, 1990. *See* 5 FCC Rcd 4030.

[7] CC&S is a Tier II exchange carrier that is wholly-owned by Rochester Telephone Company. CC&S states that it has approximately 20,000 access lines in fourteen exchanges in Michigan and Ohio. CC&S notes that MCI did not request equal access conversion for CC&S's exchanges in Cooney, Ohio, and Osseo-Pittsford, Michigan. CC&S states that it would be practical for CC&S to convert all of its exchanges simultaneously and includes these two exchanges in its waiver petition.

[8] The nine petitioners are: Amery Telephone Company (Amery); Clear Lake Telephone Company (Clear Lake); Dickeyville Telephone Corporation (Dickeyville); Farmers Telephone Company (Farmers); Lemonweir Valley Telephone Company (Lemonweir); Price County Telephone Company (Price); Southeast Telephone Company of Wisconsin, Inc. (Southeast); Union Telephone Company (Union); and Kendall Telephone, Inc. (Kendall).

[9] Although the joint petition requests a waiver for Kendall, in the reply comments, the petitioners withdraw Kendall's request. The petitioners state that Kendall should be excluded from the joint waiver petition because Kendall is equipped with an electromechanical switch without stored program control capability and therefore is not required to comply with the Commission's equal access requirements. Reply Comments of Amery Telephone Company, et al. at 2.

[10] For example, Clear Lake states that it would cost about $300 per access line to upgrade the existing switches. Petition at 4.

[11] The only comments received in response to these requests were supportive. *See* United States Telephone Association Comments at 2; National Telephone Cooperative Association Comments at 5.

[12] *See ITC Equal Access Order* at para. 50. Our decision does not encompass the waiver request by Kendall, which it has withdrawn. *See* note 9 *supra*.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Applications of

RADIO CALL
COMPANY, INC. File Nos.:

For facilities in the Public Land Mobile Service at various locations in New York, New Jersey, and Connecticut

20544-CD-P/L-01-90; 20548-CD-P/L-01-90
20732-CD-P/L-01-90; 20733-CD-P/L-01-90
20735-CD-P/L-01-90; 20741-CD-P/L-01-90
20777-CD-P/L-01-90; 20780-CD-P/L-01-90
20781-CD-P/L-01-90; 20837-CD-P/L-01-90
20856-CD-P/L-01-90; 20857-CD-P/L-01-90
20859-CD-P/L-01-90; 20865-CD-P/L-01-90
20878-CD-P/L-01-90; 21056-CD-P/L-01-90
21057-CD-P/L-01-90; 21058-CD-P/L-01-90
21064-CD-P/L-01-90; 21065-CD-P/L-01-90
21066-CD-P/L-01-90; 21067-CD-P/L-01-90
21085-CD-P/L-01-90; 21093-CD-P/L-01-90
22509-CD-P/L-01-90

MEMORANDUM OPINION AND ORDER

Adopted: January 14, 1991; Released: January 18, 1991

By the Chief, Common Carrier Bureau:

1. Radio Call Company, Inc. (Radio Call) filed a Consolidated Petition for Reconsideration of the action of the Mobile Services Division (MSD) dismissing its applications for various frequencies and locations in New York, New Jersey, and Connecticut.[1] Page America of New York, Inc. (Page America) and Bell Atlantic filed oppositions to Radio Call's petition, and Radio Call filed a consolidated reply. For the reasons set forth below, we deny reconsideration and affirm dismissal of the applications.

I. BACKGROUND

2. Radio Call filed applications for various two-way, common-carrier facilities to operate in New York, New Jersey, and Connecticut[2] in contemplation of expanding certain NYNEX Paging Company, Inc. (NYNEX) Improved Mobile Telephone System (IMTS) two-way facilities in New York City. Radio Call requested a waiver of Section 22.516(a) [3] of the Commission's rules to permit it to delay the filing of load studies pursuant to Section 22.16 of the Commission's rules[4] until the consummation of the partial assignment of licenses from NYNEX to Radio Call took place. The applications were allowed to remain on file without loading studies. After the assignments had been consummated, it was determined that traffic loading studies were required. Subsequently, Radio Call filed amendments for some of the captioned applications to provide traffic load studies pursuant to Section 22.16. On May 29, 1990, the MSD dismissed two of Radio Call's three applications for Pleasantville, New Jersey (Pleasantville), because Radio Call did not justify an initial three-channel grant pursuant to Section 22.16(b).[5] (The Pleasantville applications were for initial channels.) The MSD also dismissed the remaining applications at the various other New York, New Jersey, and Connecticut locations because they did not demonstrate need pursuant to Section 22.16(a) of the rules.

II. CONTENTIONS OF THE PARTIES

3. Radio Call argues that the MSD action was not correct because it ignored Radio Call's loading studies and Section 22.16(b)(2) of the Rules.[6] Radio Call also requests that should the MSD affirm its decision, it be allowed to choose frequency 454.650 MHz rather than 454.575 MHz.[7] Radio Call additionally asserts that its pending request for a waiver of the loading requirements of Section 22.16 is a basis for granting reconsideration and reinstatement of the applications. In support, Radio Call claims that it would not warehouse frequencies because it constructs and operates every grant it receives and its proposed wide-area service would use the spectrum more efficiently.

4. In opposition, Page America contends that Radio Call did not comply with the rules because it did not have written held orders or conduct a valid statistical survey indicating that the existing subscribers on the New York system either requested or needed service at any of the proposed locations. Page America also argues that Radio Call's waiver request does not meet the requirements of the rules.

5. Bell Atlantic by letter states that it previously objected to seven of the twenty-five captioned applications for various technical reasons. Consequently, it requests that, if Radio Call's petition is granted, the seven applications not be granted pending Radio Call's showing that there would not be harmful interference to the co-channel facilities of Bell Atlantic's subsidiary, New Jersey Bell.

6. In reply, Radio Call argues that Page America and Bell Atlantic fail to rebut Radio Call's assertion that a waiver of Section 22.16 is warranted. Radio Call further asserts that neither Page America nor Bell Atlantic object to its request to select frequency 454.650 MHz at Pleasantville if the Commission does not reinstate the dismissed applications. Finally, Radio Call alleges that Page America's opposition is an anticompetitive attempt to block Radio Call's expansion of service.

III. DISCUSSION

7. With the exception of the Pleasantville applications, all the applications requested facilities that were located near existing Radio Call facilities (or Radio Call's affiliate, MRN Communications, Inc.) authorized to operate on a different frequency.[8] To demonstrate need, Section 22.16(a) clearly states that an applicant requesting additional channels on an existing two-way system (up to a maximum of four channels) has to show that its existing grade of service is 0.25 or greater. *See Regulatory Policies and Procedures for the Domestic Public Land Mobile Radio Service*, 53 Rad. Reg. 2d (P&F) 191 (1983) (*Regulatory Policies*). Accordingly, applicants must submit traffic loading studies for existing units and supply held orders or survey results for projected units. For these studies, a mobile unit will be considered as generating traffic in a proposed system if it falls into any one of three categories:

(1) present subscriber units, (2) subscriber units for which there are written held orders, or (3) subscriber units projected through use of valid statistical surveys. *See* Section 22.16(a)(2)(iii). Radio Call did not submit loading studies for its existing facilities. Rather, Radio Call's need showings for all of the proposed facilities consisted of 113 subscriber units located in New York City obtained as a result of the assignment from NYNEX. These 113 subscriber units could not be credited for any of the proposed facilities because they were not located within the reliable service area of any of the proposed facilities. Moreover, the units serving the New York City service area are only applicable to traffic loading studies for additional channels for the New York City service area and are not acceptable as new orders for service to other areas.[9] Therefore, the MSD's dismissal of these applications for failing to justify need for the additional channels was proper.

8. Radio Call's Pleasantville proposals were for new two-way systems. To determine need for a proposal, an applicant must demonstrate an expected grade of service less than 0.25. An applicant must specify the number of units expected to receive service. Units shall be considered only if the applicant has written held orders for them or if they are projected from a valid statistical survey. *See* Section 22.16(b)(3). Radio Call did not submit written held orders or valid statistical surveys. It tried to justify these facilities using the 113 subscriber units in New York City. As stated in the previous paragraph, these subscriber units could not be used to demonstrate need in another service area. Therefore, the MSD was correct in dismissing two of these applications.[10]

9. The MSD was not arbitrary in permitting the application for frequency 454.575 MHz to remain on file. The Commission's database was searched and the applications for the frequencies 454.650 MHz and 454.525 MHz were determined to be electrically mutually exclusive with competing applications.[11] Moreover, because Radio Call proposed two-way IMTS service, all the mobile units can transmit and receive on all frequencies in a particular band. Thus, there is no apparent reason why one frequency in the band would be more desirable than any other frequency. Consequently, Radio Call has not justified reversing the MSD's dismissal of the applications for frequencies 454.525 MHz or 454.650 MHz or to reconsider the grant of frequency 454.575 MHz.

10. Section 22.19(a) of the rules specifies the showing that is required to support a waiver request.[12] Radio Call has not demonstrated that the purpose of the rule, *i.e.*, preventing the warehousing of frequencies, is being improperly applied in this case. *See Regulatory Policies*, *supra* at 193. Radio Call has not shown that it is currently operating at a sufficient capacity to justify additional frequencies at this time. Thus, granting a waiver of the requirement for loading studies would undermine the policy codified by the rule. *See generally Northeast Cellular Telephone Company, L. P., et al., v. FCC*, Nos. 89-1206 & 89-1214 slip op. at 5 (D.C. Cir. Mar. 9, 1990); *see also Wait Radio v. FCC*, 418 F.2d 1153 (D.C. Cir. 1969); *Basic Exchange Telecommunications Radio Service*, 4 FCC Rcd 5017, 5018 (1989); *cf. Mobile Phone of Texas, Inc.*, 5 FCC Rcd 3459 (Com. Car. Bur. 1990). In addition, Radio Call's claim that its proposed wide-area service would increase the efficient use of the spectrum has not been demonstrated. Moreover, Radio Call did not show that its unique circumstances render application of the rule inequitable or contrary to the public interest or that there was a lack of a reasonable alternative. In sum, the record in this case demonstrates that compliance with the rule is in the public interest to prevent frequency warehousing.

11. We also find that there is no merit to Radio Call's general allegation that Page America is acting in an anticompetitive manner affecting the public interest. Moreover, there are numerous paging carriers and paging frequencies available in these areas, and Radio Call has not demonstrated that it can not obtain additional spectrum or that Page America controls all of these channels.[13]

12. In conclusion, we find that Radio Call has failed to demonstrate any reversible error on the part of the MSD and, thus, we affirm the MSD's action.

IV. ORDERING PARAGRAPH

13. Accordingly, IT IS ORDERED that the Consolidated Petition for Reconsideration filed by Radio Call Company Inc. involving the captioned proceeding IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Richard C. Firestone
Chief, Common Carrier Bureau

FOOTNOTES

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[1] *See* Letters to Rosenman & Colin (counsel for Radio Call) from Gregory J. Vogt, Chief, MSD (May 29, 1990); Public Notice, Rpt. No. PMS-90-36-A, Mimeo No. 3449 (released June 6, 1990).

[2] The applications are for facilities on the following frequencies at the following locations: 454.375 MHz, 454.525 MHz, and 454.650 MHz at Trumbull, Connecticut; 454.525 MHz, 454.575 MHz, and 454.650 MHz at Freehold, New Jersey; 454.525 MHz, 454.575 MHz, and 454.650 MHz at Pleasantville, New Jersey; 454.375 MHz, 454.525 MHz, and 454.650 MHz at Hauppauge, New York; 454.525 MHz, 454.575 MHz, and 454.650 MHz at Beachwood, New Jersey; 454.375 MHz, 454.425 MHz, 454.475 MHz, 454.525 MHz, 454.575 MHz, and 454.650 MHz at Meriden, Connecticut; 454.400 MHz, 454.425 MHz, 454.475 MHz, 454.500 MHz, and 454.575 MHz at Noyack, New Jersey; 454.375 MHz, 454.575 MHz, and 454.650 MHz at Red Bank, New Jersey; 454.475 MHz, 454.525 MHz, and 454.575 MHz at Mahopac, New York; 454.575 MHz and 454.650 MHz at Rocky Hill, New Jersey; 454.400 MHz and 454.500 MHz at Manorville, New York; 454.500 MHz at New Haven, Connecticut; 454.625 MHz at Stamford, Connecticut; 454.525 MHz at Trenton New Jersey; and 454.525 MHz at Dover, New Jersey.

[3] Section 22.516(a) sets forth when traffic load studies are required to justify additional channels.

[4] Section 22.16 sets forth the objective need standards to justify additional channels. Section 22.16(a) requires operators of existing two-way systems seeking additional channels to demonstrate need by showing that the existing system's present (or projected) grade of service is 0.25 or greater. Section 22.16(b)

allows applicants for more than one channel for a new two-way system to demonstrate need based on an expected grade of service.

[5] As pointed out in note 2, *supra*, Radio Call requested frequencies 454.525 MHz, 454.575 MHz, and 454.650 MHz at Pleasantville. The MSD retained on file Radio Call's application for frequency 454.575 MHz but dismissed the remaining two applications.

[6] Section 22.16(b)(2) provides:

> If the proposed service area and type of service are not substantially the same as those existing, the channels requested will be treated as new rather than as additional channels. Applications are considered to be requesting initial channels if less than 50% of the proposed reliable service area contour overlaps an existing contour, or if the proposed service area contour includes a major market area not included within the existing contour.

[7] *See supra* note 5.

[8] Radio Call's applications could not be treated as additional channels for new rather than existing systems because the proposed service areas were the same as Radio Call's existing service areas. Therefore, the proposals did not comply with the provisions of Section 22.16(b)(2). Further, for new multiple channels, an objective need showing is required, *see* Section 22.16(b), and Radio Call did not provide such a showing, *see* para. 9, *infra*. Moreover, the proposed facilities were not fill-in transmitters under Section 22.16(e). Therefore, traffic loading studies under Section 22.16(a) were required.

[9] In *Digital Paging Systems of Philadelphia, Inc.*, 5 FCC Rcd 1737 (1990), the Commission stated that certain held orders for service could not be fully credited because they were not located within the proposed reliable service area.

[10] *See* note 5, *supra*.

[11] Applications of Mobilfone of Northeastern Pennsylvania, Inc., File No. 22878-CD-P/L-90, which requested frequency 454.650 MHz at Atlantic City, New Jersey; and Page America of New York, Inc., File No. 22117-CD-P/L-90, which requested frequency 454.525 MHz at Manahawkin, New Jersey.

[12] Section 22.19(a) provides:

> (a) *Request for waivers.* (1) Waivers of these rules may be granted upon application or by the Commission on its own motion. Requests for waivers shall contain a statement of reasons sufficient to justify a waiver. Waivers will not be granted except upon an affirmative showing[:] (i) That the underlying purpose of the rule will not be served, or would be frustrated, by its application in a particular case, and that grant of the waiver is otherwise in the public interest; or (ii) That the unique facts and circumstances of a particular case render application of the rule inequitable, unduly burdensome or otherwise contrary to the public interest. Applicants must also show the lack of a reasonable alternative.

[13] The Commission favors competition in the provision of communications services. *See Competitive Carrier Rule Making, First Report and Order*, 85 FCC 2d 1 (1980); *see also Preemption of State Entry in the Public Land Mobile Service*, 59 Rad. Reg. 2d (P&F) 1518 (1986), *remanded on othergrounds, NARUC v. FCC*, No. 86-1205 (D.C. Cir. Mar. 30, 1987); *clarified*, 2 FCC Rcd 6434 (1987).

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Application of:

FLORIDA CELLULAR MOBILE COMMUNICATION CORPORATION	File No. 10854-CL-P-468-A-89

For facilities in the Domestic
Public Cellular Telecommunications
Radio Service on Frequency Block A,
in Market No. 468, Maryland 2 (Kent)

MEMORANDUM OPINION AND ORDER

Adopted: January 14, 1991; Released: January 18, 1991

By the Chief, Mobile Services Division:

1. JAJ Cellular Partnership (JAJ) has filed a Petition to Dismiss or Deny (Petition) against Florida Cellular Mobile Communications Corporation (Florida), the tentative selectee in the above-referenced RSA. JAJ alleges that a Florida shareholder holds an interest in another application for the same market and that Florida's ownership disclosures are inadequate and inconsistent. Florida requests a waiver of Section 22.922 of the rules which prohibits transfer of cellular interests prior to a grant. We have reviewed the record and we find Florida's application violates Section 22.921(b) of the Commission rules forbiding any party to hold an interest in more than one non-wireline cellular application in a single RSA market.

I. BACKGROUND

2. Florida is the tentative selectee for the Maryland 2 (Kent) RSA.[1] On May 14, 1990, JAJ filed a Petition to Deny against Florida, alleging that Yerger C. Yandell, a shareholder in Florida, also holds a five percent interest in Kudzu Cellular Partnership (Kudzu). Kudzu is also an applicant for a nonwireline authorization in the Maryland 2 market. Although Florida requests a waiver of Section 22.922 of the Commission's rules to allow Mr. Yandell to divest his interest in Florida, JAJ urges the Commission only to consider the application as originally filed. Otherwise, JAJ argues, applicants would be allowed to amend their applications in violation of Section 22.921(b)(1), which prohibits any party from holding an interest in two RSA applications for the same market, negating the meaning of the rule. JAJ also alleges that Florida's waiver request lacks adequate evidentiary support as required by Section 22.19 of the Commission's rules, and that sale of Yandell's ownership to Florida may allow Yandell to profit from his wrongdoing. JAJ asserts that Florida provided no affidavits from Yandell to substantiate the claims underlying the waiver request. Finally, JAJ alleges that Florida's application fails to name its corporate directors, makes unexplained ownership information changes in an amendment, and does not explain certain relationships among its shareholders.

3. In its Opposition, Florida concedes that Yandell simultaneously held interests in two applications for the Maryland 2 market. In its April 24, 1990 Request for a Waiver of Section 22.922, Florida asserts that Mr. Yandell originally purchased his shares in Florida when Florida was intending to file applications only in seven Metropolitan Service Areas (MSA). No MSA applications were ever filed by Florida, however. Accordingly, Florida alleges, Yandell "wrote off" his investment and later moved without informing Florida. Florida sent notices to all shareholders of annual meetings and other matters including possible litigation with a shareholder over Florida's failure to file in any MSAs. Florida alleges that at least one of these notices was returned to it as undeliverable. In its settlement with the complaining shareholder, Florida agreed to file in 125 Rural Service Areas (RSA). Maryland 2 (Kent) was one of these markets. In the meantime, Yandell, who according to Florida thought Florida no longer existed, acquired an interest in Kudzu, which also filed an application in Maryland 2 (Kent). Florida therefore requests permission, through a waiver of Section 22.922, to allow Yandell to divest his interest in Florida in order to bring Florida's application into compliance with the rules. Florida states that it is willing to accept whatever terms the Commission may impose on the transfer of Yandell's interest in Florida so that Yandell does not profit from his prohibited interest in the two applications. Florida also concedes that its application, as originally filed, contained several minor errors in shareholder information. It argues that these errors were properly corrected in a timely-filed amendment and, in any case do not warrant dismissal of its application.

II. DISCUSSION

4. Section 22.921 of the Commission's rules[2] prohibits any party from holding an interest in two applications for the same RSA market. The fact that Yandell did violate this provision is uncontroverted. However, Florida argues that Yandell should be allowed to transfer his shares to correct the violation. No corrective action by the Commission can alter the fact that Florida's application, at the time it was filed, was defective. In the *Third Report and Order*, 4 FCC Rcd 2440 (1988), the Commission amended Section 22.921 to forbid *any* ownership in more than one application for the same RSA market, specifically superseding the earlier prohibition against multiple ownership interests exceeding one percent for MSA markets. This action demonstrates the importance the Commission has placed on disallowing all multiple ownership interests. Section 22.20 of the Commission's rules provides that an application will be returned to the applicant as unacceptable for filing if the applicant fails to comply with the Commission's rules. [3] Florida's application violated the prohibition against a party having ownership interests in more than one application in a market. We find no compelling public interest justification for determining that Florida or Yandell should not be required to comply with Section 22.921. Accordingly, Florida's application will be returned as defective. Yandell also held an interest in Kudzu when the Florida application was filed, which renders the Kudzu application for the Mary-

land 2 (Kent) cellular authorization defective at the time it was filed.[4] Therefore, the Kudzu application will also be returned as defective.

5. Florida's arguments in support of its waiver to permit transfer of Yandell's interest in Florida are not sufficient to overcome the Commission's strict policy to comply with Section 22.921. Having found Florida's application defective, the Commission will not consider Florida's waiver request to allow Yandell to transfer his interest. *See generally*, Letter from Gregory J. Vogt to Henry A. Solomon (May 2, 1990 Reference No. 63500-LD). A defective application may not be amended after the filing date or the lottery date to bring it into compliance with the Commission's rules. *Rem Communication*, 3 FCC Rcd 3705 (1988). Because we have found Florida's application defective for this violation, we do not need to address JAJ's other arguments.

III. CONCLUSION AND ORDERING PARAGRAPHS

6. For the reasons set forth herein, we find that Florida Cellular Mobile Communication Corporation has filed a defective application in violation of Section 22.922 of the Commission's rules.

7. Accordingly, IT IS ORDERED that Petition to Dismiss or Deny filed be JAJ Cellular Partnership IS HEREBY GRANTED.

8. IT IS FURTHER ORDERED that the application of Florida Cellular Mobile Communication Corporation, File No. 10854-CL-P-468-A-89, IS HEREBY DISMISSED.

9. IT IS FURTHER ORDERED that the request for a waiver of 47 C.F.R. Section 22.921 filed by Florida IS HEREBY DISMISSED as moot.

10. IT IS FURTHER ORDERED that the application of Kudzu Cellular Partnership for RSA market No. 468A IS HEREBY DISMISSED.

FEDERAL COMMUNICATIONS COMMISSION

Gregory J. Vogt
Chief, Mobile Services Division
Common Carrier Bureau

FOOTNOTES

[1] *See* Public Notice Report No. CL-90-51 (released November 24, 1989).

[2] Section 22.921 of the Commission's rules states in pertinent part:

> (b) . . . For Rural Service Areas, no party to a non-wireline application shall have an ownership interest, direct or indirect, in more than one application for the same Rural Service Area, including an interest of less than one percent. . .

[3] Section 22.20 of the Commission's rules states in pertinent part:

> (a) Unless the Commission shall otherwise permit, an application will be unacceptable for filing and will be returned to the applicant . . . if:
>
> (2) The application does not comply with the Commission's rules, regulations, specific requirements for additional information or other requirements.

[4] Florida did not file an application for the Connecticut 2 market and, therefore, Kudzu's award in Connecticut 2 is unaffected by this decision.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

For Selection of Tentative Selectees for 900 MHz Common Carrier Paging Frequencies in the Greater New York City Metropolitan Area	Lottery No. PMS-31

ERRATUM

Adopted: January 14, 1991; **Released: January 18, 1991**

By the Chief, Common Carrier Bureau:

1. In Order on Reconsideration, Public Mobile Services Lottery, PMS-31, DA 90-1611 (released December 11, 1990), paragraph 21, which orders the denial of applications of Contact Communications, Inc., and paragraph 22, which orders the denial of applications of Enhanced Telecommunications Services, should be revised to read as follows:

> 21. IT IS FURTHER ORDERED that, after review of the proposed locations, the applications of Contact Communications, Inc., File Nos. 28245-CD-P/L-01-88 and 28247-CD-P/L-01-88, ARE DENIED.
>
> 22. IT IS FURTHER ORDERED that, after review of the proposed locations, the applications of Enhanced Telecommunications Services, Inc. File Nos. 27392-CD-P/L-88, 27400-CD-P/L-88, and 27429-CD-P/L-88, REMAIN PENDING AND WILL BE PROCESSED in accordance with procedures for 900 MHz applications.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Firestone
Chief, Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

American Telephone and
Telegraph Company

Comparably Efficient
Interconnection Plan for
Enhanced Services Complex

MEMORANDUM OPINION AND ORDER

Adopted: December 24, 1990; Released: January 18, 1991

By the Deputy Chief, Common Carrier Bureau:

I. INTRODUCTION

1. On March 30, 1989, pursuant to the requirements the Commission adopted in the *Computer III* proceeding,[1] the American Telephone and Telegraph Company (AT&T) filed a Comparably Efficient Interconnection (CEI) Plan for a variety of enhanced voice and data services offered through AT&T's Enhanced Services Complex (ESC). In September 1989, the Bureau decided to approve certain portions of the plan, and permit AT&T to use the ESC to provide three categories of interactive voice service (IVS).[2] The Bureau deferred action on the remaining services that AT&T proposed because the plan did not fully describe the specific interactive data services (IDS) AT&T intended to provide. On April 5, 1990, AT&T filed a letter supplementing its initial CEI plan. [3] In its letter, AT&T describes in detail the categories of enhanced interactive data services (IDS) it proposes to offer through the ESC and requests approval to provide IDS. In this Order, we approve AT&T's offering of IDS through the ESC under the same terms and conditions applied to IVS.

II. BACKGROUND

2. The United States Court of Appeals for the Ninth Circuit recently vacated certain of the *Computer III* decisions and remanded them to the Commission for further proceedings consistent with its opinion.[4] In response to the Court's decision, the Commission recently adopted an Order that reinstated certain *Computer III* decisions that were not challenged in the briefs before the Court.[5] The Order permits AT&T to provide collocated and noncollocated enhanced services on an integrated basis pursuant to the nonstructural safeguards developed in the *Computer III* decisions.[6]

3. Under the requirements of the *Phase I Order* and the *Phase I Reconsideration Order*, AT&T may offer a specific enhanced service, or class of services, on an unseparated basis only after approval of a CEI plan.[7] In its CEI plan, AT&T must demonstrate that it will provide interconnection opportunities to others on an "equal access" basis, making basic facilities available to other enhanced service providers (ESPs) and users on an unbundled and functionally equal basis.[8] A CEI plan must satisfy specific CEI parameters, as well as other nonstructural safeguards governing cost allocations, the use of customer proprietary network information (CPNI), disclosure of network information, and nondiscrimination reporting.[9]

III. SERVICE DESCRIPTION

4. In its original CEI plan, AT&T proposed a network architecture that would allow AT&T to offer various voice and data enhanced services through equipment located at AT&T's central offices. According to AT&T, the ESC, when collocated, would be comprised of a variety of unregulated equipment, such as digital switching equipment, voice response units, application processors and host gateway processors.[10] AT&T initially proposed to use the ESC to offer voice services, but stated that, in the future, it would also provide data services through the ESC. We approved AT&T's provision of the voice services, and deferred ruling on its provision of data services until AT&T filed additional specific information on its proposed data offerings.

5. AT&T now requests authority to provide IDS in connection with the ESC. AT&T states that IDS applications fall into essentially the same three categories as IVS: transaction offerings, information offerings and electronic messaging offerings.[11] AT&T notes that for CEI purposes, the only difference between IVS and IDS offerings is in the customer premises equipment necessary to use them. AT&T states that IVS customers use a telephone while IDS customers use data terminals, facsimile machines and computers.[12] AT&T states that the network configurations it intends to use for providing IDS offerings will be the same as the network configurations used for IVS offerings. AT&T also includes a diagram displaying the ESC architecture to be used for providing IDS. AT&T adds that the underlying basic services it will use to provide IDS offerings are the same as those described in its original plan.[13]

6. AT&T states that IDS transaction offerings allow end users, through the use of data terminal equipment, to retrieve and update information that is stored in AT&T or customer-owned data bases. AT&T states that it will be able to expand its IVS brokerage service to customers that want to access the service via personal computers. AT&T states that IDS information offerings will function in a manner similar to a gateway, facilitating communications between end users and information providers. According to AT&T, end users, by using data terminals, will be able to access (but not modify or add) information stored in either AT&T or customer-owned data bases. AT&T states that IDS electronic messaging offerings will allow users to send and receive electronic messages, and will enable AT&T to expand its external AT&T mail service.[14]

IV. CEI REQUIREMENTS

7. The *Phase I Order* lists nine CEI parameters that all plans must satisfy.[15] These parameters are designed to ensure that the basic services used in the provision of a carrier's enhanced services are available to other ESPs in an equally efficient manner. In addition, all CEI plans must satisfy the CEI pricing requirements and nonstructural safeguards regarding the allocation of joint costs, CPNI, nondiscrimination reporting, and provision

of network technical information. AT&T states that it intends to satisfy the CEI parameters, the CEI pricing rules, and the other nonstructural safeguards in the manner previously described in its initial plan for ESC, which the Bureau approved for IVS offerings.

V. DISCUSSION

8. In the *AT&T ESC Order*, we found that AT&T's proposed offering of IVS through the ESC complied with the CEI parameters, CEI pricing requirements, and the other nonstructural safeguards described in the *Phase I Order*. Based on the additional information provided in its letter, we now conclude that AT&T has satisfied these requirements with respect to the provision of IDS through the ESC. We also find that the information contained in AT&T's supplemental letter permits us to resolve the two issues left outstanding in the *AT&T ESC* Order.

9. Parties filing comments on AT&T's original CEI plan raised issues concerning the specificity of AT&T's description of services. In reviewing the plan, we found that AT&T provided sufficient details on its IVS offering, but due to the lack of specificity, we were unable to determine if the ESC could be used to provide non-IVS offerings such as IDS. In addition, in its comments on AT&T's initial plan IDCMA both argued that AT&T had not complied with the interface functionality requirement, and requested that the Commission require AT&T to specify the basic CEI services that other ESPs will use for interconnection to the ESC. In the *ESC Order* we did not address IDCMA's argument because we did not, in that order, consider AT&T's offering of IDS through the ESC.

10. In its supplemental letter, AT&T provided specific details on its proposed IDS offering. AT&T's letter provides service descriptions for its proposed IDS applications, and states that its IDS offerings will use the same underlying basic services described in the original CEI plan. The letter also states that the interconnection to the basic network for IDS is the same as the interconnection for IVS. AT&T states that it served copies of its supplemental letter on all parties involved in the initial proceeding, and no parties commented on AT&T's supplemental letter. AT&T has now provided us with the specific information necessary to determine that its provision of IDS through the ESC comply with the requirements of the *Phase I Order*. We therefore approve AT&T's provision of IDS through the ESC.

VI. ORDERING CLAUSES

11. Accordingly, IT IS ORDERED, that pursuant to Sections 0.91 and 0.291 of the Commission's Rules, 47 C.F.R. §§ 0.91 and 0.291, AT&T's CEI Plan for Enhanced Service Complex to provide Interactive Data Services described herein, IS APPROVED.

FEDERAL COMMUNICATIONS COMMISSION

Carl D. Lawson
Deputy Chief, Common Carrier Bureau

FOOTNOTES

[1] Amendment of Section 64.702 of the Commission's Rules and Regulations, CC Docket No. 85-229, Phase I, Report and Order, 104 FCC 2d 958 (1986) (*Phase I Order), reconsideration*, 2 FCC Rcd 3035 (1987) (*Phase I Reconsideration), further reconsideration*, 3 FCC Rcd 1135 (1988) (*Phase I Further Reconsideration), second further reconsideration*, 4 FCC Rcd 5927 (1989) (*Phase I Second Further Reconsideration), Phase I Order* and *Phase I Reconsideration Order vacated sub nom.* California v. FCC, No. 87-7230 (9th Cir. filed June 6, 1990) *appeal pending sub nom.* Illinois Bell Telephone Co. v. FCC, No. 88-1364 (D.C. Cir. pet. for rev. filed May 16, 1988); *Phase II Order*, CC Docket No. 85-229, Phase II, 2 FCC Rcd 3072 (1987), *reconsideration*, 3 FCC Rcd 1150 (1988) (*Phase II Reconsideration Order), further reconsideration*, 4 FCC Rcd 5927 (1989) (*Phase II Further Reconsideration), Phase II Order vacated sub nom.* California v. FCC, No. 87-7230 (9th Cir. filed June 6, 1990, *appeal bending sub nom.* California v. FCC, N. 88-7183 (9th Cir. filed May 13, 1988).

[2] *See* In the Matter of American Telephone and Telegraph Company Comparably Efficient Interconnection Plan for Enhanced Services Complex, (*AT&T ESC Order*), 4 FCC Rcd 6974 (1989).

[3] *See Ex Parte* Letter from E. C. Fletcher, Division Manager, AT&T, to Donna Searcy, Secretary, FCC, dated April 5, 1990.

[4] *California v. FCC*, No. 87-7230, slip. op. (9th Cir. June 6, 1990). The Commission decisions under review were the *Phase I Order*, the *Phase I Reconsideration*, and the *Phase II Order*.

[5] *See* In the Matter of Computer III Remand Proceedings, Report and Order, CC Docket No. 90-368, FCC No. 90-, adopted December 13, 1990.

[6] Pursuant to the Commission's decision, the Bureau will examine AT&T's plans to determine whether they comply with the CEI requirements of the *Phase I Order*.

[7] In the *Phase I Reconsideration* the Commission relieved AT&T of the comprehensive ONA requirements of the *Phase I Order*, but required AT&T to implement an approved service-specific CEI plan as a precondition to offering each enhanced service integrated or collocated with its basic service facilities. 2 FCC Rcd at 3042, para. 45.

[8] *Phase I Order*, 104, FCC Rcd at 1036.

[9] *Id.* at 1020.

[10] Plan at 2-3.

[11] AT&T Letter at 2.

[12] *Id. at p. 2, note *.*

[13] *Id. at 3.*

[14] *Id.*

[15] *Phase I Order*, 104 FCC 2d at 1038-1043. The nine CEI parameters are: interface functionality, unbundling of basic services; resale; technical characteristics; minimization of transmission costs; installation; maintenance and repair; end user access; CEI availability; and recipients of CEI.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-606

In re Applications of

LAKESHORE COMMUNICATIONS, INC. File No. BPED-880406MK
(hereafter "Lakeshore")
Green Bay, Wisconsin
Reg: 88.5 MHz Channel 203
3 kW (H&V) 100 meters

CATHOLIC DIOCESE OF GREEN BAY (WISCONSIN) File No. BPED-890303MB
(hereafter"CATHOLIC")
Green Bay, Wisconsin
Reg: 88.1 MHz Channel 201C
50 kW (H&V) 176.8 meters

For Construction Permit for a
Non-Commercial Educational
FM Station

CORNERSTONE COMMUNITY RADIO, INC. File No. BPED-890224MA
(hereafter "Cornerstone")
Milladore, Wisconsin
Reg: 88.5 MHz Channel 203C1
50 kW (H&V) 178 meters

For Modification of
Facilities of Station WGNV(FM)
Milladore, Wisconsin

HEARING DESIGNATION ORDER

Adopted: November 20, 1990; Released: January 22, 1991

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new noncommercial educational FM station in Green Bay, Wisconsin and Cornerstone's mutually exclusive application to modify the facilities of Station WGNV(FM), Milladore, Wisconsin.

2. The Commission requires that if there will be five or more fulltime station employees, the applicant must complete and file Section VI of Form 301 and supply a statement detailing hiring and promotion policies for women and each minority group whose representation in the available labor force is five percent or greater in the proposed service area. Although Catholic has filed such statement, it is deficient. Catholic has not indicated that its general policy is to provide employment opportunity to all qualified individuals without regard to their religion or to promote the realization of equal opportunity through a positive, continuing program of specific practices designed to ensure the full realization of equal employment opportunity without regard to religion. Catholic has not indicated that its station employment application form will contain a notice informing prospective employees that discrimination because of religion is prohibited and of the right to notify appropriate government agencies of such discrimination. Neither has Catholic asserted that it will deal only with employment services which refer job candidates without regard to their religion. Accordingly, Catholic will be required to file an amended EEO program with the presiding Administrative Law Judge, or an appropriate issue will be specified by the Judge.

3. Inasmuch as it appears that there would be a significant difference in the size of the areas and populations which would receive service from the proposals, and since this proceeding involves competing applicants for noncommercial educational facilities, the standard areas and populations issue will be modified in accordance with the Commission's prior action in *New York University*, FCC 67-673, released June 8, 1967, 10 RR 2d 215 (1967). Thus, the evidence adduced under this issue will be limited to available non-commercial educational FM signals within the respective service areas.

4. None of the applicants have indicated that an attempt has been made to negotiate a share-time arrangement. Therefore, an issue will be specified to determine whether a share-time arrangement between the applicants would be the most effective use of the frequency, and thus better serve the public interest. *Granfalloon Denver Educational Broadcasting, Inc.*, 43 Fed. Reg. 49,560, published October 24, 1978. In the event that this issue is resolved in the affirmative, an issue will also be specified to determine the nature of such an arrangement. It should be noted that our action specifying a time-sharing issue is not intended to preclude the applicants, either before the commencement of the hearing or at any time during the course of the hearing, from participating in negotiations with a view toward establishing a share-time arrangement.

5. The respective proposals, although for different communities, would serve substantial areas in common. Consequently, in addition to determining, pursuant to Section 307(b) of the Communications Act of 1934, as amended, which of the proposals would best provide a fair, efficient and equitable distribution of radio service, a contingent comparative issue will also be specified.

6. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

7. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine: (a) the number of other reserved channel non-commercial educational FM services available in the proposed service area of each applicant, and the area and population served thereby; (b) whether a share-time arrangement between the applicants would result in the most effective use of the channel and thus better serve the public interest and, if so, the terms and conditions thereof; and (c) in light of Section 307(b) of the Communications Act of 1934, as amended, which of the proposals would best provide a fair, efficient and equitable distribution of radio service.

2. To determine, in the event it is concluded that a choice between the applications should not be based solely on considerations relating to Section 307(b), the extent to which each of the proposed operations will be integrated into the overall cultural and educational objectives of the respective applicants; and whether other factors in the record demonstrate that one applicant will provide a superior FM educational broadcast service.

3. To determine, in light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

8. IT IS FURTHER ORDERED, That within 30 days of the release of this Order, Catholic shall submit Section VI information in accordance with the requirement of Section 73.2080(c) of the Commission's Rules to the presiding Administrative Law Judge.

9. IT IS FURTHER ORDERED, That a copy of each document filed in this proceeding subsequent to the date of adoption of this Order shall be served on the Chief, Mass Media Bureau. Parties may inquire as to the identity of the counsel of record by calling the Hearing Branch at (202) 632-6402. Such service shall be addressed to the named counsel of record, Hearing Branch, Enforcement Division, Mass Media Bureau, Federal Communications Commission, 2025 M Street, N.W., Suite 7212, Washington, D.C. 20554. Additionally, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall also be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Federal Communications Commission, Room 350, 1919 M Street, N.W., Washington, D.C. 20554.

10. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

11. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-604

In re Applications of

MARTINSVILLE COMMUNITY WORKSHOP, INC.
(hereafter: Workshop)
Martinsville, Virginia
Req: 90.5 MHz Channel 213C3
4.3 kW (H&V) 116 meters

File No. BPED-860130MG

VISION COMMUNICATIONS, INC.
(hereafter: Vision)
Roanoke, Virginia
Req: 90.3 MHz Channel 212C2
2.0 kW (H&V) 455 meters

File No. BPED-880801ME

For Construction Permit
for a New Noncommercial
Educational FM Station

HEARING DESIGNATION ORDER

Adopted: November 20, 1990; Released: January 22, 1991

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new, noncommercial, educational FM station.

2. *Preliminary Matter.* The Workshop and Vision applications are for different communities and different channels (213C3 and 212C2, respectively). Pursuant to 47 C.F.R. § 73.509(a), in pertinent part, applications for new noncommercial FM facilities will not be accepted if the proposed operation would involve overlap of the interfering (54 dBu) and protected (60 dBu) signal strength contours of the respective stations. The proposed facilities are 43.9 miles apart. According to our engineering analysis, the interfering contour of each applicant overlaps with the protected contour of the other. Since Vision's application was filed before the August 2, 1988 cut-off date for applications mutually exclusive with Workshop's proposal, grant of one application would effectively preclude grant of the other. Accordingly, the applications are mutually exclusive and must be consolidated for hearing. *Ashbacker Radio Co. v. FCC*, 326 U.S. 327 (1948).

3. *Workshop.* Section II, Item 9 of FCC Form 340 (June 1983) requires that an applicant specify its address (number, street, city, state) as well as the home address of each of its principals. Workshop has not completed Item 9 correctly. Workshop's application gives a post office box number as the residence address for Dr. Joanne Whitley. Accordingly, Workshop must submit an amendment which gives all the information required by Section II, Item 9 to the presiding Administrative Law Judge after this Order is released.

4. *Vision.* Section 73.503(a) of the Commission's Rules mandates that an educational broadcast license may only be issued to a nonprofit educational organization and only upon a showing that the facilities will be used for the advancement of an educational program. Vision states its purpose is to be a "communications vehicle capable of reaching and educating youth and young adults of all religious denominations." There is no mention of any educational ties to any school. We find the submitted material insufficient to make a determination that Vision is a qualified educational organization proposing an acceptable educational format in compliance with 47 C.F.R. § 73.503. Accordingly, an appropriate issue will be specified.

5. Applicants for broadcast authorizations are required by Section III of Form 340 to certify that sufficient net liquid assets are on hand or that sufficient funds are available from committed resources to construct and operate requested facilities for three months without revenue. Vision responded in the negative. Vision did, however, indicate that it was "in the process of obtaining financing and will file an amendment when these efforts are completed." No such amendment was filed. Vision's response does not provide a basis to determine that it is financially qualified to be a broadcast licensee. Accordingly, an appropriate issue will be specified below.

6. *Other Matters.* None of the applicants have indicated that an attempt has been made to negotiate a share-time arrangement. Therefore, an issue will be specified to determine whether a share-time arrangement between the applicants would be the most effective use of the frequency and thus better serve the public interest. *Granfalloon Denver Educational Broadcasting, Inc.*, 43 Fed. Reg. 49560 (October 24, 1978). In the event that this issue is resolved in the affirmative, an issue will also be specified to determine the nature of such an arrangement. It should be noted that our action specifying a share-time issue is not intended to preclude the applicants, either before the commencement of the hearing or at any time during the course of the hearing, from participating in negotiations with a view toward establishing a share-time agreement between themselves.

7. Inasmuch as it appears that there would be a significant difference in the size of the areas and populations which would receive service from the proposals, and since this proceeding involves competing applicants for noncommercial educational facilities, the standard areas and populations issue will be modified in accordance with the Commission's prior action in *New York University*, FCC 67-673, released June 8, 1967, 10 RR 2d 215 (1967). Thus, the evidence adduced under this issue will be limited to available noncommercial educational FM signals within the respective service areas.

8. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

9. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine whether Vision is a qualified educational organization as required by 47 C.F.R. § 73.503(a).

2. To determine with respect to Vision, whether the applicant is financially qualified.

3. To determine: (a) the number of other reserved channel non-commercial educational FM services available in the proposed service area of each applicant, and the area and population served thereby; (b) whether a share-time arrangement between the applicants would result in the most effective use of the channel and thus better serve the public interest and, if so, the terms and conditions thereof; and (c) in light of Section 307(b) of the Communications Act of 1934, as amended, which of the proposals would best provide a fair, efficient and equitable distribution of radio service.

4. To determine, in light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

10. IT IS FURTHER ORDERED, That Workshop shall submit an amendment which contains the information required by Section II, Item 9 of FCC Form 340, to the presiding Administrative Law Judge within 30 days after the release of this Order.

11. IT IS FURTHER ORDERED, That a copy of each document filed in this proceeding subsequent to the date of adoption of this Order shall be served on the counsel of record in the Hearing Branch appearing on behalf of the Chief, Mass Media Bureau. Parties may inquire as to the identity of the counsel of record by calling the Hearing Branch at (202) 632-6402. Such service shall be addressed to the named counsel of record, Hearing Branch, Enforcement Division, Mass Media Bureau, Federal Communications Commission, 2025 M Street, N.W., Suite 7212, Washington, D.C. 20554. Additionally, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall also be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Federal Communications Commission, Room 350, 1919 M Street, N.W., Washington, D.C. 20554.

12. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

13. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-442

In the Matter of

Amendment of Section 73.202(b), RM-7358
Table of Allotments,
FM Broadcast Stations.
(Oakland, Maryland)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: January 9, 1991; Released: January 22, 1991

By the Acting Chief, Allocations Branch:

1. The Commission has before it for consideration the *Notice of Proposed Rule Making*, 5 FCC Rcd 5936 (1990), issued in response to a petition filed by Oakland Radio Station Corporation (petitioner) proposing the substitution of Channel 222A for Channel 221A at Oakland, Maryland. Petitioner also requested modification of its license for Station WXIE(FM), Channel 221A, to specify operation on the new channel. Petitioner filed supporting comments in which it reaffirmed its interest in the channel. No other comments were received.

2. We believe the public interest would be served by the substitution of Channel 222A for Channel 221A at Oakland, Maryland, since it would allow Station WXIE(FM) to increase its operation to 6 kW and thereby expand its coverage area. The substitution can be made in compliance with the minimum distance separation requirements of Section 73.207 of the Commission's Rules at petitioner's specified site.[1] In addition, we are modifying petitioner's license for Station WXIE(FM), Oakland, Maryland, to specify operation on Channel 222A.

3. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **March 8, 1991,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, to read as follows:

City	Channel No.
Oakland, Maryland	222A

4. IT IS FURTHER ORDERED, pursuant to the authority contained in Section 316 of the Communications Act of 1934, as amended, that the license of Station WXIE(FM), Oakland, Maryland, IS MODIFIED to specify operation on Channel 222A in lieu of Channel 221A, subject to the following conditions:

(a) Nothing contained herein shall be construed as authorizing any change in Station WXIE(FM)'s license, BLH-3384, except the channel as specified above. Any other changes, except those so specified under Section 73.1620 of the Rules, require prior authorization pursuant to an application for construction permit (FCC Form 301).

(b) Program tests may be conducted in accordance with the provisions of Section 73.1620 of the Rules, PROVIDED the transmission facilities comply in all respects with license BLH-3384, except for the channel as specified above and a license application (FCC Form 302) is filed within 10 days of commencement of program tests.

5. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

6. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Andrew J. Rhodes
Acting Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

FOOTNOTE

[1] The coordinates for Channel 222A are 39-26-41 and 79-31-42.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-451

In the Matter of

Amendment of Section 73.202(b), RM-6628
Table of Allotments,
FM Broadcast Stations.
(Keokuk and Washington, Iowa)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: January 9, 1991; Released: January 22, 1991

By the Acting Chief, Allocations Branch:

1. At the request of W. Russell Withers, Jr. ("petitioner"), the Commission has before it the *Notice of Proposed Rule Making and Order to Show Cause*, 4 FCC Rcd 7499 (1989), proposing the substitution of Channel 237C1 for Channel 237A at Keokuk, Iowa, and the modification of Station KOKX-FM's license to specify the higher powered channel. In order to accommodate the allotment of Channel 237C1 to Keokuk, the Commission proposed the modification of the license of Station KCII(FM), Washington, Iowa, to specify Channel 291A in lieu of its present Channel 237A. At the request of petitioner, we also proposed to delete unoccupied and unapplied-for Channel 290C2 at Keokuk. Comments were filed by the petitioner, Washington Radio, Inc. ("WRI"), licensee of Station KCII(FM), and Horizon Broadcasting, Inc. ("Horizon"), licensee of Station KXOF, Channel 292A, Bloomfield, Iowa.[1]

2. In response to the *Order to Show Cause*, WRI states that Station KCII(FM) may increase power to 6 kW on its present Channel 237A without any short-spacing problems. However, it states that if Station KCII(FM) is modified to Channel 291A, 6 kW operation might be impeded because of a short-spacing to the proposed allotment of Channel 292C3 at Bloomfield, Iowa. Therefore, in order to enable Station KCII(FM) to specify 6 kW of power on Channel 291A, WRI requests that the reference coordinates for proposed Channel 292C3 be moved approximately 1.9 miles southwest of Bloomfield. Horizon filed comments stating that it has no objection to the specification of new reference coordinates for Channel 292C3 at Bloomfield in order to enable Station KCII(FM) to operate on Channel 291A with 6 kW of power. Therefore, WRI is deemed to have consented to the modification of the license of Station KCII(FM) to specify operation on Channel 291A in lieu of its present Channel 237A.

3. We believe the public interest would be served by substituting Channel 237C1 for Channel 237A at Keokuk, Iowa, and by substituting Channel 291A for Channel 237A at Washington, Iowa, since it could provide Keokuk with an additional wide coverage area FM service. Channel 237C1 can be allotted to Keokuk in compliance with the Commission's minimum distance separation requirements and can be used at Station KOKX-FM's licensed site. Channel 291A can be allotted to Washington, Iowa, in compliance with the Commission's minimum distance separation requirements and can be used at Station KCII(FM)'s licensed site.[2] In accordance with Commission policy, petitioner will be required to reimburse WRI for the reasonable costs associated with the change in Station KCII(FM)'s license to specify operation on Channel 291A. Since no interest was expressed in use of Channel 290C2 at Keokuk, we will delete the channel as proposed.

4. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **March 8, 1991,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the communities listed below, to read as follows:

City	Channel No.
Keokuk, Iowa	237C1, 242C2
Washington, Iowa	291A

5. IT IS FURTHER ORDERED, pursuant to Section 316(a) of the Communications Act of 1934, as amended, that the license of W. Russell Withers, Jr., for Station KOKX-FM, Keokuk, Iowa, IS MODIFIED to specify operation on Channel 237C1, in lieu of Channel 237A, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall submit to the Commission a minor change application for a construction permit (Form 301).

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620.

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

6. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the license of Washington Radio Inc., for Station KCII(FM), Washington, Iowa, IS MODIFIED to specify operation on Channel 291A in lieu of Channel 237A, subject to the following conditions:

(a) Nothing contained herein shall be construed as authorizing any change in Station KCII(FM)'s license, BLH-6931, except the channel as specified above. Any other changes, except those so specified under Section 73.1620 of the Rules, require prior authorization pursuant to an application for construction permit (FCC Form 301).

(b) Program tests may be conducted in accordance with the provisions of Section 73.1620 of the Rules, PROVIDED the transmission facilities comply in all respects with license BLH-6931, except for the channel as specified above and a license application (FCC Form 302) is filed within 10 days of commencement of program tests.

7. IT IS FURTHER ORDERED, That the Secretary shall send a copy of this *Report and Order* by Certified Mail, Return Receipt Requested, to the licensee of Station KCII(FM), as follows: Washington Radio, Inc., P.O. Box 524, Washington, Iowa 52353.

8. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

9. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Andrew J. Rhodes
Acting Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

FOOTNOTES

[1] Petitioner's comments reiterating its intention to apply for Channel 237C1 at Keokuk were late filed but contained a request that they be accepted *nunc pro tunc*. Horizon filed a Motion to Strike petitioner's late-filed expression of interest. Counsel to petitioner states that although he was out of town at the time comments were due, he believed that comments had been timely filed. However, petitioner urges acceptance of the late-filed comments since the proceeding is uncontested. Horizon argues that petitioner has not set forth an adequate reason why its late-filed expression of interest should be accepted. In addition, Horizon states that acceptance of petitioner's expression of interest would be prejudicial to Horizon's proposal to substitute Channel 292C3 for Channel 292A at Bloomfield, Iowa, and modification of Station KXOF-FM's license to specify the higher powered channel. *See* MM Docket 89-264, 4 FCC Rcd 4904 (1989), and counterproposals thereto.

We believe that the public interest would be served by accepting petitioner's late-filed expression of interest. Horizon previously filed comments stating that it had no objection to the allotment of Channel 291A to Washington and agreed to the specification of a new transmitter site at Bloomfield which would permit the Washington station to operate as a 6 kW Class A facility. Horizon has presented no reason why adoption of this proposal would now be prejudicial to the Bloomfield rule making. Therefore, in accordance with our policy of accepting late-filed expressions of interest in uncontested proceedings, we deny Horizon's Motion to Strike and will accept petitioner's comments for the purpose of expressing continuing interest. *See Ariton, Alabama, et al.*, 4 FCC Rcd 1182 (1989), *Santa Isabel, Puerto Rico*, 3 FCC Rcd 2366 (1988), *aff'd. Amor Family Broadcasting Group v. FCC and USA*, No. 89-1366 (D.C. Cir. November 16, 1990).

[2] The coordinates for Channel 237C1 at Keokuk are North Latitude 40-24-38 and West Longitude 91-25-57. The coordinates for Channel 291A at Washington are North Latitude 41-18-18 and West Longitude 91-42-36. Because the petition which resulted in these allotments was filed prior to October 2, 1989, the licensees of Stations KOKX-FM and KCII(FM) may avail themselves of the provisions of Section 73.213(c)(1) of the Commission's Rules. *See* 47 C.F.R. §73.213(c).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-459

In the Matter of

Amendment of Section 73.202(b), Table of Allotments, FM Broadcast Stations. (Clovis, New Mexico)	RM-7386

REPORT AND ORDER
(Proceeding Terminated)

Adopted: January 9, 1991; Released: January 22, 1991

By the Acting Chief, Allocations Branch:

1. At the request of Alton Lloyd Finley, Jr. ("petitioner"), the Commission has before it the *Notice of Proposed Rule Making*, 5 FCC Rcd 6186 (1990), proposing the allotment of Channel 272C3 to Clovis, New Mexico, as the community's fifth local FM service. Petitioner filed comments reiterating his intention to apply for the channel, if allotted. No other comments were received.

2. We believe the public interest would be served by allotting Channel 272C3 to Clovis, New Mexico, since it could provide the community with an additional local FM service. Channel 272C3 can be allotted to Clovis in compliance with the Commission's minimum distance separation requirements without the imposition of a site restriction.[1]

3. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **March 8, 1991,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the community listed below, to read as follows:

City	Channel No.
Clovis, New Mexico	256C1, 260C1, 268C, 272C3, 298C1

4. The window period for filing applications will open on **March 11, 1991,** and close on **April 10, 1991.**

5. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

6. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Andrew J. Rhodes
Acting Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

FOOTNOTE

[1] The coordinates for Channel 272C3 at Clovis are North Latitude 36-24-06 and West Longitude 103-12-18.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-450

In the Matter of

Amendment of Section 73.202(b), RM-7391
Table of Allotments,
FM Broadcast Stations.
(Winterset, Iowa)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: January 9, 1991; Released: January 22, 1991

By the Acting Chief, Allocations Branch:

1. At the request of AFM Associates ("petitioner"), the Commission has before it the *Notice of Proposed Rule Making*, 5 FCC Rcd 6002 (1990), proposing the substitution of Channel 258C3 for Channel 258A at Winterset, Iowa, and the modification of the construction permit for Station KTDG(FM) to specify operation on the higher powered channel. Petitioner filed comments reiterating its intention to apply for Channel 258C3, if allotted. No other comments were received.

2. We believe the public interest would be served by substituting Channel 258C3 for Channel 258A at Winterset, Iowa, since it could provide the community with a wide-coverage area FM service. Channel 258C3 can be allotted to Winterset in compliance with the Commission's minimum distance separation requirements with a site restriction of 13.7 kilometers (8.5 miles) south of the community to avoid short-spacings to Station KFGQ-FM, Channel 257A, Boone, Iowa, and to the outstanding construction permit for Channel 258A at Eldora, Iowa (BPH-880415MF).[1] As proposed, we will also modify petitioner's construction permit for Station KTDG(FM) to specify operation on the higher powered channel.

3. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **March 8, 1991,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the community listed below, to read as follows:

City	Channel No.
Winterset, Iowa	258C3

4. IT IS FURTHER ORDERED, pursuant to Section 316(a) of the Communications Act of 1934, as amended, that the construction permit of AFM Associates for Station KTDG(FM), Winterset, Iowa, IS MODIFIED to specify operation on Channel 258C3, in lieu of Channel 258A, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the permittee shall submit to the Commission a minor change application for a construction permit (Form 301).

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620.

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

5. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

6. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Andrew J. Rhodes
Acting Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

FOOTNOTE

[1] The coordinates for Chanel 258C3 at Winterset are North Latitude 41-12-34 and West Longitude 94-02-09.

**Before the
Federal Communications Commission
Washington, D.C. 20554**

MM Docket No. 91-3

In the Matter of

Amendment of Section 73.202(b), RM-7589
Table of Allotments,
FM Broadcast Stations.
(Reedsport, Oregon)

NOTICE OF PROPOSED RULE MAKING

Adopted: January 10, 1991; Released: January 22, 1991

By the Acting Chief, Allocations Branch:

1. The Commission has before it the petition for rule making filed by Paul C. Bjornstad ("petitioner") requesting the allotment of Channel 258A to Reedsport, Oregon, as the community's second local FM service. Petitioner states that he will apply for the channel, if allotted.

2. We believe the public interest would be served by proposing the allotment of Channel 258A to Reedsport, Oregon, since an interest has been expressed in providing the community with its second local FM service. Channel 258A can be allotted to Reedsport in compliance with the Commission's minimum distance separation requirements without the imposition of a site restriction.[1]

3. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the community listed below, to read as follows:

	Channel No.	
City	Present	Proposed
Reedsport, Oregon	221A	221A, 258A

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **March 15, 1991,** and reply comments on or before **April 1, 1991,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Margaret L. Tobey, Esq.
Sidley & Austin
1722 Eye Street, N.W.
Washington, D.C. 20006
(Counsel to petitioner)

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202 (b), 73.504 and 73.606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Andrew J. Rhodes
Acting Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules. IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

> (a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)
>
> (b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.
>
> (c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTE

[1] The coordinates for Channel 258A at Reedsport are North Latitude 43-42-00 and West Longitude 124-06-12.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-4

In the Matter of

Amendment of Section 73.202(b), RM-7588
Table of Allotments,
FM Broadcast Stations.
(Eagle Grove, Iowa)

NOTICE OF PROPOSED RULE MAKING

Adopted: January 10, 1991; Released: January 22, 1991

By the Acting Chief, Allocations Branch:

1. The Commission has before it the petition for rule making filed by Iowa Inspirational Radio ("petitioner") requesting the allotment of Channel 264C3 to Eagle Grove, Iowa, as the community's first local FM service. Petitioner states that it will apply for the channel, if allotted.

2. We believe the public interest would be served by proposing the allotment of Channel 264C3 to Eagle Grove, Iowa, since it could provide the community with its first local FM service. Channel 264C3 can be allotted to Eagle Grove in compliance with the Commission's minimum distance separation requirements without the imposition of a site restriction.[1]

3. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the community listed below, to read as follows:

	Channel No.	
City	Present	Proposed
Eagle Grove, Iowa	--	264C3

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **March 15, 1991,** and reply comments on or before **April 1, 1991,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

James M. Weitzman, Esq.
Kaye, Scholer, Fierman, Hays & Handler
901 - 15th Street, N.W., Suite 1100
Washington, D.C. 20005
(Counsel to petitioner)

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202 (b), 73.504 and 73.606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Andrew J. Rhodes
Acting Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits

or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

> (a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)
>
> (b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.
>
> (c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTE

[1] The coordinates for Channel 264C3 at Eagle Grove are North Latitude 42-39-54 and West Longitude 93-54-18.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Pacific Bell	Transmittal No. 1504

Revisions to Tariff
F.C.C. No. 129

ORDER

Adopted: January 9, 1991; Released: January 11, 1991

By the Chief, Common Carrier Bureau:

1. On October 15, 1990, Pacific Bell filed Transmittal No. 1504 to recover the additional cost of specially contructed facilities to provide, at the request of MCI Telecommunications Corporation, a route other than normal for existing high capacity service. On October 30, 1990, Metropolitan Fiber Systems, Inc. (MFS) filed a petition to suspend for one day and investigate the tariff revisions. Pacific Bell filed reply comments on November 9, 1990. The tariff is scheduled to take effect on January 13, 1991.

2. MFS is concerned that Pacific Bell may be using ndividual case basis (ICB) special construction as a means to circumvent the prohibition on unreasonably discriminatory pricing. MFS Petition at 1-2. MFS claims hat the Commission recognized this possibility in the *ICB Reconsideration Order* by requiring local exchange carriers LECs) to justify future ICB filings.[1] *Id.* at 2-3. According o MFS, Pacific Bell has not met the strict standard for ustifying a departure from averaged ratemaking. *Id.* at 3.

3. Pacific Bell responds that it has shown that the conditions for special construction have been met and hat the rates are not unreasonably discriminatory. Pacific Bell Reply at 2-3. Indeed, Pacific Bell argues that cusomers subject to the special construction tariff pay for he specially constructed facility in addition to paying all ppropriate charges under the applicable service tariff. *Id.* t 3. Pacific Bell notes that the extra charge is designed to protect the ratepayer and Pacific Bell from the risk of wasted investment if the constructed facility becomes tranded or underutilized before its full cost is recovered hrough service charges. *Id.* Finally, Pacific Bell contends hat the *ICB Reconsideration Order* did not establish a new tandard for evaluating special construction filings or even deal with DS1 facilities. *Id.* at 4.

4. The Common Carrier Bureau has reviewed Pacific Bell Transmittal No. 1504, the MFS petition, and Pacific Bell's reply. We conclude that no compelling argument has been presented that the tariff revisions warrant invesigation at this time.

5. Accordingly, IT IS ORDERED that the petition to uspend and investigate Pacific Bell Tariff F.C.C. No. 129, Transmittal No. 1504, filed by Metropolitan Fiber Sysems, Inc., IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Firestone
Chief, Common Carrier Bureau

FOOTNOTE

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[1] Local Exchange Carriers' Individual Case Basis DS3 Service Offerings, CC Docket No. 88-136, 5 FCC Rcd 4842, 4846 (1990) (*ICB Reconsideration Order*), *further recon. pending.*

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

BellSouth Telephone Companies — Transmittal No. 346

Revisions to Tariff
F.C.C. No. 4

MEMORANDUM OPINION AND ORDER

Adopted: January 10, 1991; Released: January 11, 1991

By the Chief, Common Carrier Bureau:

I. BACKGROUND

1. On October 15, 1990, the BellSouth Telephone Companies (BellSouth) filed Transmittal No. 346 to establish, on an individual case basis (ICB), rate elements for a "multi-nodal, self-healing, drop and insert high capacity digital network, equipped for three digital ports." BellSouth Transmittal No. 346, Cover Letter at 1. BellSouth states that each port currently has service, but that the customer, American Transtech/UC, requested fiber optic transmission equipment that can function in a ring topology connected by alternately routed fiber optic facilities. *Id.* BellSouth claims that it will use information developed from this offering to prepare a general offering for this type of service, which it intends to file in March 1991. *Id.*

2. Advanced Telecommunications Corporation (ATC) filed a petition to reject and MCI Telecommunications Corporation (MCI) filed a petition to suspend and investigate Transmittal 346. BellSouth replied to both petitions. Transmittal 346 is scheduled to become effective on January 13, 1991. For the reasons discussed below, we reject Transmittal 346.

II. SUMMARY OF PLEADINGS

3. ATC, an interexchange carrier and potential customer of the self-healing network service, objects to BellSouth making the service available to only one customer at the outset, while requiring other customers to wait until BellSouth makes the service generally available. ATC Petition at 2. ATC argues that the Commission's *ICB Order* [1] prohibits DS3-type service at ICB rates. *Id.* ATC asserts that BellSouth's tariff should be rejected just as a similar "self-healing network" designed for a single customer by Southwestern Bell was recently rejected by the Common Carrier Bureau. *Id.* at 2-3. When BellSouth is ready to offer a cost-justified service on a non-discriminatory basis, says ATC, BellSouth should be allowed to offer self-healing network service. *Id.* ATC argues that the cost support provided by BellSouth is inadequate because the cost support materials do not demonstrate that the costs BellSouth cites are unique to this particular customer and does not show that generally applicable costs cannot be developed. *Id.* at 3 n.2.

4. MCI contends that BellSouth fails to provide any justification for charging ICB rates for its self-healing network service and or proof that unreasonable rate discrimination will not occur. MCI Petition at 3. MCI observes that BellSouth's proposed service is similar to a service known as "Self-Healing Network Service" (SHNS), currently offered on a general basis by US West. *Id.* at 4. MCI maintains that BellSouth, while offering the same types of functions and services as SHNS, does not explain why BellSouth's offering is so unique that generally tariffed rates are impossible to formulate. *Id.* Moreover, claims MCI, BellSouth does not explain what type of information it expects to gain from this ICB offering that precludes BellSouth from offering the service now under generally tariffed rates. *Id.* MCI further claims that BellSouth provides so little detail of the elements of the service and their costs that it is impossible to verify BellSouth's cost assumptions and assertions. *Id.* at 4 n.12.

5. In reply, BellSouth asserts that its fiber ring service provides simultaneous transmission of communications in two physically separate paths around a fiber ring and is capable of supporting simultaneous but separate communications from each node to any other node in the network. BellSouth Reply at 2. These features, says BellSouth, are not available with existing DS3 services and customers perceive that the service is distinct from DS3 services. *Id.* at 2 n.1. BellSouth, therefore, challenges the claim that it is providing redundant or additional DS3 service under the guise of an ICB arrangement, as contended by MCI. *Id.*

6. BellSouth contends that it has only limited experience with, and limited demand for, its fiber ring service. Therefore, according to BellSouth, it may offer the service at ICB rates until it is possible to formulate general rates. Formulation of such rates, it contends, requires the development of overall service and technical standards, evaluation of available equipment for suitability, and the development of a network architecture to meet current and planned technology deployment. *Id.* at 4. BellSouth further states that the instant transmittal represents a transitional ICB arrangement designed to meet a customer's request for service pending BellSouth's development of a general offering. *Id.* at 5.

7. Finally, BellSouth maintains that the filing of a general offering for fiber ring service by US West does not demonstrate that BellSouth can make a general offering of its service at this time, as MCI contends. *Id.* at 5 n.7. BellSouth argues that it must develop its own costs based upon its own service design and operating standards and must take into consideration the demand expected in its own region to calculate its general fiber ring rates. *Id.*

III. DISCUSSION

8. BellSouth Transmittal 346 contains essentially the same type of cost support data and same rate structure which Southwestern Bell filed in its Transmittal 1994, and suffers from the same deficiencies. The Common Carrier Bureau recently rejected the Southwestern Bell transmittal.[2] Like Southwestern Bell, BellSouth has failed to provide with Transmittal 346 adequate cost support to satisfy the requirements of Section 61.38 of the Commission's Rules, 47 C.F.R. § 61.38. Specifically, its expense data are

ot sufficiently disaggregated such that the Commission in readily evaluate the rates. [3] In addition, BellSouth has iled to provide calculations to show how the proposed ites were developed, or estimates of the effects of the roposed fiber ring on other Special Access traffic and evenues.

9. Specifically, BellSouth shows total annual fully asgned recurring costs for its proposed fiber ring service of 153,275 and annual revenues of $339,552. BellSouth, owever, provides no calculations to support its recurring harges, which are 122 percent higher than its recurring osts. Further, BellSouth shows fully assigned onrecurring costs of $79,292, but recovers only $40,960 nonrecurring charges. BellSouth states that other onrecurring costs will be recovered in recurring rates, ut provides no explanation of the methodology or calulations it uses to incorporate nonrecurring costs in its ecurring charges.

10. BellSouth, to support its rates for additional ports, rovides similarly deficient and unsupported information. fact, BellSouth's cost support for additional ports apears to contradict its fiber ring rates. For example, for dditional ports BellSouth shows fully assigned total anual recurring costs of $2,008 and annual recurring revnues of $2,820, or a rate that is 40 percent higher than e costs. If the same methodology was used to develop oth the fiber ring rate and the additional port rate, the atio of cost to revenue should be equal -- either 122 ercent or 40 percent. In these circumstances, BellSouth's ling is deficient because it has omitted key explanations nd workpapers depicting the calculations leading to the ites.

11. Moreover, BellSouth fails to address the effects that s fiber ring offering will have on other services and the ffect on overall traffic and revenues. Thus, BellSouth ransmittal 346 violates Section 61.38(b)(2)(ii) of the ommission's Rules, which requires that carriers provide n explanation of the effect of new tariff matter on both ew traffic and revenues and on existing services' traffic nd revenues, including the effect on the carrier's overall affic and revenues.

12. In sum, the cost support supplied with Transmittal 46 is devoid of the information necessary to determine hether an investigation or suspension of the transmittal warranted pursuant to Section 204 of the Communicaons Act, 47 U.S.C. § 204. The tools required for the ommission to carry out its statutory mandate with reect to evaluating tariff filings are contained in Section 1.38 and BellSouth, by this filing, deprives us of the struments that we need to fulfill our responsibilities nder the Communications Act. This violation of the quirements of Section 61.38 forces us to conclude that e transmittal does not comply with applicable Commison rules. Therefore, we reject Transmittal No. 346.[4]

IV. ORDERING CLAUSES

13. Accordingly, IT IS ORDERED that BellSouth Telehone Companies Tariff F.C.C. No. 4, Transmittal No. 46, IS REJECTED.

14. IT IS FURTHER ORDERED that BellSouth Telehone Companies SHALL ISSUE revisions to the tariff ot later than five business days from the date of the lease of this Order removing the rejected material from s tariff. These revisions shall be scheduled to become fective on not less than one day's notice.

15. IT IS FURTHER ORDERED that Special Permission No. 91-018 IS ASSIGNED and Sections 61.58 and 61.59, 47 C.F.R. §§ 61.58, 61.59, ARE WAIVED for the purposes of issuing the above revision.

16. IT IS FURTHER ORDERED that the petition to reject Transmittal No. 346 filed by Advanced Telecommunications Corporation IS GRANTED, and the petition to suspend and investigate Transmittal 346 filed by MCI Telecommunications Corporation IS DISMISSED.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Firestone
Chief, Common Carrier Bureau

FOOTNOTES

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[1] Local Exchange Carriers' Individual Case Basis DS3 Service Offerings, CC Docket No. 88-136, Memorandum Opinion and Order, 4 FCC Rcd 8634 (1989) (*ICB Order*).

[2] Southwestern Bell Telephone Co., Revisions to Tariff F.C.C. No. 68, Transmittal No. 1994, Memorandum Opinion and Order, 5 FCC Rcd 5980 (Com.Car.Bur. 1990).

[3] For instance, BellSouth's expenses are not displayed in a format that reflects capital expenses (*e.g.*, cost of money, depreciation, and income tax) and other expenses (*e.g.*, maintenance, administration, and general overhead expenses).

[4] We need not address whether BellSouth's fiber ring service is not "like" any of its existing services, and thus eligible for ICB treatment on a transitional basis, since we are rejecting the service for lack of cost support.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

American Telephone and Telegraph Company	Transmittal Nos. 2655, 2664, 2665, and 2749

Revisions to Tariff F.C.C. No. 12

ORDER

Adopted: January 11, 1991; Released: January 11, 1991

By the Chief, Common Carrier Bureau:

1. American Telephone and Telegraph Company (AT&T) has filed Transmittal Nos. 2655, 2664, 2665, and 2749 to introduce Virtual Telecommunications Network Service (VTNS) Options 74, 75, and 76, by which AT&T will provide voice and data communications service among locations in the United States, Puerto Rico, the U.S. Virgin Islands, and specific international locations. Following substantially complete installation, the rates for Option 74 are stabilized for a five-year term with a one-year extension if the customer opts for such extension and AT&T agrees. The rates for Option 75 are stabilized for a three-year term with a one-year extension if the customer opts for such extension and AT&T agrees. The rates for Option 76 are stabilized for a three-year term. *See* AT&T Transmittal No. 2655 Description and Justification (D&J) at 1-4; AT&T Transmittal No. 2664 D&J at 1-4; AT&T Transmittal No. 2665 D&J at 1-4. The basic charge for Option 74 is $109,900 per month. It will be reduced by $10,000 for the first full month of service after the initial service date. The basic charge for Option 75 is $310,081 per month. It will be reduced by $86,630 per month for four full months following the initial service date. The basic charge for Option 76 is $419,500 per month. *See* AT&T Transmittal No. 2655 D&J at 5; AT&T Transmittal No. 2664 D&J at 5; AT&T Transmittal No. 2665 D&J at 5. Transmittal Nos. 2655, 2664, 2665, and 2749 are scheduled to become effective January 12, 1991.

2. US Sprint Communications Company Limited Partnership (Sprint) filed a petition to reject, or alternatively, to suspend and investigate Transmittal No. 2665 on November 5, 1990, and Transmittal Nos. 2664 and 2665 on November 8, 1990. MCI Telecommunications Corp. (MCI) filed a petition to reject or suspend Transmittal No. 2655 on November 5, 1990, and Transmittal No. 2665 on November 9, 1990. Williams Telecommunications Group, Inc. (Williams) filed a petition to reject or suspend and investigate Transmittal No. 2655 on November 6, 1990, Transmittal No. 2664 on November 7, 1990, and Transmittal No. 2665 on November 9, 1990. AT&T filed a reply to the petitions against Transmittal No. 2655 on November 16, 1990, Transmittal No. 2664 on November 19, 1990, and Transmittal No. 2665 on November 21, 1990.

3. Sprint contends that Options 74 through 76 raise the same issues as the options remanded by the U.S. Court of Appeals in the *Tariff 12 Remand Order* [1] and thus must be reviewed in light of the remand. Sprint Option 74 Petition at 3-4; Sprint Options 75 and 76 Petition at 3-4. Sprint argues that AT&T has failed to demonstrate that Options 74 through 76 are integrated service packages that are "unlike" their component services and thus has failed to justify the discrimination between these options and AT&T's other services. Sprint Option 74 Petition at 4-6; Sprint Options 75 and 76 Petition at 4-6. Further, Sprint contends that even if Options 74 through 76 could qualify as integrated service packages, their rates vary without justification from other options under Tariff 12 and are thus discriminatory. Sprint Option 74 Petition at 6-7; Sprint Options 75 and 76 Petition at 7-8. Sprint also argues that Options 74 through 76 impermissibly bundle 800 Service with SDN Service for the application of the Domestic Usage Volume Pricing Plan in violation of Section 201(b) of the Communications Act. Sprint Option 74 Petition at 8-9; Sprint Options 75 and 76 Petition at 8-9. Sprint also alleges that AT&T provides no justification in its cost support that the rates, terms, and conditions for Options 74 through 76 are reasonable, or that they are not unreasonably discriminatory. Sprint Option 74 Petition at 9; Sprint Options 75 and 76 Petition at 9.

4. MCI also maintains that Options 74 and 76 raise the same issues as the options remanded in the *Tariff 12 Remand Order* and must be reviewed in light of that Order. MCI Option 74 Petition at 2; MCI Option 76 Petition at 2. MCI contends that Options 74 and 76 are comprised of constituent offerings that are available under standard AT&T tariffs and under other Tariff 12 service arrangements, and that AT&T has not provided adequate cost support as required by Section 61.38 of the Commission's Rules, 47 C.F.R. § 61.38, to justify price differences between or among these services. Thus, MCI argues, there are no bases to compare the charges actually assessed under these offerings or to ascertain whether a neutral, rational basis underlies these pricing differences. MCI Option 74 Petition at 2-4 & 4 n.5; MCI Option 76 Petition at 2-4 & 4 n.4. MCI also claims that Tariff 12 unlawfully bundles AT&T's 800 Service with AT&T services that are subject to greater competition. MCI Option 74 Petition at 3 n.4; MCI Option 76 Petition at 3-4.

5. Williams contends that Options 74 through 76 are unreasonably discriminatory because, except for their lower prices, they are like the component services in other AT&T tariffs. Williams alleges that AT&T has provided no justification for the rate disparities between these options and AT&T's standard tariffs. Williams Option 74 Petition at 2-9; Williams Option 75 Petition at 2-10; Williams Option 76 Petition at 2-9. Williams also contends that the rates for Options 74 through 76 are unlawfully discriminatory when compared to other Tariff 12 options. Williams Option 74 Petition at 9-12; Williams Option 75 Petition at 10-13; Williams Option 76 Petition at 10-13. In addition, Williams argues that Tariff 12 options are not generally available because it is unrealistic to expect another customer to have the same network needs as the original option customer. Williams Option 74 Petition at 12-14; Williams Option 75 Petition at 13-15; Williams Option 76 Petition at 13-14. Williams also alleges that AT&T's cost support is inadequate. Williams Option 74 Petition at 14; Williams Option 75 Petition at 15-16; Williams Option 76 Petition at 15-16. Williams further

claims that Tariff 12 packages violate the Commission's resale policy because their customized nature prevents them from being used by resellers. Williams Option 74 Petition at 15; Williams Option 75 Petition at 17; Williams Option 76 Petition at 17. Williams also contends that the bundling of AT&T's 800 Service with other Tariff 12 services in Options 75 through 76 precludes competition, thereby enabling AT&T to capture the bulk of large customers' other interexchange needs. Williams Option 75 Petition at 19-20; Williams Option 76 Petition at 19-20.

6. In addition, Williams contends that the Commission should adopt, or require AT&T to adopt, safeguards to remedy any unlawful discrimination that will occur if Options 74 through 76 take effect. Williams Option 74 Petition at 18-20; Williams Option 75 Petition at 22-24; Williams Option 76 Petition at 22-24. Williams alleges that even the Tariff 12 customers could benefit from such a procedure because if Tariff 12 is found to be a system of unlawful preferences, the Tariff 12 customers could be liable to the Federal Government for treble the value of the preference under Section 503(a) of the Communications Act, 47 U.S.C. § 503(a). Williams Option 75 Petition at 24-25; Williams Option 76 Petition at 24-26. Williams also contends that the Tariff 12 customers would also be liable to AT&T for the difference between the general tariff rates and the Tariff 12 rates. Williams Option 76 Petition at 24 n.28.

7. AT&T replies that the *Tariff 12 Remand Order* creates no basis to reject or suspend VTNS offerings. AT&T argues that the decision did not call into question the lawfulness of Tariff 12, but rather remanded on the technical ground that the Commission had not "turn[ed] square corners of administrative law" in terminating the investigation of the initial options. AT&T Option 74 Reply at 3-6; AT&T Option 75 Reply at 3-6; AT&T Option 76 Reply at 3-6. AT&T asserts that the rates in Options 74 through 76 are not unjustly discriminatory because the Communications Act prohibits discrimination only between "like" services, and the Commission has held that Tariff 12 integrated service packages are not "like" the component services offered in separate tariffs. AT&T further claims that since Tariff 12 options are not "like" a combination of separately tariffed services, the options are not a "bundling" of separate services and thus the Commission decisions on which petitioners rely are inapposite. AT&T Option 74 Reply at 6-9; AT&T Option 75 Reply at 6-10; AT&T Option 76 Reply at 6-10. In addition, AT&T contends that there is no unreasonable discrimination between the rates in Options 74 through 76 and rates in other VTNS options. AT&T asserts that Tariff 12 options are generally available and claims that a number of options have multiple, unaffiliated customers. AT&T also argues that the general availability requirement assures compliance with the Commission's resale and sharing rules. AT&T Option 74 Reply at 10 & n.*; AT&T Option 75 Reply at 10-11 and 11 n.*; AT&T Option 76 Reply at 10-11 and 11 n.*. AT&T also contends that its cost support fully satisfies Section 61.38 of the Commission's Rules. AT&T Option 74 Reply at 16-17; AT&T Option 75 Reply at 15-17; AT&T Option 76 Reply at 16-18.

8. In addition, AT&T contends that existing Tariff 12 customers are not liable for damages under Section 503(a) of the Communications Act. AT&T asserts that the provision is facially inapplicable because it deals with a "rebate" of tariffed charges and every Tariff 12 customer pays charges precisely as specified in the tariff. AT&T Option 75 Reply at 17 n.*; AT&T Option 76 Reply at 18 n.*. AT&T contends that the cases cited by Williams all involve payments *not* specified in any tariff and they make clear that a customer's payment of an effective tariffed rate can never constitute the acceptance of a rebate. AT&T asserts that the cases state that an honest and reasonable belief that an offset is authorized by the tariff is a defense to a treble forfeiture even if the offset is later found not to be authorized by the applicable tariff. AT&T Option 76 Reply at 18 n.*.

9. The Common Carrier Bureau has reviewed AT&T Transmittal Nos. 2655, 2664, 2665, and 2749, the petitions filed by Sprint, MCI, and Williams, and related pleadings. We conclude that no compelling argument has been presented that these tariffs are so patently unlawful as to warrant rejection.

10. On October 23, 1990, the U.S. Court of Appeals for the District of Columbia Circuit reversed and remanded the Commission's Order in CC Docket No. 87-568. AT&T Communications, Revisions to Tariff F.C.C. No. 12, Memorandum Opinion and Order, 4 FCC Rcd 4932, *recon. denied*, 4 FCC Rcd 7928 (1989). *See MCI Telecommunications Corp. v. FCC*, No. 89-1382, slip op. (D.C. Cir. Oct. 23, 1990). Although these transmittals do not present new questions that warrant investigation at this time, they could be affected by the Commission decision in the CC Docket No. 87-568 remand proceedings. Accordingly, Transmittal Nos. 2655, 2664, 2665, and 2749 take effect subject to the outcome of the remand proceedings in CC Docket No. 87-568.

11. Accordingly, IT IS ORDERED that the petitions to reject, or to suspend and investigate, American Telephone and Telegraph Company Tariff F.C.C. No. 12, Transmittal Nos. 2655, 2664, and 2665 filed by US Sprint Communications Company Limited Partnership, MCI Telecommunications Corporation, and Williams Telecommunications Group, Inc., ARE DENIED.

12. IT IS FURTHER ORDERED that Transmittal Nos. 2655, 2664, 2665, and 2749 take effect subject to the outcome of remand proceedings in AT&T Communications, Revisions to Tariff F.C.C. No. 12, CC Docket No. 87-568.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Firestone
Chief, Common Carrier Bureau

FOOTNOTE

[1] *See MCI Telecommunications Corp. v. FCC*, No. 89-1382, slip op. (D.C. Cir. Oct. 23, 1990) (*Tariff 12 Remand Order*).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

American Telephone and Telegraph Company — Transmittal Nos. 2691 and 2695

Revisions to Tariff F.C.C. No. 12

ORDER

Adopted: January 14, 1991; Released: January 15, 1991

By the Chief, Common Carrier Bureau:

1. American Telephone and Telegraph Company (AT&T) has filed Transmittal Nos. 2691 and 2695 to modify Virtual Telecommunications Network Service (VTNS) Options 14 and 12, respectively, by which AT&T provides voice and data communications service among locations in the United States, Puerto Rico, the U.S. Virgin Islands, and specific international locations. Transmittal Nos. 2691 and 2695 are scheduled to become effective January 16, 1991.

2. The tariff revisions to Option 14 add the ability to add or delete network components for data transmission capabilities (DTCs); separate the DTCs included in the basic charge by access and network components; reduce the basic charge from $613,000 per month to $558,815 per month; reduce the minimum annual charge from $31,750,000 to $30,664,000; revise rate schedules A through D to reflect reduced rates; adjust change charge rates; add change charge rates for the additional service elements; add the additional service elements to the domestic DTC volume pricing plan; and eliminate certain option-specific regulations. The modified rates are designed to encourage customer use above the levels required to meet the minimum commitments. *See* AT&T Transmittal No. 2691 Description and Justification (D&J) at 2-9.

3. The tariff revisions to Option 12 add the ability to place international calls, to add DTCs at various additional speeds, and to add measured ports; modify the basic charge by introducing a one-month promotional reduction of $68,690 for the first full month of service within six months of the effective date of these tariffs revisions and by changing the service elements included in the basic charge; increase the minimum annual charge from $10,000,000 to $11,250,000; introduce an international usage volume pricing plan; introduce an international DTC, voice transmission capability (VTC), and satellite transmission capability (STC) volume pricing plan; waive installation charges under certain conditions; and eliminate option-specific regulations for network prompter service. According to AT&T, the modified rates and regulations are designed to be responsive to the needs of customers and to encourage customer use above the levels required to meet the minimum commitments. *See* AT&T Transmittal No. 2695 D&J at 2-9.

4. Williams Telecommunications Group, Inc. (Williams) filed a petition to reject or suspend and investigate the modifications to Option 14 on November 19, 1990, and the modifications to Option 12 on November 20, 1990. AT&T filed a reply to the petition against the Option 14 modifications on November 30, 1990, and to the petition against the Option 12 modifications on December 3, 1990.

5. Williams contends that the *Tariff 12 Remand* [1] completely undermines the rationale for allowing AT&T to file new or modified Tariff 12 options without meaningful Commission review. Williams Option 14 Petition at 2; Williams Option 12 Petition at 2-3. Williams claims that modified Options 14 and 12 are unreasonably discriminatory because, except for their lower prices, they are like the component services in other AT&T tariffs. Williams alleges that AT&T has provided no justification for the rate disparities between these options and AT&T's standard tariffs. Williams Option 14 Petition at 2-13; Williams Option 12 Petition at 5-14. Williams further argues that the rate modifications in Options 14 and 12 cannot be justified even partially by competitive necessity, as AT&T implies, because competitors are effectively precluded from competing for the services in these options. In support, Williams cites AT&T's statement that the modifications are expected to have no impact on AT&T's other services because, absent this filing, all current customer demand for the service functionalities provided by Options 14 and 12 would continue to be met under VTNS. Williams Option 14 Petition at 13; Williams Option 12 Petition at 14.

6. In addition, Williams contends that the rates for modified Options 14 and 12 are unlawfully discriminatory when compared to other Tariff 12 options. Williams Option 14 Petition at 13-17; Williams Option 12 Petition at 15-17. Williams argues that Tariff 12 options are not generally available because it is unrealistic to expect another customer to have the same network needs as the original option customer. Williams Option 14 Petition at 17-19; Williams Option 12 Petition at 18-20. Williams also alleges that AT&T's cost support is inadequate. Williams Option 14 Petition at 19-21; Williams Option 12 Petition at 20-21. Additionally, Williams claims that Tariff 12 packages violate the Commission's resale policy because their customized nature prevents them from being used by resellers. Williams Option 14 Petition at 21-22; Williams Option 12 Petition at 21.

7. Williams further contends that the Commission should adopt, or require AT&T to adopt, safeguards to remedy any unlawful discrimination that will occur if modified Options 14 and 12 take effect. Williams Option 14 Petition at 25-28; Williams Option 12 Petition at 24-26. Williams alleges that even the Tariff 12 customers could benefit from such a procedure because if Tariff 12 is found to be a system of unlawful preferences, the Tariff 12 customers could be liable to the federal government for treble the value of the preference under Section 503(a) of the Communications Act, 47 U.S.C. § 503(a). Williams Option 14 Petition at 28-29; Williams Option 12 Petition at 3-4, 27-28. Additionally, Williams alleges that AT&T's proposal to forgive cancellation charges which the Option 12 customers would otherwise be required to pay under existing tariffs constitutes a rebate in violation of Section 503(a) of the Communications Act. Williams charges that this also violates Section 202(a) of the Com-

munications Act because it bestows an unreasonable preference on selected customers. Williams Option 12 Petition at 3-5.

8. AT&T replies that the *Tariff 12 Remand* creates no basis to reject or suspend VTNS offerings. AT&T Option 14 Reply at 2-5; AT&T Option 12 Reply at 2-5. In addition, AT&T contends that there is no unreasonable discrimination between the rates in Options 14 and 12 and rates in other VTNS options. AT&T Option 14 Reply at 5-7; AT&T Option 12 Reply at 5-6. Additionally, AT&T contends that its cost support fully satisfies Section 61.38 of the Commission's Rules. AT&T Option 14 Reply at 7-8; AT&T Option 12 Reply at 7.

9. AT&T also contends that existing Tariff 12 customers are not liable for damages under Section 503(a) of the Communications Act for obtaining service under Tariff 12. AT&T Option 14 Reply at 9-10 & 9 n.*; AT&T Option 12 Reply at 8-9 & 9 n.*. AT&T further asserts that existing AT&T customers who switch to Tariff 12 are not liable for damages under Section 503(a) as a result of AT&T's waiver of termination charges because its tariffs expressly and lawfully waive termination charges if a customer orders another AT&T service with equal or greater revenue commitment and term length. Finally, AT&T argues that the waiver of such termination charges does not constitute unreasonable discrimination under Section 202(a) of the Communications Act because all similarly situated customers may avail themselves of these tariffed waiver provisions. AT&T Option 12 Reply at 8 n.*.

10. The Common Carrier Bureau has reviewed AT&T Transmittal Nos. 2691 and 2695, the petitions filed by Williams, and related pleadings. We conclude that no compelling argument has been presented that these tariffs are so patently unlawful as to warrant rejection.

11. On October 23, 1990, the U.S. Court of Appeals for the District of Columbia Circuit reversed and remanded the Commission's Order in CC Docket No. 87-568, AT&T Communications, Revisions to Tariff F.C.C. No. 12, Memorandum Opinion and Order, 4 FCC Rcd 4932, *recon. denied*, 4 FCC Rcd 7928 (1989). *See MCI Telecommunications Corp. v. FCC*, No. 89-1382, slip op. (D.C. Cir. Oct. 23, 1990). Although these transmittals do not present new questions that warrant investigation at this time, they could be affected by the Commission decision in the CC Docket No. 87-568 remand proceedings. Accordingly, Transmittal Nos. 2691 and 2695 take effect subject to the outcome of the remand proceedings in CC Docket No. 87-568.

12. Accordingly, IT IS ORDERED that the petitions to reject, or to suspend and investigate, American Telephone and Telegraph Company Tariff F.C.C. No. 12, Transmittal Nos. 2691 and 2695, filed by Williams Telecommunications Group, Inc., ARE DENIED.

13. IT IS FURTHER ORDERED that Transmittal Nos. 2691 and 2695 take effect subject to the outcome of remand proceedings in AT&T Communications, Revisions to Tariff F.C.C. No. 12, CC Docket No. 87-568.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Firestone
Chief, Common Carrier Bureau

FOOTNOTE

[1] *See MCI Telecommunications Corp. v. FCC*, No. 89-1382, slip op. (D.C. Cir., Oct. 23, 1990) (*Tariff 12 Remand*).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

COMMUNICATIONS SATELLITE CORPORATION	File No. I-T-C-89-119
Application for authority to implement a dual satellite system to provide channels of communication via the INMARSAT system.	
Application for authority to construct and operate a 1.8-meter L-band earth station at its Southbury, Connecticut communication-satellite coast earth station complex.	File No. CSG-89-104-P/L
Application for authority to construct and operate a 1.2-meter L-Band earth station at its Santa Paula, California communication satellite coast earth station complex.	File No. CSG-89-068-P/L CSG-89-068-P/L(A)

ORDER AND AUTHORIZATION

Adopted: December 31, 1990; Released: January 22, 1991

By the Chief, International Facilities Division:

1. The captioned applications, filed on April 6 and June 19, 1989, and supplemented on June 19 and July 19, 1989, by the Communications Satellite Corporation (Comsat), request authority pursuant to Sections 503 and 504(c) of the International Maritime Satellite Telecommunications Act, and Section 214 and Title III of the Communications Act of 1934, as amended, to implement a dual satellite system for the provision of International Maritime Satellite Organization (INMARSAT) services in the Atlantic Ocean Region (AOR) and Pacific Ocean Region (POR); construct and operate a 1.8-meter L-band antenna and associated equipment at its Southbury, Connecticut (WA-28) communication-satellite coast earth station complex; and to construct and operate a 1.2-meter L-band antenna and associated equipment at its Santa Paula, California (KA-31) communication-satellite coast earth station complex for use with the INMARSAT dual satellite system. The applications were placed on public notice on April 19, June 28, and June 30, 1989. No comments were received.

2. The proposed international earth station facilities at Southbury, Connecticut will consist of a 1.8-meter (Andersen Manufacturing, Inc.) antenna which will operate in the 1635.5-1645.0 MHz transmitting frequency band and in the 1535.0-1543.5 MHz receiving frequency band and will be used for testing and communications services through the INMARSAT AOR satellites located between 14^0 and 60^0 West Longitude and the various INMARSAT coast earth stations in the AOR, as well as with the co-located Southbury, Connecticut communication-satellite coast earth station complex. The proposed earth station conforms with INMARSAT Standard A technical parameters. The maximum effective isotropic radiated power density shall not exceed 36.2 dBW/4kHz and emissions shall be limited to 24K0F3E and 4K80G2D for transmit and 2K40G1D and 24K0F3E for receive.

3. Comsat also proposes to construct and operate a 1.2-meter L-band antenna and associated equipment at its Santa Paula, California communication-satellite coast earth station complex. Comsat states that it has transferred its INMARSAT Standard A ship earth station (Scientific Atlanta Model 3052) from Washington, D.C. to its Santa Paula, California coast earth station complex. Comsat proposes to operate the 1.2-meter antenna in the 1635.5-1645.0 MHz transmitting frequency band and in the 1535.0-1543.5 MHz receiving frequency band with the INMARSAT POR satellites located between 172^0 and 184^0 West Longitude and the various INMARSAT coast earth stations in the POR, as well as with the co-located Santa Paula complex (KA-31) communications facilities. The proposed earth station conforms with INMARSAT Standard A technical parameters. The maximum effective isotropic radiated power density shall not exceed 36.2 dBW/4kHz and emissions shall be limited to 24K0F3E and 4K80G2D for transmit and 2K40G1D and 24K0F3E for receive.

4. The above facilities will be used to implement the dual satellite system which INMARSAT is proposing for provision of maritime mobile-satellite services in both the AOR and POR. Comsat states that present traffic growth indicates that the AOR satellite, MARECS-B2 located at 26^0 West Longitude, will reach saturation by July 1989; and that the POR satellite, the Maritime Communications Package of the INTELSAT V (MCS-D) located at 180^0 West Longitude, should also reach saturation during the third quarter of 1989. The earliest possible launch date for second generation satellites would be mid-1990 for the AOR and late 1990 for the POR. INMARSAT was leasing the MCS-B satellite at 18.5^0 West Longitude from INTELSAT as an AOR in-orbit spare, and was using the MARECS-A satellite at 178^0 East Longitude as a spare in the POR. Comsat now proposes to use all four satellites to alleviate possible saturation.

5. Comsat plans to use two satellites in each ocean region as a network, and to space them as close together as possible so that ship earth stations do not have to discriminate between the two satellites. Comsat states that capacity will be increased by approximately 25% in the AOR and 75% in the POR. According to Comsat, these plans necessitate installation of additional L-band facilities at the Southbury, Connecticut and Santa Paula, California communication-satellite coast earth station complexes. Comsat states that this arrangement will allow INMARSAT extra time to get its second generation sat-

llites up and working. Comsat's legal, technical and fi- ancial qualifications to operate the proposed earth ations are established.

6. Upon consideration of the applications, we find that uthorization of the requested facilities and services is equired by the public convenience and necessity.

7. Accordingly, IT IS ORDERED that applications File os. I-T-C-89-119, CSG-89-104-P/L, and CSG- 9-068-P/L(A), as amended, ARE GRANTED, and omsat is authorized to:

> a. implement an INMARSAT dual satellite system in the AOR and POR utilizing the MCS-B and MARECS-B2 satellites in the AOR and the MCS-D and MARECS-A satellites in the POR;
>
> b. construct and operate a 1.8-meter L-band antenna and associated equipment at its Southbury, Connecticut communication-satellite coast earth station complex;
>
> c. construct and operate a 1.2 meter L-band antenna and associated equipment at its Santa Paula, California communication-satellite coast earth station complex; and
>
> d. use these facilities to provide international maritime mobile satellite services, provided, however, that Comsat shall file with the Commission a report of equipment which was actually installed upon completion of construction.

8. The Commission retains jurisdiction over this matter o reallocate circuits in the satellite system among the arious international common carriers and other autho- ized users as required to ensure nondiscriminatory use f, and equitable access to, the communications satellite ystem.

9. This order is issued under Section 0.291 of the ommission's Rules and is effective upon release. Peti- ions for reconsideration under Section 1.106 or applica- ions for review under Section 1.115 of the Commission's ules may be filed within 30 days of the date of public otice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Application of

BLACK TELEVISION
WORKSHOP OF
LOS ANGELES, INC.
(Assignor)

and

HISPANIC CHRISTIAN
COMMUNICATIONS
NETWORK
(Assignee)

For Assignment of Construction
Permit for Noncommercial
Educational Station KEEF-TV,
Los Angeles, California

In re Application of

HISPANIC CHRISTIAN
COMMUNICATIONS NETWORK

For Interim Operating Authority of
Noncommercial Educational
Station KEEF-TV,
Los Angeles, California

MEMORANDUM OPINION AND ORDER

Adopted: December 31, 1990; Released: January 22, 1991

By the Commission:

1. The Commission has before it for consideration: (a) a *Memorandum Opinion and Order*, 5 FCC Rcd 2901 (1990) (" *MO&O*"), upholding a Mass Media Bureau decision dismissing an application for the assignment of the construction permit of Noncommercial Educational Station KEEF-TV, Los Angeles, California, from Black Television Workshop of Los Angeles, Inc. ("BTW") to Hispanic Christian Communications Network ("HCCN"); (b) a Petition for Reconsideration of the *MO&O*, jointly filed by BTW and HCCN ("Petitioners") on June 5, 1990; (c) a Supplement to Petition for Reconsideration, jointly filed by BTW and HCCN on July 6, 1990; (d) an Opposition to the Supplement to Petition for Reconsideration, filed by Mary Woodfork ("Woodfork"), on August 9, 1990; (e) a Reply to Opposition, filed by BTW on August 20, 1990; (f) a Reply to Opposition, filed by HCCN on August 23, 1990; and (g) a Request for Interim Operating Authority, filed by HCCN on May 24, 1990.

BACKGROUND

2. In 1988, a proceeding (MM Docket No. 88-420) was commenced to determine whether the construction permit for KEEF-TV should be revoked. *Order to Show Cause, Hearing Designation Order, and Notice of Apparent Liability*, 3 FCC Rcd 5443 (1988) (" *HDO* "). The *HDO* specified issues to determine, *inter alia*, whether control of the permittee had been transferred without Commission approval, in violation of Section 310(d) of the Communications Act of 1934, as amended. The order to show cause arose out of a dispute over control of KEEF-TV between Woodfork, an original member of BTW's board of directors, and Booker T. Wade Jr. ("Wade"), the current president of BTW.

3. The hearing was scheduled to commence in Los Angeles on March 27, 1989. However, the proceeding was stayed, pursuant to the then-prevailing language of Section 1.245(b)(4) of the Commission's Rules, pending our consideration of BTW's request to disqualify the Presiding Judge. Thus, the hearing has not yet commenced.

4. After the stay was imposed, BTW sought to assign the KEEF-TV construction permit to HCCN, pursuant to the Commission's *Minority Distress Sale Policy*.[1] However, in the above referenced *MO&O*, we upheld the Mass Media Bureau's denial of the proposed assignment because the *Minority Distress Sale Policy* had been declared unconstitutional by the United States Court of Appeals for the District of Columbia Circuit in the case of *Shurberg Broadcasting of Hartford, Inc. v. FCC*, 876 F.2d 902 (D.C. Cir. 1989). We determined that, based on the Court of Appeals decision, this agency was barred by law from granting the assignment application. 5 FCC Rcd at 2901.

5. In their Petition for Reconsideration of the *MO&O*, BTW and HCCN requested that the Commission withhold action on the proposed distress sale until the United States Supreme Court had the opportunity to review the lower court's decision in *Shurberg*. While the Petition for Reconsideration was pending, the Supreme Court reversed the lower court, thereby reinstating the Commission's *Minority Distress Sale Policy*.[2] In light of this development, Petitioners have filed the referenced Supplement to Petition for Reconsideration, wherein they renew their request for favorable action on the subject assignment application.

6. Woodfork maintains that the proposed sale of KEEF-TV should not be approved until the Commission determines through a hearing who has the lawful authority to act on behalf of BTW. BTW contends that a hearing is unnecessary because, with the exception of Woodfork, all of the original members of BTW's board of directors have signed a resolution supporting the proposed sale of KEEF-TV. Thus, BTW maintains that Woodfork is simply outvoted. BTW also denies Woodfork's allegation that it coerced the other board members into acquiescing to the proposed sale.

7. After the stay of the revocation proceeding was imposed, HCCN also requested authority to operate KEEF-TV on an interim basis. In its May 24, 1989, request, HCCN acknowledged that interim operating authority ordinarily is permitted only in situations, unlike that here, in which a station's license has already been revoked. Nevertheless, HCCN argued that there is "no regulatory or statutory prohibition" to its request. HCCN also asserted that because it is not a party to the revocation proceeding, it will not benefit in any way if it receives authority to operate KEEF-TV on an interim basis.

DISCUSSION

8. Based on the facts presented, we will deny Woodfork's opposition to the proposed distress sale of KEEF-TV. Woodfork stands as the only original member of BTW's board of directors who opposes the distress sale. All of the other original members have signed a resolution supporting the transaction. Because we find that there is no evidence to support Woodfork's claim that the board members who signed the resolution were coerced into doing so, we believe that the resolution constitutes a *bona fide* expression of the permittee's intent, which is to assign the construction permit for KEEF-TV to HCCN, pursuant to the Commission's *Minority Distress Sale Policy*.

9. Moreover, there exist significant and compelling public interest reasons for considering the merits of the instant distress sale application. Not only would the distress sale, if ultimately approved by the staff, further the Commission's goal of increasing minority participation in the broadcast medium, it would expedite the inauguration of a new, noncommercial, educational UHF television service in Los Angeles, one of the nation's most densely populated areas.

10. A distress sale, by its very nature, avoids the need for a hearing. Accordingly, we need not reach a decision on the issue of whether an unauthorized transfer of control was effected.

11. Although our action herein directs the Chief, Mass Media Bureau, to consider the above-captioned distress sale application, we note that there exist two impediments to an immediate grant. The first impediment relates to the sales price. We note that under our distress sale policy, a licensee of a constructed and operating station is entitled to receive up to 75% of the fair market value of the station. While BTW proposes such a price, the facts here do not fall squarely within the contours of the traditional distress sale case. Pursuant to Section 73.3597(c)(2) of the Commission's Rules, the Commission will not consent to the assignment or transfer of control of a construction permit of an unbuilt station (i.e., a station that has not commenced program tests) if the agreements or understandings between the parties provide for, or permit, payment to the seller of a sum "in excess of the aggregate amount clearly shown to have been expended by the seller, solely for preparing, filing, and advocating the grant of the construction permit for the station, and for other steps reasonably necessary toward placing the station in operation." Although BTW constructed and briefly conducted program tests, it did not construct in compliance with the facilities authorized in its construction permit, and, therefore, it had no authority to conduct such tests. *See Letter from Roderick K. Porter, Deputy Chief, Mass Media Bureau*, dated August 11, 1987, Ref. 8940-MLB.

12. In light of BTW's failure to construct in accordance with its permit, a serious question thus arises whether KEEF-TV must be treated as an unbuilt station for purposes of Section 73.3597 and, therefore, whether BTW should be limited to payments that do not exceed its reasonable and prudent expenses. If KEEF-TV is treated as an unbuilt station, then, consistent with our distress sale policy, the price of the distress sale arguably should be limited to 75% of reasonable and prudent expenses. In these unusual circumstances, however, we think it unnecessary to limit the sales price so severely. The deterrence objective underlying the distress sale policy can be adequately achieved in this case by adhering to a strict interpretation of Section 73.3597(c)(2) and treating KEEF-TV as an unbuilt station. Therefore, taking into account all the circumstances in this case of first impression, we believe the result most consistent with the goals of our distress sale policy would be to limit BTW to recovery of its reasonable and prudent expenses. Accordingly, the instant application cannot be granted at this time.

13. The second impediment to the immediate grant of the distress sale application is that the construction permit for KEEF-TV contemplates operation on Channel 68, a channel reserved for a noncommercial educational facility. However, HCCN has failed to indicate adequately that it will operate KEEF-TV on a noncommercial educational basis. Although HCCN, on July 20, 1989, amended Section II of the assignment application to provide additional information about its governing board, it failed to provide a proposed weekly schedule of programs which would clearly demonstrate its educational intent and purpose. Therefore, we are unable to determine whether HCCN is qualified to operate on this reserved channel. *Way of the Cross of Utah, Inc.*, 58 RR 2d 455 (1984).

14. Finally, given our decision directing the Bureau to consider the instant application, which contemplates an assignment of construction permit to HCCN, it is unnecessary to render a decision on HCCN's request to operate KEEF-TV on an interim basis. According, HCCN's request for interim operating authority will be dismissed as moot.

15. ACCORDINGLY, IT IS ORDERED, that the Petition for Reconsideration, filed June 5, 1990, and the Supplement thereto, filed July 6, 1990, jointly by BTW and HCCN, ARE HEREBY GRANTED.

16. IT IS FURTHER ORDERED, that the Chief, Mass Media Bureau, is HEREBY DIRECTED TO CONSIDER THE ABOVE CAPTIONED DISTRESS SALE APPLICATION in a manner consistent with our concerns expressed hereinabove.

17. IT IS FURTHER ORDERED, that the Request for Interim Operating Authority, filed May 24, 1989, by HCCN, IS HEREBY DISMISSED AS MOOT.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] *Statement of Policy on Minority Ownership of Broadcasting Facilities*, 68 FCC 2d 979 (1978).

[2] *Astroline Communications Company Limited Partnership v. Shurberg Broadcasting of Hartford, Inc.*, 110 S.Ct. 2997 (1990).

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 80-286

In the Matter of

Amendment of Part 67 (new Part 36)
of the Commission's Rules and
Establishment of a Federal-State
Joint Board

ORDER

Adopted: January 8, 1991; Released: January 22, 1991

By the Commission:

1. Pursuant to Section 410(c) of the Communications Act, 47 U.S.C. §410(c), we hereby appoint The Honorable Dennis J. Nagel, Chairperson of the Iowa Utilities Board, to the Federal-State Joint Board in CC Docket No. 80-286. On November 13, 1990, the National Association of Regulatory Utility Commissioners nominated Chairperson Nagel to fill a vacancy on this Joint Board. This vacancy was created by Colorado PUC Commissioner Ronald L. Lehr's October 31, 1990 resignation from the Joint Board. Henceforth a copy of all filings in these proceedings shall be served on Chairperson Nagel at the following address:

The Honorable Dennis J. Nagel
Chairperson
Iowa Utilities Board
Lucas State Office Building
Des Moines, Iowa 50319

2. Accordingly, IT IS ORDERED, pursuant to Section 410(c) of the Communications Act of 1934, 47 U.S.C. §410(c), that Dennis J. Nagel will serve as a member of the Federal-State Joint Board in CC Docket No. 80-286.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-454

In the Matter of

Amendment of Section 73.202(b), RM-7436
Table of Allotments,
FM Broadcast Stations.
(Clearwater, Kansas)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: January 10, 1991; Released: January 23, 1991

By the Acting Chief, Allocations Branch:

1. The Commission has before it for consideration the *Notice of Proposed Rule Making*, 5 FCC Rcd 6197 (1990), issued in response to a petition filed by Central K Communications ("petitioner"). The *Notice* proposed the allotment of FM Channel 254A to Clearwater, Kansas, as that community's first FM broadcast service. Petitioner filed comments in support of the *Notice* and stated its intention to apply for the channel. No other comments were received.

2. We believe the public interest would be served by the allotment of Channel 254A to Clearwater, Kansas, since it could provide the community with its first FM broadcast service. Channel 254A can be allotted to Clearwater, Kansas, in compliance with the minimum distance separation requirements of the Commission's Rules, provided there is a site restriction 7.3 kilometers (4.5 miles) southwest of the community.[1] The site restriction will prevent a short spacing to Station KBUZ, Channel 256C1, El Dorado, Kansas.[2]

3. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **March 11, 1991,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, to read as follows:

City	Channel No.
Clearwater, Kansas	254A

4. The window period for filing applications for Channel 254A at Clearwater will open on **March 12, 1991,** and close on **April 11, 1991.**

5. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

6. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Andrew J. Rhodes
Acting Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

FOOTNOTES

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[1] The coordinates for Channel 254A are 37-27-21 and 97-33-48.

[2] Station KBUZ was upgraded from Channel 256C2 to Channel 256C1 in MM Docket 89-476, effective June 30, 1990. *See* 5 FCC Rcd 3517 (1990).

**Before the
Federal Communications Commission
Washington, D.C. 20554**

MM Docket No. 89-496

In the Matter of

Amendment of Section 73.202(b), Table of Allotments, FM Broadcast Stations. (Georgetown and Myrtle Beach, South Carolina)	RM-6971

REPORT AND ORDER
(Proceeding Terminated)

Adopted: January 10, 1991; Released: January 23, 1991

By the Acting Chief, Allocations Branch:

1. At the request of Coastline Communications of Carolina, Inc. ("petitioner"), licensee of Station WBPR, Channel 249C2, Georgetown, South Carolina, the Commission has before it the *Notice of Proposed Rule Making*, 4 FCC Rcd 8117 (1989), proposing the reallotment of Channel 249C2 to Myrtle Beach, South Carolina, and the modification of Station WBPR's license to specify Myrtle Beach as its community of license. Comments were filed by petitioner and Pinnacle Southeast, Inc., licensee of Station WYAV, Channel 281C1, Conway, South Carolina. Petitioner subsequently filed a request for withdrawal of its petition.[1] We will grant petitioner's request.

2. Accordingly, IT IS ORDERED, That the petition for rule making (RM-6971) of Coastline Communications of Carolina, Inc., to reallot Channel 249C2 from Georgetown to Myrtle Beach, and to modify its license for Station WBPR accordingly, IS DISMISSED.

3. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

4. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Andrew J. Rhodes
Acting Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

FOOTNOTE

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[1] In accordance with Section 1.420(j) of the Commission's Rules, petitioner submitted a statement that it has not received or been promised any consideration for the withdrawal of the petition for rule making.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-461

In the Matter of

Amendment of Section 73.202(b), RM-7376
Table of Allotments,
FM Broadcast Stations.
(Gardnerville-Minden, Nevada)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: January 10, 1991; Released: January 23, 1991

By the Acting Chief, Allocations Branch:

1. At the request of Carson Valley Radio, Inc. ("petitioner"), the Commission has before it the *Notice of Proposed Rule Making*, 5 FCC Rcd 6246 (1990), proposing the substitution of Channel 256C3 for Channel 257A at Gardnerville-Minden, Nevada, and the modification of the license for Station KGVM to specify operation on the higher powered channel. Petitioner filed comments reiterating its intention to apply for the channel, if allotted. No other comments were received.

2. We believe the public interest would be served by substituting Channel 256C3 for Channel 257A at Gardnerville-Minden, Nevada, since it would provide the community with a wide coverage area FM service. Channel 256C3 can be allotted to Gardnerville-Minden in compliance with the Commission's minimum distance separation requirements without the imposition of a site restriction.[1] As proposed, we will also modify petitioner's license for Station KGVM to specify operation on Channel 256C3.

3. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **March 11, 1991,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the community listed below, to read as follows:

City	Channel No.
Gardnerville-Minden, Nevada	256C3

4. IT IS FURTHER ORDERED, pursuant to Section 316(a) of the Communications Act of 1934, as amended, that the license of Carson Valley Radio, Inc., for Station KGVM, Gardnerville-Minden, Nevada, IS MODIFIED to specify operation on Channel 256C3, in lieu of Channel 257A, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall submit to the Commission a minor change application for a construction permit (Form 301).

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620.

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

5. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

6. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Andrew J. Rhodes
Acting Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

FOOTNOTE

[1] The coordinates for Channel 256C3 at Gardnerville-Minden are North Latitude 38-56-24 and West Longitude 119-45-00.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-439

In the Matter of

Amendment of Section 73.202(b), Table of Allotments, FM Broadcast Stations. (Cave City, Kentucky)	RM-7324

REPORT AND ORDER
(Proceeding Terminated)

Adopted: January 14, 1991; Released: January 23, 1991

By the Acting Chief, Allocations Branch:

1. The Commission has before it for consideration the *Notice of Proposed Rule Making*, 5 FCC Rcd 5818 (1990), issued in response to a petition for rule making filed by Steven W. Newberry ("petitioner"), licensee of Station WHHT(FM), Channel 279A, Cave City, Kentucky, proposing the substitution of Channel 279C3 for Channel 279A at Cave City and modification of his license to specify the higher powered channel. Newberry Broadcasting, Inc.,[1] licensee of Station WHHT(FM), filed comments stating its intention to apply for Channel 279C3, if allotted. No other comments were received.

2. We believe the public interest would be served by the substitution of Channel 279C3 for Channel 279A at Cave City, since it could provide a wide coverage area FM service to the community. Channel 279C3 can be allotted to Cave City in compliance with the Commission's minimum distance separation requirements with a site restriction of 17.2 kilometers (10.7 miles) south[2] of the community in order to avoid a short-spacing to vacant Channel 280A at Drakesboro, Kentucky. We will modify the license of Station WHHT(FM) to specify operation on Channel 279C3 in accordance with Section 1.420(g) of the Commission's Rules.

3. Accordingly, pursuant to the authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **March 11, 1991,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, as follows:

Community	Channel No.
Cave City, Kentucky	279C3

4. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the license of Station WHHT(FM), Cave City, Kentucky, IS MODIFIED to specify operation on Channel 279C3 in lieu of Channel 279A, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall submit to the Commission a minor change application for a construction permit (Form 301), specifying the new facility;

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620; and

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

5. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

6. For further information concerning this proceeding, contact Nancy J. Walls, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Andrew J. Rhodes
Acting Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

FOOTNOTES

[1] Newberry Broadcasting, Inc., became licensee of Station WHHT(FM) on March 17, 1989.

[2] The coordinates for Channel 279C3 at Cave City are North Latitude 36-59-39 and West Longitude 86-01-48.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-473

In the Matter of

Amendment of Section 73.202(b), RM-7392
Table of Allotments,
FM Broadcast Stations.
(Edenton and Scotland Neck, North
Carolina)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: January 14, 1991; Released: January 23, 1991

By the Acting Chief, Allocations Branch:

1. At the request of Lawrence F. and Margaret A. Loesch ("petitioners"), the Commission has before it the *Notice of Proposed Rule Making*, 5 FCC Rcd 6293 (1990), proposing the substitution of Channel 273C2 for Channel 272A at Edenton, North Carolina, and the modification of their license for Station WZBO-FM to specify operation on the higher powered channel. In addition, the *Notice* proposed the substitution of Channel 238A for Channel 274A at Scotland Neck, North Carolina, and the modification of Station WWRT's construction permit to specify the alternate Class A channel. Comments were filed by the petitioners and WYAL Radio, Inc., licensee of Station WWRT.

2. Petitioners reiterate their intention to apply for Channel 273C2, if allotted to Edenton, and state their willingness to reimburse WYAL Radio, Inc., for the reasonable costs associated with the change in channel for Station WWRT. WYAL Radio, Inc., states its agreement to the modification of Station WWRT's construction permit to specify Channel 238A, noting that the channel can be used at the transmitter sites specified in both the station's construction permit and its pending application (BMPH-891002IP).

3. We believe the public interest would be served by substituting Channel 273C2 for Channel 272A at Edenton, North Carolina, and substituting Channel 238A for Channel 274A at Scotland Neck, North Carolina, since it could provide Edenton with an additional wide coverage area FM service. Channel 273C2 can be allotted to Edenton in compliance with the Commission's minimum distance separation requirements with a site restriction of 18.6 kilometers (11.6 miles) southeast to avoid a short-spacing to Station WHLQ, Channel 273A, Louisburg, North Carolina, and to accommodate petitioner's desired transmitter site. Channel 238A can be allotted to Scotland Neck and can be used at the site specified in Station WWRT's outstanding construction permit.[1]

4. In accordance with Section 1.420(g) of the Commission's Rules, we will also modify the license of Station WZBO-FM to specify operation on Channel 273C2. Additionally, the petitioners will be required to reimburse WYAL Radio, Inc., for the reasonable costs associated with the change in channel for Station WWRT. *See Circleville, Ohio*, 8 FCC 2d 159 (1967). As stated in the *Notice*, if the proposal of LBS Broadcasting, Inc., to substitute Channel 274C1 for Channel 274B at Appomattox, Virginia, by substituting Channel 238A for Channel 274A at Scotland Neck (RM-7299), is ultimately granted, LBS Broadcasting, Inc., will be required to share in the reimbursement costs for Station WWRT.

5. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **March 11, 1991,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the communities listed below, to read as follows:

City	Channel No.
Edenton, North Carolina	261C2, 273C2
Scotland Neck, North Carolina	238A

6. IT IS FURTHER ORDERED, pursuant to Section 316(a) of the Communications Act of 1934, as amended, that the license of Lawrence F. and Margaret A. Loesch, for Station WZBO-FM, Edenton, North Carolina, IS MODIFIED to specify operation on Channel 273C2, in lieu of Channel 272A, subject to the following conditions:

> (a) Within 90 days of the effective date of this *Order*, the licensee shall submit to the Commission a minor change application for a construction permit (Form 301).
>
> (b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620.
>
> (c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

7. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the construction permit of WYAL Radio, Inc., for Station WWRT, Scotland Neck, North Carolina, IS MODIFIED to specify operation on Channel 238A in lieu of Channel 274A, subject to the following conditions:

> (a) Nothing contained herein shall be construed as authorizing any change in Station WWRT's construction permit, BPH-870331MP, except the channel as specified above. Any other changes, except those so specified under Section 73.1620 of the Rules, require prior authorization pursuant to an application for construction permit (FCC Form 301).

(b) Program tests may be conducted in accordance with the provisions of Section 73.1620 of the Rules, PROVIDED the transmission facilities comply in all respects with construction permit BPH-870331MP, except for the channel as specified above and a license application (FCC Form 302) is filed within 10 days of commencement of program tests.

8. IT IS FURTHER ORDERED, That the Secretary shall send a copy of this *Report and Order* by Certified Mail, Return Receipt Requested, to the permittee, as follows: Station WWRT, WYAL Radio, Inc., P.O. Box 425, Scotland Neck, North Carolina 27874.

9. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

10. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Andrew J. Rhodes
Acting Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

FOOTNOTE

[1] The coordinates for Channel 273C2 at Edenton are North Latitude 35-55-52 and West Longitude 76-31-34. The coordinates for Channel 238A at Scotland Neck are 36-08-09 and 77-26-09.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-448

In the Matter of

Amendment of Section 73.202(b), Table of Allotments, FM Broadcast Stations. (Nome, Alaska)	RM-7427

REPORT AND ORDER
(Proceeding Terminated)

Adopted: January 14, 1991; Released: January 23, 1991

By the Acting Chief, Allocations Branch:

1. The Commission considers herein the *Notice of Proposed Rule Making*, 5 FCC Rcd 5997 (1990), issued in response to a petition filed on behalf of the Catholic Bishop of Northern Alaska ("petitioner") proposing the allotment of Channel 241A to Nome, Alaska, as that community's second local FM broadcast service. Petitioner filed supporting comments in response to the *Notice*. No other comments were received.

2. We believe the public interest would be served by allotting Channel 241A to Nome since it could provide an additional local FM broadcast service to the community. Channel 241A can be allotted to Nome consistent with the minimum distance separation requirements of Section 73.207(b) of the Commission's Rules, without the imposition of a site restriction.[1]

3. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **March 11, 1991,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED with respect to the community listed below, as follows:

City	Channel No.
Nome, Alaska	241A, 262A

4. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

5. The window period for filing applications on Channel 241A at Nome, Alaska, will open on **March 12, 1991,** and close on **April 11, 1991.**

6. For further information concerning the above, contact Nancy Joyner, Mass Media Bureau, (202) 634-6530. Questions related to the window application filing process should be addressed to the Audio Services Division, FM Branch, Mass Media Bureau, (202) 632-0394.

FEDERAL COMMUNICATIONS COMMISSION

Andrew J. Rhodes
Acting Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

FOOTNOTE

[1] Coordinates used for Channel 241A at Nome are 64-30-00 and 165-25-00.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-600

In re Applications of

MOODY BIBLE INSTITUTE (hereafter "Moody")	File No. BPED-880818ML
MICHAEL DAVID MAHAFFEY (hereafter "Mahaffey")	File No. BPH-880824MC
CYNTHIA W. WARE (hereafter "Ware")	File No. BPH-880824ML
HENRY KENNEY, JR. (hereafter "Kenney")	File No. BPH-880824MN
SPANS LIMITED PARTNERSHIP (hereafter "SPANS")	File No. BPH-880825MG
David Earl Hoxeng d/b/a ADX COMMUNICATIONS OF LEXINGTON (hereafter "ADX")	File No. BPH-880825MH
John Barrett Townsend II and Frances Pride Townsend d/b/a BETHANY-BARRETT BROADCASTING (hereafter "Bethany-Barrett")	File No. BPH-880825MK
21ST CENTURY COMMUNICATIONS LIMITED PARTNERSHIP (hereafter "21st")	File No. BPH-880825MR
STANLEY/ LEXINGTON, LTD. (hereafter "Stanley/Lexington")	File No. BPH-880825MX
SST, INC. (hereafter "SST")	File No. BPH-880825MY
LEXINGTON URBAN COMMUNICATIONS, LIMITED PARTNERSHIP (hereafter "Lexington")	File No. BPH-880825NB
SANTEE BROADCASTING, INC. (hereafter "Santee")	File No. BPH-880825NE
Helen V. Millar and Nancy S. Millar d/b/a MILLAR BROADCASTING COMPANY (hereafter "Millar")	File No. BPH-880825NI
SUZANNE E. VILLENEUVE (hereafter "Villeneuve")	File No. BPH-880825NN
SOJOURNER COMMUNICATIONS LIMITED PARTNERSHIP (hereafter "Sojourner")	File No. BPH-880825NT
OCEAN WAVES BROADCASTING (hereafter "OWB")	File No. BPH-880825OB
SUSAN L. CALLER (hereafter "Caller")	File No. BPH-880825OD
Robert A. Manning and Gary L. Cox, A Partnership d/b/a ATLANTIC RADIO PARTNERS (hereafter "Atlantic")	File No. BPH-880825OH
PATRICK D. MCCONNELL (hereafter "McConnell")	File No. BPH-880825OJ
NIK-O-LIN, INC. (hereafter "NIK-O-LIN")	File No. BPH-880825OL
JACK L. GIVENS (hereafter "Givens")	File No. BPH-880825OQ
DJC, LTD. (hereafter "DJC")	File No. BPH-880825PA
PAMELA R. JONES (hereafter "Jones")	File No. BPH-880811MG (DISMISSED HEREIN)
PRESS BROADCASTING CO. (hereafter "Press")	File No. BPH-880825MC (DISMISSED HEREIN)

URBAN KENTUCKY
BROADCASTERS,
INC.
(hereafter "UKBI")

File No. BPH-880825ME
(DISMISSED HEREIN)

For Construction Permit
for a New FM Station on
Channel 283C2 (104.5 MHz)
in Lexington-Fayette, Kentucky

HEARING DESIGNATION ORDER

Adopted: November 20, 1990; Released: January 23, 1991

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.[1]

2. *Preliminary Matters.* An engineering study of the applications filed by Jones and UKBI reveals a discrepancy between the locations of the proposed sites as plotted and the coordinates listed in their applications at Section V-B, Item 4 and Section V-G, Item 1. Specifically, Jones' application indicates that the site is located at 38^0 10' 49" NL and 84^0 16' *46"* WL but she plots the site at 38^0 10' 49" NL and 84^0 16' *55* " WL. UKBI's application states that its site is at 38^0 07' *13* " NL and 84^0 18' 17" WL but it plots its site at 38^0 07' *16*" NL and 84^0 18' 17" WL. Therefore, it is impossible to determine from the face of the applications whether the proposals are in compliance with the Commission's Rules.

3. In the *Report and Order* in MM Docket 84-750, 50 Fed. Reg. 19936 (1985) ("Report and Order"), the Commission adopted an FM application processing standard which requires a "hard look" approach as to certain critical elements that are essential to a determination that an application is "substantially complete." This approach benefits the public interest by reducing frivolous and speculative applications and streamlining our processing procedures to make more efficient use of our staff and other resources. *See, e.g. Hillebrand Broadcasting, Inc.*, 1 FCC Rcd 419 (1986).

4. Further, in Appendix D to the *Report and Order*, *supra*, we stated that the absence of the geographic coordinates, to the nearest second, would prevent a determination of acceptability and thus would render the application not substantially complete. Thus, in the present case, these inconsistent coordinates make it impossible to determine the veracity of the site availability certifications, the environmental impact statements, or the information supplied for FAA approval. In other cases, absence of these data makes it impossible to determine the distance from the proposed site to the other proposed or existing broadcast facilities and to the community of license. In the commercial FM service, spacing determines acceptability of an application where mutual exclusivity exists with respect to a given allocation (*see* 47 C.F.R. § 73.207), and determines when mutual exclusivity exists between applicants for, or permittees of, different allocations. The geographic location also determines whether protection must be afforded to monitoring facilities and to radio quiet zones (*see* 47 C.F.R. § 73.1030), marks the center of the "blanketing" area (*see* 47 C.F.R. § 73.315), and is fundamental to analysis of a proposal's environmental and electromagnetic effects on other nearby communications facilities. *See, e.g., Steven B. Courts*, 4 FCC Rcd 4764 (1989). Accordingly, Jones' and UKBI 's application will be returned as inadvertently accepted for filing.

5. Press' application fails to include the 7.5 minute series U.S. Geological survey topographic quadrangle map as required by FCC Form 301, Section V-B, Item 15 (1986). The applicant indicates that the map was included in its Engineering Exhibit EE-1 as Figure 2. However, Figure 2 was missing.

6. By means of the *Report and Order, supra*, the Commission established a prerequisite of tenderability or substantial completeness that commercial FM broadcast applications include transmitter site maps in accordance with our *Public Notice*, Mimeo 3693, released April 5, 1985, and called for by FCC Form 301, Section V-B, Item 15 (1986). *See* paragraph 23 and Appendix D to the *Report and Order*. Specifically, Appendix D lists the critical elements that are essential for staff processing in order to determine that an application is substantially complete. If any one of the elements described there is missing from an application following the close of the applicable window, that application must be returned as not sufficient for tender. Accordingly, because of the absence of a transmitter site map, Press's application will be returned as inadvertently accepted for tender.

7. *NIK-O-LIN.* On January 13, 1989, Mr. Dan L. Thompson filed an informal objection against NIK-O-LIN's application. NIK-O-LIN had proposed to locate its transmitter site in Bourbon County, Kentucky where Mr. Thompson is a resident and property owner. Mr. Thompson objected to the proposed location of NIK-O-LIN's tower primarily because the site is in close proximity to his property, which contains his private airport. As a consequence, Mr. Thompson argues that the tower would constitute an air hazard to all aircraft that land at the airport.

8. On December 29, 1988, NIK-O-LIN amended its application to specify a new transmitter site. Subsequently, by letter dated February 15, 1989 and received by the Commission on February 23, 1989, Mr. Thompson informed the Commission that NIK-O-LIN was "successful in securing another suitable location that will not interfer with my operation." Based on the foregoing, the informal objection will be dismissed as moot.

9. *SPANS, Lexington, Atlantic.* Section II, Item 4 of FCC Form 301 (1986) requires that an applicant specify its address (number, street, city, state) as well as the home address of each of its principals. SPANS, Lexington and Atlantic have not completed Item 4 correctly. SPANS does not give street addresses for the applicant and the principals of the partnership. Lexington does not give a street address for the applicant. Atlantic lists a post office box number as the residence address for the applicant. Accordingly, SPANS, Lexington and Atlantic must submit an amendment which gives all the information required by Section II, Item 4 to the presiding Administrative Law Judge within 30 days of the release of this Order.

10. *SPANS.* Section II, Item 9(a), form 301 (1986) asks whether or not the applicant is in violation of Section 310 of the Communications Act of 1934, as amended, relating to interests of aliens and foreign governments. SPANS answered in the affirmative. Accordingly, an appropriate issue will be specified.

11. SPANS' application, as originally filed, contained a certification that it had sufficient net liquid assets on hand, or that sufficient funds were available from committed sources, to construct and operate the requested facilities for three months without revenue. However, on October 5, 1990, SPANS amended its application to report that the letter of reasonable assurance obtained from the National Bank of Washington (NBW) probably will not be honored. SPANS states that recently the NBW was placed in receivership by federal authorities. Subsequently, the NBW was acquired by the Riggs National Bank, which most likely will not honor the NBW letter. In view of the foregoing, there is a question of whether or not SPANS' financial certification is still valid. Accordingly, a financial qualifications issue will be specified below.

12. *OWB and Atlantic*. Section III of FCC Form 301 (1986) requires that applicants certify that they have sufficient net liquid assets on hand, or that sufficient funds are available from committed sources to operate the requested facility for three months without revenue. OWB and Atlantic certified that they were not financially qualified. Accordingly, an appropriate issue will be specified below.

13. On March 2, 1990 NIK-O-LIN filed petitions to dismiss or deny the applications of OWB and Atlantic. NIK-O-LIN argues that because OWB and Atlantic have failed to certify they are financially qualified to construct and operate their proposed facilities, their applications should not have been accepted for filing and must now be dismissed. However, because of the action taken in paragraph 12 of this Order, NIK-O-LIN's petitions will be granted to the extent indicated herein and denied in all other respects. *See Northhampton Media Associates*, 4 FCC Rcd 5517 (1989).

14. The Commission requires that if there will be five or more fulltime station employees, the applicant must complete and file Section VI of Form 301, and supply a statement detailing hiring and promotion policies for women and each minority group whose representation in the available labor force is five percent or greater in the proposed service area. OWB proposes to employ five or more full time employees; however, it did not include the required statement. Additionally, although the following applicants have filed such statements, they are deficient. Accordingly, each applicant listed below will be required to file an amended EEO program with the presiding Administrative Law Judge within 30 days of the release of this Order or an appropriate issue will be specified by the Judge.

APPLICANTS	DEFICIENCIES
Lexington	Failed to identify the school(s) or other beneficiaries, as well as the proposed form of assistance the applicant will provide in its proposed training program for minorities and women interested in entering the broadcast ield.
Villeneuve	Failed to identify specific sources of recruitment specializing in women and minority candidates; Failed to identify publications she will utilize in attracting women and minority candidates.
Atlantic	Failed to identify specific sources of recruitment specializing in women and minority candidates.
DJC	Failed to identify specific sources of recruitment specializing in women candidates; Failed to identify the proposed form of assistance the applicant will provide in its proposed training program for minorities and women interested in entering the broadcast field.

15. The engineering data submitted by Mahaffey, Ware, Kenney, Bethany-Barrett, 21st, Stanley/Lexington, SST, Lexington, Millar, OWB, Caller, NIK-O-LIN, Givens and DJC does not clearly demonstrate that they provide a 3.16 mV/m signal to the entire proposed city of license, as required by Section 73.315(a) of the Commission's Rules. The FM Branch does not require waiver of this requirement unless the proposed 3.16 mV/m coverage falls below 80% of the area of the principal community. *See John R. Hughes*, 50 Fed. Reg. 5679 (February 11, 1985). *See* also *Southwest Communications, Inc.*, released July 16, 1986 (Letter from the Chief, FM Branch, reference 8920-HVT). Engineering study reveals that the aforementioned applicants' 3.16 mV/m contours are in substantial compliance with this requirement. Their contours would cover over 80% of the community of license. Accordingly, since no waiver is required, the requests for waiver filed by the aforementioned applicants will be dismissed as moot.

16. *Ware*. Ware is general sales manager at WHRS-AM and WLFX-FM [formerly WFMI-FM], Winchester, Kentucky, thus triggering a potential violation of the Commission's cross-interest policy. *See Reexamination of the Commission's Cross-Interest Policy*, 2 FCC Rcd 3699 (1987). Ware has indicated that, in the event a construction permit is issued to her in this proceeding, she will resign her position at these stations. Accordingly, an appropriate condition will be specified below.

17. *Caller*. Caller indicates that her husband, Steven Caller, is currently the treasurer, a director and holds a 6.375% interest in F.B.C., Incorporated, licensee of WLKT-TV, Lexington, Kentucky. Since the instant proposal and WLKT-TV would essentially serve the same community, Mr. Caller's involvement with WLKT-TV would violate the Commission's one-to-a-market rule.[2] Caller has indicated that her husband intends to terminate his interest and sever all connections with WLKT-TV in the event of grant of the referenced application. Accordingly, in the event of grant of Caller's application, Steven Caller will be required to sever all connections with WLKT-TV prior to the commencement of program test authority.

18. The applicants below have petitioned for leave to amend their applications on the dates shown. The accompanying amendments were filed after the last day for filing minor amendments as of right. Under 47 C.F.R. § 1.65 the amendments are accepted for filing. However, an applicant may not improve its comparative position after the time for amendments as of right has passed. Therefore, any comparative advantage resulting from the amendments will be disallowed.

APPLICANTS	DATE(S)FILED
Mahaffey	January 6, 1989, August 29, 1989, November 16, 1989
SPANS	Janauary 31, 1989, April 11, 1989, August 25, 1989, November 6, 1989, April 16, 1990, October 5, 1990
21st	March 7, 1990
Stanley/Lexington	May 15, 1989
SST	June 21, 1990
Santee	June 8, 1989, October 11, 1989, June 1, 1990
Millar	March 16, 1989, January 16, 1990, September 28, 1990
NIK-O-LIN	June 12, 1989, April 9, 1990, May 15, 1990, June 21, 1990, August 3, 1990, August 24, 1990

19. Data submitted by the applicants indicate there would be significant difference in the size of the areas and populations which would receive service from the proposals. Consequently, the areas and populations which would receive FM service of 1 mV/m or greater intensity, together with the availability of other primary aural services in such areas, will be considered under the standard comparative issue for the purpose of determining whether a comparative preference should accrue to any of the applicants.

20. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

21. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

> 1. To determine whether SPANS is owned or controlled by aliens or their representatives in violation of Section 310(b) of the Communications Act of 1934, as amended.
>
> 2. To determine with respect to SPANS, OWB and Atlantic, whether the applicants are financially qualified.
>
> 3. To determine which of the proposals would, on a comparative basis, best serve the public interest.
>
> 4. To determine, in light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

22. IT IS FURTHER ORDERED, That the applications of Jones and UBKI ARE RETURNED as inadvertently accepted for filing and the application of Press IS RETURNED as inadvertently accepted for tender.

23. IT IS FURTHER ORDERED, That the informal objection filed on January 13, 1989 by Mr. Dan L. Thompson against the application of NIK-O-LIN IS DISMISSED AS MOOT.

24. IT IS FURTHER ORDERED, That SPANS, Lexington and Atlantic shall submit an amendment which contains the information required by Section II, Item 4 of FCC Form 301, to the presiding Administrative Law Judge within 30 days of the release of this Order.

25. IT IS FURTHER ORDERED, That the petitions to dismiss or deny filed on March 2, 1990 by NIK-O-LIN against the applications of OWB and Atlantic ARE GRANTED to the extent indicated herein and ARE DENIED in all other respects.

26. IT IS FURTHER ORDERED, That within 30 days of the release of this Order, Lexington, Villeneuve, OWB, Atlantic and DJC shall submit Section VI information in accordance with the requirement of Section 73.2080(c) of the Commission's Rules to the presiding Administrative Law Judge.

27. IT IS FURTHER ORDERED, That the requests for waiver of § 73.315(a) filed by Mahaffey, Ware, Kenney, Bethany-Barrett, 21st, Stanley/Lexington, SST, Lexington, Millar, OWB, Caller, NIK-O-LIN, Givens and DJC ARE DISMISSED AS MOOT.

28. IT IS FURTHER ORDERED, That in the event of a grant of Ware's application, the construction permit shall be conditioned as follows:

> Prior to the commencement of program test authorization permittee shall certify to the Commission that Cynthia Ware has resigned her position as general sales manager at WHRS-AM and WLFX-FM, Winchester, Kentucky.

29. IT IS FURTHER ORDERED. That in the event of a grant of Caller's application, the construction permit shall be conditioned as follows:

> Prior to the commencement of program test authorization, the permittee shall certify to the Commission that her husband, Steven Caller, has divested his interest and severed all connections with F.B.C., Incorporated, licensee of Station WLKT-TV.

30. IT IS FURTHER ORDERED, That the petitions for leave to amend filed by Mahaffey, SPANS, 21st, Stanley/Lexington, SST, Santee, Millar and NIK-O-LIN ARE GRANTED, and the corresponding amendments ARE ACCEPTED to the extent indicated herein.

31. IT IS FURTHER ORDERED, That a copy of each document filed in this proceeding subsequent to the date of adoption of this Order shall be served on the counsel of record in the Hearing Branch appearing on behalf of the Chief, Mass Media Bureau. Parties may inquire as to the identity of the counsel of record by calling the Hearing Branch at (202) 632-6402. Such service shall be addressed to the named counsel of record, Hearing Branch, Enforcement Division, Mass Media Bureau, Federal Com-

munications Commission, 2025 M Street, N.W., Suite 7212, Washington, D.C. 20554. Additionally, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall also be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Federal Communications Commission, Room 350, 1919 M Street, N.W., Washington, D.C. 20554.

32. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

33. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

FOOTNOTES

[1] D.V.D. Broadcasting Limited Partnership (BPH-880825NK) and Perfect Pitch, Inc. (BPH-880825NW) requested dismissal of their applications. The requests were voluntary and in accordance with our requirements governing such matters. Accordingly, the applications were dismissed by Commission letter dated July 12, 1990.

[2] Commission policy states that a common interest can reasonably be presumed to exist between husband and wife, and that the broadcast interests of one can be attributed to the other. *Alexander S. Klein*, 86 FCC 2d 423, 425-27 (1981).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-400

In re Applications of

MABLETON BROADCASTING COMPANY, INC.	File No. BPH-870706ML
GONZALES BROADCASTING, INC.	File No. BPH-870707MJ
BOLTON BROADCASTING, LIMITED	File No. BPH-870710MD
VOTH BROADCASTING COMPANY	File No. BPH-870710MF
RADIO MABLETON LIMITED	File No. BPH-870710MT
METROPOLITAN MANAGEMENT CORPORATION	File No. BPH-870710MY
LORENZO JELKS	File No. BPH-870710MZ
QRW PARTNERS LIMITED PARTNERSHIP	File No. BPH-870710NF
MABLETON COMMUNICATIONS, LIMITED	File No. BPH-870710NQ

For a Construction Permit for a New
FM Station on Channel 273A
(102.5 MHZ), Mableton, Georgia

MEMORANDUM OPINION AND ORDER

Adopted: January 10, 1991; Released: Janaury 23, 1991

By the Review Board: MARINO (Chairman) and BLUMENTHAL.

1. Subsequent to the release of our *Memorandum Opinion and Order*, 5 FCC Rcd 6314 (Rev. Bd. 1990), remanding the above-captioned proceeding for supplemental evidentiary hearings before the ALJ, the Board received: (1) a "Petition For Declaratory Ruling," filed November 26, 1990 by Mableton Broadcasting Co., Inc. ("MBC"); and (2) an "Appeal of Ruling Refusing to Disqualify," filed December 14, 1990 by QRW Partners, Limited Partnership ("QRW"), seeking removal of the presiding ALJ for bias.[1] No responsive pleadings appear to have been filed to either. We will dismiss the former and deny the latter.

MBC PETITION

2. Citing Section 1.2 of the Commission's rules, 47 CFR § 1.2, MBC seeks a declaration from the Board that certain rulings of the ALJ, generally relating to prehearing procedures, are either *ultra vires* or unduly burdensome.[2] Initially, however, Section 1.2 of the rules gives only the full Commission authority to issue declaratory rulings,[3] an authority not expressly delegated to this Board. *See* 47 CFR § 0.361 *et seq.* (delegations of authority to Review Board).

3. But, second, even if we ignored MBC's petition styling and regarded its pleading as an appeal under Section 1.301 of the rules, 47 CFR § 1.301, dismissal would be required. Under subsection (b) of the aforecited rule, appeals of interlocutory ALJ rulings are not accepted unless permission for appeal to the Board is first secured from the ALJ; if the ALJ denies permission, the grievance ordinarily may be raised only upon exception after release of the initial decision.[4] *See, e.g., Georgia Public Telecommunications Comm'n*, 5 FCC Rcd 3714 (Rev. Bd. 1990). Here, MBC did not first seek permission from the ALJ to appeal, and we will not speculate on the ALJ's (hypothetical) reaction to any such permission request, in clear disharmony with the explicit and implied logic of Section 1.301. [5]

QRW APPEAL

4. By motion of November 13, 1990, QRW sought from the ALJ a ruling disqualifying himself. The ALJ denied that motion, saying he had "looked into his own mind" and found he had acted on the merits, not out of prejudice. FCC 90M-3951, *supra* note 1.[6] In that now-denied motion, QRW had asserted a bias against it, in the main, because at the initial hearing the ALJ asked numerous and repeated questions about the media interests and employment positions of QRW principal William Dilday, past and present. *See* Appeal at 7-16 (and transcript excerpts therein).[7] More specifically, QRW here asserts that (*id.*, at 17):

> the transcript of this proceeding demonstrates that Judge Miller had a definite bias and prejudice against William Dilday. Apparently the source of this bias and prejudice was Mr. Dilday's status as a principal in an applicant in the RKO Boston proceeding -- a proceeding over which Judge Miller presided. Regardless of the source of the prejudice and bias, Judge Miller was prejudiced and biased to the point where he had a preconceived notion that QRW was the alter ego of William Dilday. The Presiding Judge in his Denial Order made no attempt to explain away his action in the hearing, other than to make the unresponsive general de-

> fense that "it was an effort on the Trial Judge's part to develop a full and complete record on the standard comparative issue."

5. In considering appeals under Section 1.245, the Board shall be guided by the standards developed by the Commission to resolve claims of bias, most recently reflected in cases such as *WWOR-TV, Inc.*, 5 FCC RCD 2845 (1990). There the Commission stated:

> In order to justify a request to disqualify the Presiding Judge from an adjudicatory proceeding, a party must demonstrate personal bias or prejudice impairing the Presiding Judge's ability to act in an impartial manner. *See WWOR -TV, Inc.*, 4 FCC Rcd 6155, 6155 ¶ 4 (1989), citing *Berger v. United States*, 255 U.S. 22, 23, 33-35 (1921) ("[affidavits] must give fair support to the charge of a bent of mind that may prevent or impede impartiality of judgement"). To be disqualifying the alleged bias or prejudice "must stem from an extrajudicial source and result in an opinion on the merits on some bias other than what the judge learned from his participation in the case." *United States v. Grinnell Corp.*, 384 U.S. 563, 583 (1966).

6. Here, however, and unlike most cases which seek disqualification based upon adverse interlocutory rulings made by an ALJ during the course of a hearing, *see, e.g.*, *WWOR-TV, Inc.*; *Tri-State Community Development*, 5 FCC Rcd 942 (1990), QRW bases its instant request for disqualification on transcript quotations made in the prior, *initial* hearing. So far as the Board is aware, QRW did not seek ALJ disqualification during that initial hearing, based upon the ALJ's questions there regarding Dilday. Since that initial hearing, much water has flowed over the dam: (1) the ALJ released his *Initial Decision*, 5 FCC Rcd 2774 (1990); and (2) this Board reviewed all of the exceptions to that initial decision, heard oral argument, issued its remand order correcting primary errors, and mandated a supplemental hearing necessary for the Board to decide the case fairly to all parties. In fact, our previous *Memorandum Opinion and Order* remanding the case vacated the adverse ALJ conclusions against QRW, and it required new findings and conclusions to be set down by the ALJ "without the coloration of matter not within the customary and reasonable purview of the standard comparative issue," *see* 5 FCC Rcd at 6223, findings and conclusions the Board (the full Commission, and the court, if necessary) may review upon any exceptions by QRW to the ALJ's supplemental decision.

7. But even putting aside the delayed timing of QRW's disqualification request, and assuming that QRW's perception of ALJ bias at the initial hearing has lately led it to seek a different ALJ for the supplemental hearing, we find in its appeal an insufficient basis to find bias on the grounds asserted by QRW. As noted above, QRW's complaint is based almost entirely upon the ALJ's questioning of, and about, William Dilday.[8] It is true that the ALJ's *Initial Decision* did find QRW overall to be a sham applicant, in that it regarded QRW's general partner (only 10% QRW equity) to be a "front" for limited partner William Dilday (30% QRW equity), *see id.*, 5 FCC Rcd at 2486-88, 2494; but the transcript quotations proferred here by QRW, though reflecting skepticism that a man like Dilday (with a long history of, and numerous interests in, broadcasting) would remain absolutely passive in the affairs of this Mableton station, do not on their face bespeak of animus or a "bent of mind" eminating from extrajudicial sources. *WWOR-TV, supra* (quoting *Berger v. U.S.*, 225 U.S. 22, 33-35 (1921)).

8. Moreover, and without indicating in the slightest any likely outcome, we remind that we have already reviewed QRW's extensive exceptions to the ALJ's *Initial Decision*, vacated entirely the adverse findings and conclusions, and required of the ALJ a fresh report on QRW to be grounded solely upon facts properly on the record. Should QRW be dissatisfied with the ALJ's supplemental decision, it may again register its exceptions with the Board, which will be no less receptive to claims of mistreatment than it was in addressing the grievances of QRW (and several other applicants) in the Board's prior review of the *Initial Decision*. For the nonce, QRW would appear to need no further, extraordinary assurance of fair treatment on its application.[9]

9. ACCORDINGLY IT IS ORDERED, That the "Petition for Declaratory Ruling" filed November 26, 1990 by Mableton Broadcasting Company, Inc. IS DISMISSED; and the "Appeal of Ruling Refusing to Dsiqualify" filed December 14, 1990 by QRW Partners Limited Partnership IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Norman B. Blumenthal
Member, Review Board

FOOTNOTES

[1] By *Memorandum Opinion and Order*, FCC 90M-3951, released December 13, 1990, and pursuant to 47 CFR § 1.245, the ALJ denied QRW's motion to disqualify himself. By companion *Memorandum Opinion and Order*, FCC 90M-3997, released December 18, 1990, and pursuant to subsection (b)(4) of the aforecited rule, the ALJ suspended the remanded proceeding, thus depriving the earlier-filed MBC petition of any apparent urgency.

[2] More specifically, MBC contests the authority of the ALJ:

> (a) to order a party to file a supplemental appearance;
>
> (b) to order a party to appear at the offices of competing party's counsel for purposes of settlement discussions; and
>
> (c) to order a party to participate at hearing sessions, when that party has no burden of proceeding or proof on the issues to be heard.

[3] 47 CFR § 1.2 reads as follows:

> The Commission may, in accordance with section 5(d) of the Administrative Procedure Act, on motion or on its own motion issue a declaratory ruling terminating a controversy or removing uncertainty. (5 U.S.C. 554).

[4] *But see* 47 CFR § 1.301(a), allowing the interlocutory appeals as a matter of right where a party's right to participate in a hearing is terminated, where a claim of privilege is denied, or where counsel is removed by an ALJ.

[5] Because we dismiss the MBC petition on procedural grounds, we do not reach the merits of its claims as to the ALJ's rulings or decide whether the rulings reflect a flagrant abuse of discretion. *See Communications Satellite Corp.*, 32 FCC 2d 533 (1971).

[6] The Commission recently delegated to the Review Board jurisdiction to rule on appeals of ALJ disqualification rulings. *Review of Motions to Disqualify Presiding Officer*, 5 FCC Rcd 5366 (1990). An applicant adversely affected may later, of course, seek full Commission review of the Board's disposition of such an appeal. *See id.*; *see generally* 47 U.S.C. § 155(a)(4) (action taken by delegated authority subject to review by Commission *en banc).*

[7] QRW, as further evidence of bias, adverts to language in the ALJ's *First Remanded Hearing Order* FCC 90M-3657, released November 19, 1990. In that order, issued in response to the Board's *Memorandum Opinion and Order* remanding this case for further hearing, the ALJ declared:

> Based on the evidence of record the Trial Judge has made it clear that there is no way he could recommend any of the following six applicants for a grant: (1) MBC; (2) Gonzales; (3) Voth; (4) Loreno Jelks; (5) MMC; and (6) QRW.

FCC 90M-3657 at n.23. This footnote (and other language, *passim*, of the ALJ's November 19 *Prehearing Order)* is most certainly injudicious, but appears to be directed largely to the Board's remand order and not to the applicants themselves. The specific footnote language invoked here by QRW, unfortunate as it appears, is facially ambiguous, since it refers to "the evidence of record" *prior to* the supplemental hearing and revised decision now ordered by the Board, and need not necessarily be construed as a critical predisposition toward all *six* of the applicants denominated in the subject footnote. In that regard, it is observed that none of the other five applicants highlighted therein have charged bias or sought the ALJ's disqualification. Nevertheless, particularly in light of the injudicious language of the footnote (as well as many other intemperate passages in the ALJ's November *Prehearing Order)*, the Board will conduct a *de novo* review of the supplemental record developed by the ALJ. And, just as it did in its remand order, it will correct any and all perceived errors made by the ALJ.

[8] While QRW's instant Appeal quotes extensively from the transcript of the initial hearing, the following excerpts illustrate the nature and tone of the ALJ's interest in William Dilday:

> JUDGE MILLER: We now move to [QRW counsel] Mr. Winston.
>
> Mr. Winston, let me tell you something that I'm going to bring up with me so that you will have a chance to think about this.
>
> Have you given the diversification holdings of your limited partnership?
>
> MR. WINSTON: We did not, your honor.
>
> JUDGE MILLER: And I'm particularly interested in, you know who I'm interested in, don't you?
>
> MR. WINSTON: Yes, Mr. Dilday.
>
> JUDGE MILER: Mr. Dilday, that's right, because I had him in -- in RKO Boston. Well, I -- proceed. One of the Dildays. I had two Dildays in RKO Boston. (Tr. 269)

Later in the same admissions session, Judge Miller stated to Mr. Hart, counsel for another applicant:

> I -- I'm always interested when Mr. Dilday's in an application, don't you see.
>
> I have no idea whether Mr. -- Mr. Dilday happens to be black, but Mr. Dilday has his finger in a lot of pots, and I know that, see, and if you can show that that's [QRW's application] a sham, be my guest. (Tr. 274).

Still later in the admission's session, the Presiding Judge again spontaneously raised the question of Mr. Dilday:

> JUDGE MILLER: That Jackson, Mississippi, makes me, makes me even more interested in seeing Mr. Dilday's holdings.
>
> MR HART: Right. That was the part I was focusing on, your honor. I do have an objection to --
>
> JUDGE MILLER: I don't know if that's the same Dilday that used to run the Jackson, Mississippi, television?
>
> MR. WINSTON: Yes, that is the same Dilday, sir.
>
> JUDGE MILLER: Go ahead Mr. Hart.
>
> MR. HART: Paragraph 6 of that exhibit the sentence, "I relocated, hired and trained staff members." I don't think that that is necessary to be included in the exhibit. The broadcast experience is the date and the position held. I think a little surplus, so I would move to strike that sentence.
>
> JUDGE MILLER: That's overruled, and I may be doing you a favor.
>
> MR. HART: All right, I have --
>
> JUDGE MILLER: Because -- because Mr. Hart, if I remember, this -- this has been a while, Mr. Dilday travels throughout the South trying his very best to bail out stations in financial trouble. That's one of his activities. Isn't that correct, Mr. Winston?
>
> MR. WINSTON: I'm not aware of that, your honor. I don't -- I don't think that's true characterize -- characterization.
>
> JUDGE MILLER: Well, maybe I'm wrong. It may be a while. I'll go back and take a look, but it may be a remote possibility that she's working for Dilday.

Appeal at 7-8.

[9] *See* , however, *supra* note 7.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

THE COMPETITIVE
TELECOMMUNICATIONS
ASSOCIATION, INC.,
Complainant,

v. File No. E-89-385

WISCONSIN BELL, INC.,
Defendant.

ORDER

Adopted: January 14, 1991; Released: January 23, 1991

By the Chief, Enforcement Division, Common Carrier Bureau:

1. On September 27, 1989 the Competitive Telecommunications Association, Inc. (hereinafter "CompTel") filed on behalf of a number of its member companies, including Schneider Communications, Inc., (hereinafter "Schneider Communications")[1] the above-captioned formal complaint against Wisconsin Bell Telephone Company (hereinafter the "Defendant"). The complaint seeks damages for Defendant's alleged overearnings on interstate access services for the period October 1, 1985 through December 31, 1986.

2. The parties to the complaint have conducted discussions aimed at settling matters in controversy. On December 21, 1990, CompTel and Wisconsin Bell filed a joint motion seeking dismissal of the complaint with prejudice as it relates to Schneider Communications. The parties state that a mutually agreeable settlement of all pending controversies between Schneider Communications and the Defendant has been reached.

3. We are satisfied that dismissal of the complaint insofar as it relates to Schneider Communications will serve the public interest by eliminating or reducing the need for further litigation and the expenditure of further time and resources of the parties and of this Commission.

4. Accordingly, IT IS ORDERED, pursuant to authority delegated by Section 0.291 of the Commission's Rules, 47 C.F.R. 0.291, that the above-captioned complaint IS DISMISSED WITH PREJUDICE to the extent that it relates to the claims of Schneider Communications, Inc.

FEDERAL COMMUNICATIONS COMMISSION

Mary Beth Richards
Chief, Enforcement Division
Common Carrier Bureau

FOOTNOTE

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[1] The remaining member companies represented by the complainant include: American Sharecom, Inc., ITT Communications Services, Inc., Litel Telecommunications Corp., Telecommunications Services Corp., Telephone Associates Long Distance Services, Telus Communications, Inc. and Wisconsin American Sharecom, Inc.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

LONG DISTANCE SERVICE
OF WASHINGTON, INC.,
Complainant,
v. File No. E-90-302

CONTEL OF VIRGINIA, INC.,
Defendant.

ORDER

Adopted: January 14, 1991; Released: January 23, 1991

By the Chief, Enforcement Division, Common Carrier Bureau:

1. On May 18, 1990, Long Distance Service of Washington, Inc. (hereinafter "LDS") filed with the Commission the above-captioned formal complaint against Contel of Virginia, Inc. (hereinafter "Contel") seeking recovery of damages for Contel's alleged overearnings on interstate access services for the period January 1, 1987 through December 31, 1988. In accordance with Commission rules governing formal complaint proceedings, Contel filed an answer to the complaint.

2. The parties to the above-captioned complaint have conducted discussions aimed at settling the complaint. As a result of these negotiations, the parties state that a mutually agreeable settlement of all pending controversies has been reached. On January 11, 1991, the parties filed a joint motion seeking dismissal of the complaint with prejudice. We are satisfied that dismissal of the complaint will serve the public interest by eliminating the need for further litigation and the expenditure of further time and resources of the parties and of this Commission.

3. Accordingly, IT IS ORDERED, pursuant to authority delegated by Section 0.291 of the Commission's Rules, 47 C.F.R. 0.291, that the Joint Motion to Dismiss the above-captioned complaint IS GRANTED and that the proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Mary Beth Richards
Chief, Enforcement Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Application of

CAGAL CELLULAR COMMUNICATIONS CORPORATION File No. 02883-CL-TC-1-89

For consent to the transfer of control of
the authorization of Station KNKA697
operating in the Domestic Public Cellular
Radio Telecommunications Service from Paul
Rosenthal to McCaw Communications of Santa
Rosa, Inc. in the Santa Rosa-Petaluma
Metropolitan Statistical Area

MEMORANDUM OPINION AND ORDER

Adopted: January 16, 1991; Released: January 23, 1991

By the Chief, Mobile Services Division:

1. On March 22, 1989, Paul Rosenthal (Rosenthal) filed an application for the consent to the transfer of control of Cagal Cellular Communications Corporation, Station KNKA697, to McCaw Communications of Santa Rosa, Inc. (McCaw).[1] Grant Singleton (Singleton) has filed Comments on the captioned application. Cagal filed a reply to Singleton's Comments.[2]

2. Singleton was ranked second behind Cagal in the Commission's lottery for the Santa Rosa-Petaluma, California Metropolitan Statistical Area. He states that while he interposes no objection to the proposed transfer of control, he does request that any grant be conditioned on the Commission's decision on Singleton's Application for Review that he filed August 17, 1987, which seeks reversal of the initial grant of Cagal's cellular construction permit.

3. Based on the Commission's denial of Singleton's Application for Review (*see Cagal Cellular Communications Corporation*, FCC 90-421 [adopted Dec. 19, 1990; released Jan. 16, 1991]), we find that Singleton's Comments are moot. We also find that the captioned application for the transfer of control from Rosenthal to McCaw will serve the public interest, convenience, and necessity. Therefore, the captioned application IS GRANTED.

FEDERAL COMMUNICATIONS COMMISSION

Gregory J. Vogt
Chief, Mobile Services Division
Common Carrier Bureau

FOOTNOTES

[1] This application was listed on *Public Notice*, Report No. CL-89-128 (released April 13, 1989).

[2] The Cellular Corporation had filed a Petition to Dismiss or Deny the captioned application but subsequently withdrew it pursuant to a settlement agreement with Cagal and McCaw.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Application of

INTERSTATE CELLULAR, INC. File No. 07510-CL-L-91

For a license to partially cover
construction permit for a Cellular
Mobile Telephone System to Operate on
Frequency Block B in the Alabama
8-Lee (B 2) Rural Service Area

MEMORANDUM OPINION AND ORDER

Adopted: January 14, 1991; Released: January 23, 1991

By the Chief, Mobile Services Division:

1. Interstate Cellular, Inc., a cellular mobile telephone system, (Interstate) has filed an application to partially cover its construction permit to operate on Frequency Block B (wireline) to serve the Alabama 8-Lee Rural Service Area (RSA). Dana Communications, Ltd. (Dana) has filed a petition to defer the issuance of the covering license. Interstate has filed an opposition to the petition. For the reasons set forth below, we deny the petition and grant the application.

I. BACKGROUND AND CONTENTIONS

2. Dana requests that the Commission delay granting operating authority to Interstate until Dana, the nonwireline tentative selectee in this market, is granted its construction permit. Dana maintains that unless the Commission defers Interstate's operating authority the benefits of competition are likely to be denied to consumers in the Lee RSA and monopoly pricing will occur. Dana explains that while its market research reveals there is demand for cellular service, it is unlikely that a nonwireline system will survive if the wireline is allowed such a substantial head start.

3. On May 18, 1990, the Mobile Services Division (MSD) dismissed Dana's application finding that it failed to contain the financial showing required by Section 22.917(c) of the rules.[1] Subsequently, Dana submitted an amendment to its application and a petition for reconsideration. Dana avers that grant of its application has been delayed by MSD's failure to act on its request for reinstatement of its permit to construct. Dana concludes that denying deferral of Interstate's operating authority would be contrary to the Commission's goal of establishing competitive cellular service.

II. DISCUSSION

4. The Commission has stated repeatedly that a party requesting deferral of wireline operating authority "[b]ears a heavy burden of demonstrating that such action would be in the public interest."[2] *Cellular Report and Order; see also, Eau Claire Cellular Telephone Company*, 3 FCC Rcd 3081 (Com. Car. Bur., 1988); *Illinois SMSA Limited Partnership*, 3 FCC Rcd 6144 (Com. Car. Bur., 1988). The Commission has stated that it would defer action on a wireline application only "[w]here it can be demonstrated in a particular case that harm to the public will result from allowing the wireline carrier an early entry into the market involved." *Cellular Report and Order, on reconsideration*, 89 FCC 2d 75 at n.32. In this case, the public interest will be served by expeditious provision of cellular service to the public. The Commission does not guarantee the economic well-being of any applicant or licensee, but rather desires to further the public interest by promoting the provision of reliable, economic service as soon as possible. *Cellular Report and Order*, 86 FCC 2d at 491, and *on reconsideration*, 89 FCC 2d at 74-75.

5. Dana has failed to show that the public interest would not be served by Interstate's early entry. Nor are we persuaded by Dana's unsupported assertion that nonwireline competition would be virtually precluded by permitting Interstate to have a head start, or that such a head start would subject the area to monopoly pricing. Early entry by wireline carriers in other markets has not prevented nonwireline permitees from successfully constructing and operating cellular systems in those markets. Dana has not provided evidence that customers choosing to receive service from Interstate will continue to subscribe to that carrier after entry of a second carrier. *See, e.g., Miami CGSA, Inc.*, Mimeo No. 4507 at n.25 (Com. Car. Bur. May 31, 1984). *See also Century Cellunet of Jackson MSA Limited Partnership*, 4 FCC Rcd 3414 (Mob. Ser. Div. 1988).

6. Based on a review of its petition to defer, we find that Dana has failed to satisfy the heavy burden of demonstrating that early entry by Interstate will jeopardize the development of a competitive market in the Lee RSA and disserve the public interest.

7. Accordingly, IT IS ORDERED, that the application of Interstate Cellular, Inc. for a partial covering license, File No. 07510-CL-L-91, IS GRANTED.

8. IT IS FURTHER ORDERED, that the Petition for Deferral of Operating Authority filed by Dana Communications, Ltd. IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Gregory J. Vogt
Chief, Mobile Services Division
Common Carrier Bureau

FOOTNOTES

[1] Section 22.917 (c) (5) of the rules provides in pertinent part that a non-wireline RSA applicant shall demonstrate at the time of filing that its application has either a firm financial commitment or the available financial resources necessary to construct and operate the proposed cellular system for one year.

[2] *Cellular Communications Systems,* 86 FCC 2d 469, 490 (1981) (*Cellular Report and Order*), *on reconsideration.* 89 FCC 2d 58 (1982), *on further reconsideration,* 90 FCC 2d 571 (1982).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

GARY W. SHORT FOIA Control No. 90-122

On Request for Inspection
of Records

MEMORANDUM OPINION AND ORDER

Adopted: January 11, 1991; Released: January 23, 1991

By the Commission:

1. The Commission has before it an Application for Review filed by SDC Corporation (SDC) seeking review of an initial ruling by the Common Carrier Bureau (Bureau), which granted a request for records by Gary W. Short (Short) under the Freedom of Information Act (FOIA). 5 U.S.C. §552. Short was granted access to a list of companies and their assigned five-digit (10XXX) Carrier Identification Code (CIC). *See* Letter to Gary W. Short from Richard M. Firestone, Chief, Common Carrier Bureau, dated July 30, 1990. On appeal, SDC again requests confidentiality for its CIC.[1]

2. As noted in the Bureau decision, Bell Communications Research (Bellcore), the entity that administers the North American Numbering Plan (NANP), assigns CICs to interexchange carriers and other companies requesting codes. Bellcore has provided lists of assigned CICs to the Bureau since the mid-1980s. In response to Short's request, the Bureau sent a letter to all companies with CICs, informing them that a FOIA request had been filed, and requesting companies interested in confidential status for their CICs to file a request for confidentiality with the Bureau. The letter stated that companies were required to identify the specific FOIA provision under which they were claiming a right to confidentiality.

3. Fourteen of the nearly seven hundred companies with CICs filed confidentiality requests, contending that their CICs were protected from disclosure under Exemption 4 of the FOIA, which protects "trade secrets" and confidential "commercial or financial information."[2] After reviewing these requests, the Bureau concluded that they failed to substantiate their contentions that CICs were protected under FOIA.

4. SDC now restates in its Application for Review its claim that its CIC is a trade secret under Exemption 4 to the FOIA. SDC asserts that when a CIC was issued to a previous subsidiary to its parent company, the subsidiary "received many disruptive telephone calls desiring or inquiring about using [the subsidiary] as their choice as a common carrier." It states that confidentiality for its CIC is required to prevent similar "nuisance" calls.

5. We find that SDC has failed to demonstrate that its CIC is protected from disclosure as a trade secret. The definition of a trade secret under FOIA Exemption 4 requires that the information be the "end product of either innovation or substantial effort" by SDC. *See Public Citizen Health Research Group v. FDA*, 704 F.2d 1280, 1288 (D.C. Cir. 1983). SDC's CIC code is not the result of any innovation or effort on its part, as SDC merely applied for a CIC code from Bellcore along with several hundred other applicants. SDC's only claim is that release of its CIC will result in nuisance calls requesting that it provide service as a common carrier. It appears unlikely, however, that public access to a list of 700 CICs will result in telephone requests to SDC for long-distance service, especially given that the CIC list incorporates the names of many corporations that clearly are not common carriers and does not include information regarding the type of services that SDC provides. Even assuming that SDC receives a few calls, its CIC is not within the trade secret exemption and, hence, is subject to the disclosure mandate of FOIA.

6. Accordingly, for the foregoing reasons, IT IS ORDERED, that the Application for Review filed by SDC IS DENIED. SDC will be accorded 10 working days from the release date of this Order in which to seek a judicial stay. *See* 47 C.F.R. § 0.461(h)(4).

7. The officials responsible for this action are the following Commissioners: Alfred C. Sikes, Chairman, James H. Quello, Sherrie P. Marshall, Andrew C. Barrett, Ervin S. Duggan.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

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[1] Another party also filed an Application for Review requesting confidentiality for its CIC. However, on October 22, 1990 the party wrote a letter stating that its need for confidentiality would expire on December 15, 1990. Accordingly, the party's Application for Review is now moot.

[2] 5 U.S.C. § 552(b)(4).

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Application of

Virginia RSA 6 Cellular Limited Partnership	File Nos. 10880-CL-P-686-B1-89; 163500-91-17-JFW

For a facility in the
Domestic Public Cellular
Telecommunications Radio
Service on Frequency Block B,
in Market 686, Virginia 6 (Highland)

MEMORANDUM OPINION AND ORDER AND NOTICE OF APPARENT LIABILITY

Adopted: January 7, 1991; Released: January 8, 1991

By the Commission:

I. BACKGROUND

1. On November 24, 1989, the Commission announced that a full market settlement had been reached by the wireline cellular applicants in the Highland, Virginia market (RSA 686: Virginia 6).[1] On March 21, 1990, Virginia RSA 6 Cellular Limited Partnership (Partnership)[2] was designated as the surviving applicant for the wireline system in that segment of the market.[3] On April 30, 1990, Partnership was named as the tentative selectee.[4]

2. On June 18, 1990, Charles Rease Braley, III (Braley), the nonwireline cellular tentative selectee for the Highland, Virginia market, filed a timely petition to dismiss or deny Partnership's application. On June 26, 1990, Partnership filed an opposition to the petition to deny.

II. PREMATURE CONSTRUCTION

3. *Contentions*. Braley contends that Partnership unlawfully constructed the proposed communications tower sites at Kiser Hill (near Waynesboro, Virginia), College Park Hill (in Staunton, Virginia), and Massanutten Peak (near Harrisonburg, Virginia), in violation of Sections 301 and 319 of the Communications Act of 1934, as amended, (the Act).[5] In support thereof, Braley submitted sworn affidavits, photographs and sketches showing that communications towers, newly mounted cellular antennas and new transmission lines routed from these antennas to apparently new equipment shelters were observed on May 21, 1990 and May 31, 1990 at both the Kiser Hill and College Park Hill sites, and on May 31, 1990 at the Massanutten Peak site. Braley's supporting materials also document that a new side-mounted microwave antenna was observed at both the College Park Hill and Massanutten Peak sites on May 21, 1990 and May 31, 1990, respectively, and that an air conditioning unit was overheard in the equipment shelter at College Park Hill on May 31, 1990. The supporting materials further document that an equipment shelter at Massanutten Peak was posted with a sign warning that the intrusion, fire and temperature alarms were active in the building. Braley also submits an experienced cellular engineer's sworn statement that on May 31, 1990, "the electric power meters next to the three cellular equipment shelters indicated that power was being drawn by all of [the] facilities," and that "the cellular equipment at each of the sites was fully constructed, tested, tweaked and awaiting activation." Petition, Attachment B, at 7-8.

4. Braley further contends that Partnership's construction activities are not authorized by the exception set forth in Section 22.43(d)(4)(i) of the rules[6] because Partnership commenced construction prior to the expiration of the 60-day period. Braley argues that the 60-day waiting period began with the April 30, 1990 Public Notice announcing Partnership as the tentative selectee, and expired on June 30, 1990. Accordingly, Braley asserts that Partnership may not invoke the preconstruction exception because it had fully constructed two of the proposed sites as early as May 21, 1990, and a third site as early as May 31, 1990. Braley also alleges that Partnership apparently constructed the towers at Kiser Hill and Massanutten Peak before receiving FAA antenna clearances and Commission antenna marking and lighting specifications, in violation of Sections 22.43(d)(3), (as it relates to Section 22.43(d)(4)), 22.109(a), 22.923(b)(4) and Part 17 of the rules, and the terms of a 90-day special temporary authority (STA) for the construction of microwave facilities at these sites that was issued April 18, 1990.[7] As an alternative to a dismissal or denial of the application, Braley requests that the Commission conduct an evidentiary hearing to determine whether, and to what extent, Partnership has engaged in unlawful premature construction.

5. In its opposition, Partnership contends that Braley's allegations of unauthorized construction are factually incorrect and legally unsound, and that the construction was authorized by Commission precedent under Section 319(a) of the Act and Section 22.43(a)(1) the rules. Partnership denies that the towers are new, owned or constructed by Partnership or its general partner, CFW Cellular. Partnership states that CFW Cellular entered into a lease agreement with the owner of each tower for the use of space for for Partnership's cellular antennas.[8] It also states that the cellular antennas have not been connected to the base station transmitters, the system has not been tested and it has not signed a contract for switching services with the Roanoke wireline cellular licensee. Partnership concedes that cellular equipment buildings were placed at the cell sites on March 8 and 9, 1990,[9] and that electricity is being drawn at the equipment shelters to power the facilities' air conditioning, heating and security systems, but it argues that these steps are permissible under Sections 301 and 319(a) of the Act. Partnership also concedes that antennas and transmission cables were installed at Kiser Hill, Massanutten Peak and College Park Hill on March 14, 1990, April 25, 1990 and May 16, 1990, respectively. It contends that such steps are permissible under the Commission's rules because the antennas are not connected to the base station transmitters. Partnership further concedes that microwave equipment was mounted on the towers at College Park Hill and Massanutten Peak, but states that the construction of the microwave facilities was authorized by the 90-day STA issued on April 18, 1990.[10] Finally, Partnership admits that on March 10, 1990, CFW Telephone Company (CFW

Telephone), the owner of the tower at Kiser Hill and an affiliate of CFW Cellular, "increased the height of its tower at Kiser Hill by 20 feet in order to provide space required under the terms of its lease with CFW Cellular." Opposition, Exh. 3, at 2.

6. Partnership argues that the construction at the three sites was authorized by the exception set forth in Section 22.43(d)(4)(i) of the rules. It states that the 60-day period ran from the March 21, 1990 Public Notice until May 21, 1990. Because no petitions to deny had been filed during that time period, it claims that it was authorized to begin construction on May 21, 1990.[11] In response to Braley's claim that at least two towers were constructed without the proper FAA and Commission antenna clearances, Partnership counters that it neither constructed nor owns the two towers. Partnership also submits evidence that the FAA clearances for all three towers have been granted and forwarded to the Commission.

7. *Discussion*. Under Section 319(a) of the Act and Section 22.43(a) of the rules, a cellular applicant generally is prohibited from commencing station construction prior to receipt of Commission authorization. The preauthorization construction of towers, installation of radio antennas and mounting of microwave equipment is encompassed by this prohibition. *MCI Telecommunications Corporation*, 3 FCC Rcd 509 (1988), *as supplemented*, 4 FCC Rcd 7299 (1988), *appeal dismissed by judgment sub nom. TeleSTAR, Inc. v. FCC*, 901 F.2d 1131 (D.C. Cir. 1990) (Table). The prohibition on premature construction, however, is not absolute. The following preauthorization steps, *inter alia*, have been permitted: installing a tower base and anchors; installing a new power line; purchasing and storing, on-site, radio equipment; pouring concrete footings; clearing a transmitter site; constructing a transmitter building and other "preliminary steps" not having an "intrinsic" radio communications use "related to the facility." *See id.*, 3 FCC Rcd at 509; *Western Tele-Communications, Inc.*, 3 FCC Rcd 6405 (1988), *appeal dismissed by judgment sub nom. TeleStar, Inc. v. FCC*, 899 F.2d 1268 (D.C. Cir. 1990) (Table); *Christian Broadcasting of the Midlands, Inc.*, 103 FCC 2d 375 (1986), *reconsideration denied*, 2 FCC Rcd 6404 (1987); *King Country Broadcasters*, 55 Rad. Reg. 2d 1591, 1592 (1984), *overruled on other grounds*, *Christian Broadcasting of the Midlands, Inc.*, 103 FCC 2d 375 (1986), *reconsideration denied*, 2 FCC Rcd 6404 (1987); *Patton Communications Corporation*, 81 FCC 2d 336, 338 (1980); *Childress Broadcasting Corp.*, 24 Rad. Reg. 669 (1962). Section 22.43(d)(4)(i) of the rules provides an additional exception to the general prohibition against preauthorization construction for cellular services, *see* note 6, *supra*. In assessing the actions taken by Partnership, we apply these legal standards.

8. Partnership, by mounting cellular antennas and installing transmission cables at the Kiser Hill, Massanutten Peak and College Park Hill proposed cell sites, furthers an intrinsic radio purpose directly related to its proposed facilities. *MCI*, 3 FCC Rcd at 509, 510 ("the placement. . . of . . . antennas on . . . tower[s] constitute[s] unauthorized construction"); *WSAV, Inc. and WJIV-TV, Inc.*, 10 Rad. Reg. 402 (1955), *affirmed sub nom. WJIV-TV, Inc.*, 231 F.2d 725 (1956). Similarly, the increase in height of the tower at Kiser Hill by CFW Telephone, pursuant to its lease with with CFW Cellular (*see* para. 5, *supra)*, serves an intrinsic radio purpose directly related to the proposed cellular facility. Partnership is subject to the Commission's rules with respect to this increased tower height construction, undertaken by CFW Telephone in furtherance of Partnership's application. In any event, we note that CFW Telephone is an affiliate of CFW Cellular, Partnership's principal owner, and shares the same management with CFW Cellular, a fact which Partnership itself relies on in a slightly different context. *See* para. 12, *infra*.[12] Partnership admits that it engaged in these various construction activities at the Kiser Hill, Massanutten Peak and College Park Hill locations prior to May 21, 1990, less than 60 days from public notice of the sole eligible wireline applicant, the earliest of the dates specified by Section 22.43(d)(4)(i). Therefore, Partnership may not invoke the exception set forth in Section 22.43(d)(4)(i).[13] In view of the foregoing, we find that Partnership has engaged in unlawful preconstruction under Section 319(a) of the Act and Section 22.43(a) of the rules.

9. Partnership's placement of cellular equipment buildings containing unconnected base station transmitters at the three proposed sites, on the other hand, constitutes a permissible preliminary step under Section 319 of the Act and Section 22.43(a) of the rules. *MCI*, 3 FCC Rcd at 509; *Western Tele-Communications, Inc.*, 3 FCC Rcd at 6406 ("purchase and on-site storage of radio equipment . . . and construction of a transmitter building . . . constitute permissible preauthorization construction"). Further, Partnership may take necessary and reasonable steps to protect equipment when it is placed at the proposed site. Thus, Partnership's connection of electric lines to the buildings to supply power for alarms, air conditioning and heating similarly constitutes a permissible preliminary step. Because Partnership's statement that construction of the microwave facilities at the Masanutten Peak and College Park Hill sites occurred following receipt of the STA is uncontroverted, we deny Braley's claim of unauthorized preconstruction with respect to these microwave facilities. Therefore, we find that Partnership's construction of microwave facilities at Massanutten Peak and College Park Hill constitutes permissible construction, as authorized by the STA grant of April 18, 1990. With respect to the STA itself, we note that Braley did not file a petition for reconsideration or application for review and, thus, the STA has become final and unappealable. In any event, there is no support for Braley's speculation that the STA request was not filed in good faith.

10. In evaluating Braley's request for a hearing on the issue of unauthorized preconstruction, we apply the two-prong test established in Sections 309(d)(1) and (2) of the Act. *See Astroline Communications Company Limited Partnership*, 857 F.2d 1557 (D.C. Cir. 1988.); *Gencom, Inc. v. FCC*, 832 F.2d 171 (D.C. Cir. 1987). Although Braley has raised specific allegations of fact sufficient to present a *prima facie* case that there has been unlawful premature construction, there is no substantial and material question of fact on the issue of premature construction and its effect on Partnership's qualifications requiring the conduct of an evidentiary hearing under Section 309(d)(2). As discussed above, the facts regarding the installation of transmission cables, placement of cellular equipment buildings, and mounting of cellular antennas and microwave equipment are uncontroverted. In addition, Partnership has admitted that the tower height was increased at Kiser Hill. Further, Partnership has submitted sufficient evidence in its affidavits to establish when and by whom the towers were constructed at the three sites. *See* note 8, *supra*. As a result of these facts, we are able to reach the

legal conclusion that Partnership engaged in unlawful premature construction. *See* para. 8, *supra*. As discussed below, we do not believe these violations affect Partnership's qualifications to be a Commission licensee. In the absence of a basis on which to order a hearing, we deny Braley's request.

III. CHARACTER QUALIFICATIONS

11. *Contentions*. Braley argues that because Partnership is composed of landline companies with working knowledge of the Act and the rules, Partnership's unlawful preconstruction compels the Commission to find that it does not have the requisite character qualifications to be a Commission licensee.

12. In response, Partnership states that the record of CFW Telephone before the Commission and the Virginia State Commission Corporation (SCC) demonstrates Partnership's adherence to Commission rules and commitment to customer service. Partnership states that CFW Telephone is an affiliate of CFW Cellular and shares the same management with that company. Partnership submitted a report from the SCC in which CFW Telephone is rated "satisfactory" on all service quality results for the first quarter of 1990. Partnership explains that a "satisfactory" rating is the highest made by the SCC. Opposition, p. 4, n. 2.

13. *Discussion*. In resolving a request for an inquiry into an applicant's basic character qualifications to be a Commission licensee, the Commission focuses on "the likelihood that . . . [t]he applicant will deal truthfully with the Commission and comply with the Communications Act and our rules and policies." *Policy Regarding Character Qualifications in Broadcast Licensing (Policy Statement)*, 102 FCC 2d 1179, 1183 (1986), *on recon.*, 1 FCC Rcd 421 (1986), *appeal dismissed sub nom. National Association of Better Broadcasting v. FCC*, No. 86-1179 (D.C. Cir. June 11, 1987). *See also Policy Regarding Character Qualifications in Broadcasting Licensing*, 5 FCC Rcd 3252 (1990), *recon. pending*.[14] Although any violation of the Communication's Act or the rules raises character concerns, "not all violations are equally predictive of future reliability and truthfulness." *Policy Statement*, 102 FCC 2d at 1210, n. 76. In determining the relevance and weight to accord improper activites with respect to the ability to operate a proposed facility in the public interest, the Commission considers such factors as "whether the misconduct was isolated or recurring, inadvertent or deliberate, and recent or remote." *Id*. at 1226. In the case before us, we are mindful of the absence of any evidence of misrepresentation or lack of candor by Partnership. *MCI*, 3 FCC Rcd at 514 (petition for revocation denied where violations were isolated and apparently inadvertent, and there was "no evidence of misrepresentation or lack of candor . . . or any intention to violate [the] Rules or the Communications Act").[15] We also are mindful of Partnership's claim that installation of the various cellular antennas was undertaken on the mistaken belief that "it was permissible under the Commission's rules . . . so long as the antennas were not connected to the base station transmitters . . . ." Opposition at 12. Further, Partnership has provided evidence of CFW Telephone's satisfactory compliance with other regulatory rules and standards. *See* para. 12, *supra*. While Partnership's premature construction is a serious violation of the Act and the rules, there is nothing in the record to suggest a likelihood that in the future it will not deal truthfully with the Commission and comply with the Act and the Commission's rules and policies. Therefore, we cannot find that Partnership's conduct warrants an inquiry into its basic qualifications to be a Commission licensee. Accordingly, we find Partnership to be legally, technically, financially and otherwise qualified to be a Commission licensee. Moreover, we find that a grant of the instant application will serve the public interest, convenience and necessity.

IV. NOTICE OF APPARENT LIABILITY

14. As discussed above, Partnership engaged in unlawful premature construction by installing cellular antennas and transmission lines at two proposed cell sites, and by installing cellular antennas and transmission lines and increasing the height of a tower at a third proposed cell site, in violation of Section 319(a) of the Act and Section 22.43(a)(1) of the rules. Partnership's violations were both willful and repeated within the meaning of Section 503(b)(1) of the Act. Although we find that Partnership's violations as set forth above are not sufficient to establish that it does not possess the requisite character qualifications to be a Commission licensee, we admonish Partnership to exercise henceforth greater diligence toward complying with the Commission's rules. In addition, we choose not to exercise our discretion to order dismantlement of the facilities constructed without authorization under Section 22.43(d)(5)(iii). In this case, we believe that the expeditious provision of telecommunications services to the public outweighs any benefits of dismantlement under the rule.[16] However, we find that Partnership's overall conduct and failure to exercise reasonable care in complying with the prohibitions of our rules warrants imposition of a forfeiture with respect to the unlawful construction activities at each of its three proposed cell sites.

15. In determining the amount of the forfeiture to be imposed, we have taken into account "the nature, circumstances, extent, and gravity of the prohibited acts committed and, with respect to the violator, the degree of culpability, any history of prior offenses, ability to pay, and such other matters as justice may require." 47 U.S.C. Section 503(b)(2). In consideration of the serious nature of the violations and CFW Telephone's record of performance with the SCC, *inter alia*, we find that Partnership is apparently liable for a forfeiture in the amount of $20,000.00 with respect to each of the three proposed sites. Accordingly, Partnership is apparently liable for a forfeiture in the total amount of $60,000.00.

V. ORDERING CLAUSES

16. IT IS ORDERED, pursuant to Section 503(b) of the Act and Section 1.80 of the rules, That Virginia RSA 6 Cellular Limited Partnership IS APPARENTLY LIABLE FOR A FORFEITURE in the amount of $60,000.00, for unauthorized premature construction in violation of Section 319(a) of the Act and Sections 22.43(a)(1) of the rules.

17. IT IS FURTHER ORDERED, pursuant to Section 1.80(f)(3) of the rules, That Virginia RSA 6 Cellular Limited Partnership, within thirty days of the release date of this notice, shall pay the full amount of the forfeiture or file a response showing why the forfeiture should not be imposed or the amount should be reduced. The for-

feiture should be paid by check or money order drawn to the order of the Federal Communications Commission. The check or money order should be mailed to the Forfeiture Unit, Financial Services Branch, FCC, Box 19209, Washington, D.C. 20036, or delivered to the Forfeiture Unit, Financial Services Branch, Room 452, 1919 M Street, N.W., Washington, D.C. 20554.

18. IT IS FURTHER ORDERED, That the Application of Virginia RSA 6 Cellular Limited Partnership, File Number 10880-CL-P-686-B1-89, IS GRANTED. This authorization does not include the right to any interference protection in any areas outside the Virginia 6-Highland RSA. The authorization is conditioned upon coordination with current and future co-channel licensee(s) in the areas outside the Virginia 6-Highland RSA. Further, Virginia Limited Partnership is on notice that in the event current or future MSA/RSA licensees encounter interference from any service extension(s), Virginia Limited Partnership will have to change frequencies in those cells or reduce its 39 dBu contour to eliminate any interference due to an extension.

19. IT IS FURTHER ORDERED, That the Petition to Deny filed by Charles Rease Braley, III is DENIED.

20. IT IS FURTHER ORDERED, That a copy of this Memorandum Opinion and Order and Notice of Apparent Liability for forfeiture shall be sent by certified mail to: Virginia RSA 6 Cellular Limited Partnership, (CFW Cellular, Inc.), 54 Woodlee Road, P.O. Box 2008, Staunton, Virginia 24401.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] Public Notice, Report No. CL-90-50 (released November 24, 1990).

[2] CFW Cellular, Inc. (CFW Cellular) is the sole general partner in Partnership. CFW Cellular owns a 74 percent interest in Partnership. CFW Cellular and all the limited partners (or their affiliated entities) in the partnership provide landline local exchange telephone service in RSA 686.

[3] Public Notice, Report No. CL-90-131 (released March 21, 1990).

[4] Public Notice, Report No. CL-90-165 (released April 30, 1990).

[5] Section 301 of the Act provides in relevant part that "[n]o person shall use or operate any apparatus for the transmission of energy or communications or signals by radio . . . except under and in accordance with this Act and with a license in that behalf granted under the provisions of this Act."

Section 319(a) of the Act provides in relevant part that "[n]o license shall be issued under the authority of this Act for the operation of any station unless a permit for its construction has been granted by the Commission."

[6] Section 22.43(d)(4)(i) of the rules provides in relevant part that "[c]ellular tentative selectees seeking the initial wireline . . . radio station authorization to be awarded in a cellular market...or the sole surviving wireline applicant after a full market settlement, to apply for the initial wireline authorization in a cellular market . . . . [may commence construction] once 60 days have elapsed from the date of public notice announcing the tentative selectee . . . or the sole surviving wireline applicant...."

[7] Letter from Domestic Facilities Division to CFW Cellular, Inc. (May 9, 1990) (granting STA from April 18, 1990 through July 18, 1990, "to construct the microwave facilities . . . ").

[8] In sworn affidavits submitted with its opposition and in a response (filed on August 27, 1990) to an August 20, 1990 Commission request for additional information, Partnership states that the tower at Kiser Hill was erected by CFW Telephone Company on May 9, 1988 to provide paging and IMTS service; the tower at Massanutten Mountain was erected by Stonewell Broadcasting Company in January of 1990 to provide radio broadcasting, and currently is owned by Great Eastern Associates; the tower at College Park Hill was erected by Staunton Video Corporation in 1983, and currently is owned by Adelphi Cable Corporation.

[9] The buildings were delivered to Partnership with the base station transmitter equipment "already installed in modular format." Opposition, Exh. 3, at 3.

[10] Microwave facilities are used to interconnect cells and/or switching locations with cell sites. They are not used to provide direct communications between cells and cellular service subscribers.

[11] In addition, Partnership asserts that Braley's petition to deny was untimely filed. Section 1.823(b)(2) of the rules provides that "[i]n the Cellular Service, Petitions to Deny may be filed . . . within 45 days of the Public Notice announcing such selection." Partnership's assertion is without merit. *See also* Public Notice, note 4 *supra*, which specified that petitions were due June 18, 1990.

Partnership also disputes Braley's claim that he has standing to file a petition to deny. We find that Braley, as a nonwireline cellular tentative selectee for the same market, has standing to file the instant petition to deny under Section 22.30(a)(3). *FCC v. Sanders Brothers*, 309 U.S. 477 (1940).

Partnership further alleges that Braley's petition is a disguised headstart petition and, as such, should be summarily dismissed. In a headstart petition, a nonwireline carrier requests deferral of initiation of service by the wireline carrier for a brief period of time not to exceed six months. *See* Cellular *Communications Systems*, 89 FCC 2d 58, 74, 75 and n. 32 (1982). As the discussion *infra* makes clear, Braley's petition raises questions of fact (regarding preconstruction at the proposed cellular sites) which do not involve market protection issues. Partnership's allegation, therefore, is rejected.

[12] The record evidence convinces us that Partnership did not construct the towers located at the proposed cell sites and that the towers were not constructed for Partnership in furtherance of its application. *See* note 7, *supra*. For this reason, Braley's argument with regard to FAA approval, *see* para. 4 *supra*., is without merit. Partnership inaccurately states in its Amended Application (filed on March 22, 1990) that a "new structure" is to be constructed at both the Kiser Hill and Massanutten Peak proposed cell sites. Amended Application, Exh. 3, Sch. B, numbers 1 and 3, at 3, item 35. We admonish Partnership to exercise greater care in the preparation of its Commission submissions.

[13] Because we find that Partnership commenced construction at the three sites prior to expiration of the 60-day period, we need not address Braley's request that the Commission issue a restraining order *pendente lite* denying Partnership the benefit of the pre-grant exception. *See also* Letter to Peter A. Rohrbach, Esq. from the Mobile Services Division (December 20, 1990)

(granting Partnership an STA from December 18, 1990 to January 18, 1991 to install equipment and conduct system testing at the three sites).

[14] Although not directly applicable to common carriers, the character qualifications standards adopted in the broadcast context can provide guidance in the common carrier area as well. *See MCI*, 3 FCC Rcd at 515, n. 14; *Policy Statement Recon. Order*, 1 FCC Rcd at 424.

[15] *Cf. TeleSTAR, Inc.*, 2 FCC Rcd 5 (Rev. Bd. 1987), *affirmed*, 3 FCC Rcd 2860 (1988), *aff'd by judgment*, 886 F.2d 442 (1989) (Table), *cert. denied*, (Case No. 89-1770, October 1, 1990) (applicant who had misrepresented material facts and displayed a lack of candor in explaining its premature construction was not qualified to be a Commission licensee); *Pass Word, Inc.*, 76 FCC 2d 465 (1980), *affirmed*, 673 F.2d 1363, 1365 (D.C. Cir. 1982), *cert. denied*, 459 U.S. 840 (1982) (revocation upheld based on "a series of *knowing and deliberate* material misrepresentations to the agency") (emphasis in the original).

[16] Any competitive advantage which Partnership may have gained over Braley by constructing prior to the expiration of the 60-day period under Section 22.43(d)(4)(i) has been eliminated by the filing of Braley's petition to dismiss. Accordingly, Braley's request that Partnership's prematurely constructed facilities be dismantled to ensure Partnership does not benefit from its premature construction is denied.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-38
REISSUED

In re applications of

MOUNTAIN MEDIA, INC. (hereafter MMI)	File No. BPH-851018MC
SELECTRONICS CORPORATION (hereafter Selectronics)	File No. BPH-851018MD
RADIO VERMONT, INC. (hereafter RVI)	File No. BPH-851018ME

For a Construction Permit
for a New FM Station on
Channel 241A in Warren, Vermont

HEARING DESIGNATION ORDER

Adopted: March 11, 1988; Released: March 16, 1988

By the Chief, Audio Services Division:

1. IT IS ORDERED, That the previous hearing designation order released in this proceeding, MM DOCKET NO. 88-38, released February 19, 1988, is hereby VACATED and REISSUED with revisions having been made. This action is taken pursuant to 47 C.F.R. § 1.113(a).

2. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.

3. *Preliminary Matters. MMI.* On October 18, 1985, MMI filed its application for a new FM station in Warren, Vermont, and on March 24, 1986, the Chief, FM Branch returned that application as inadvertently accepted for tender. Thereafter, on April 23, 1986, MMI filed a timely Petition for Reconsideration which was granted by letter on February 13, 1987. MMI was subsequently reinstated *nunc pro tunc* and accepted for filing on March 4, 1987.

4. On April 3, 1987, Selectronics filed a timely Petition to Dismiss or Deny MMI's application. Selectronics alleges in its Petition that MMI's proposed transmitter site is short-spaced to station CJFM-FM, Montreal, Quebec, Canada, in violation of 47 C.F.R. § 73.207, the *Canadian-United States FM Broadcasting Agreement of 1947* and the *Working Arrangement for the Allotment and Assignment of FM Broadcasting Channels 201 - 300 Under the Canadian-U.S. FM Broadcasting Agreement of 1947* (Adopted September 7, 1984) ("*Working Arrangement*").

5. The Warren, Vermont allotment, for which MMI is applying, is for Channel 241A. CJFM operates on first adjacent Channel 240C1. Section 73.207 of the Commission's Rules and the *Working Arrangement* require a minimum separation between a Class A station and a first adjacent Class C1 station of 164 kilometers. The spacing between MMI's proposed site and CJFM's transmitter site is 161.9 kilometers and is thus short-spaced by 2.1 kilometers.

6. On April 16, 1987, MMI filed a timely Opposition to Seletronics' Petition to Dismiss or Deny. MMI, in its Opposition, asserts that it is in compliance with the *Working Arrangement*. MMI bases its argument on Section 3.5 of the *Working Arrangement* dealing with specially negotiated short-spaced allotments and assignments. MMI argues that Section 3.5 of the *Working Arrangement* allows the Commission to negotiate any proposed assignments which do not conform to the minimum spacing requirements with Canadian stations. Thus, a short-spacing problem between a Canadian station and a U.S. station should be treated differently than between two domestic stations. MMI is correct that the *Working Arrangement* treats short-spacing between the U.S. and Canada slightly differently than the Commission's Rules treat short-spacing between two domestic stations. The US/Canada *Working Arrangement*, allows the Commission to submit the technical data of any applicant short-spaced to a Canadian FM broadcast facilty to the Canadian Department of Communications, even in the absence of a request for a waiver, for clearance. Unlike the US/Mexico agreement, which does not have provisions for allowing the Commission to request clearance from the Mexican Government, the US/Canada *Working Arrangement* allows a short-spaced application to be designated for hearing if Canada has no objection and the Commission finds no objectionable interference within the U.S. In the instant case, the Canadian Government cleared MMI's proposed site on March 26, 1987 with no objection.

7. With clearance from the Canadian Department of Communications and with the Commission's technical study finding no unacceptable interferance within the U.S. borders, the Commission cannot find MMI's application objectionable nor unacceptable. Therefore, the Petition to Dismiss or Deny filed by Selectronics will hereby be denied.

8. *Site Availability.* MMI advances the argument in its Opposition to Selectronics' Petition to Deny that the other applicants do not have acceptable sites. MMI's allegations are essentially attempts to specify issues. Since the Commission's *Report and Order* in re *Revised Procedures for the Processing of Contested Broadcast Applications*; *Amendments of Part 1 of the Commission's Rules*, 72 FCC 2d 202 (1979), directed the deletion of all issue pleadings in pending cases, the matters raised in MMI's allegations would not ordinarily be considered in the Hearing Designation Order. Because of the unique circumstances presented with the submission of a Settlement Agreement, to be discussed in Paragraph 12, below, it was necessary to consider the issues raised by MMI in order to make a determination as to the acceptability of the proposed Agreement. MMI's first allegation in its Opposition, considered herein because of the singular situation at hand, is that there will be "severe adverse local reaction" to Selectronics' site. In the first instance, MMI's argument is too speculative to require an issue "Reasonable assurance" does not require zoning approval prior to grant of an

application. *Gareth F. Garlund and Anna White Garlund (KIQO)*, 69 FCC 2d 2006 (1978) Further, a sworn affidavit regarding the likelihood of local opposition by MMI's own attorney is unpersuasive.

9. MMI does, however, raise significant questions of fact regarding RVI's site which go directly to the acceptability of the proposed Settlement Agreement discussed in paragraph 12, below. In its Opposition to Selectronics' Petition to Dismiss or Deny, MMI asserts that the property on which RVI has proposed to construct its transmitter has been sold and the new owners have not been contacted. RVI subsequently notified the Commission on August 6, 1987, by a Motion for Leave to Amend and an accompanying amendment, that its site had indeed been lost. As of this date, RVI has not yet submitted any new site on which RVI proposes to construct its transmitter. On August 20, 1987, MMI filed a timely Objection to RVI's Motion for Leave to Amend. MMI makes numerous allegations in its Objection which go directly to RVI's candor in this proceeding. The thrust of MMI's argument is that RVI knew by April 16, 1987, at the latest, that its site had been lost, since that is when MMI pointed out that fact in its Opposition pleading against Selectronics' Petition. Therefore, RVI knew that its site was no longer available three and one-half (3-1/2) months prior to RVI's amendment informing the Commission. Furthermore, First Vermont Bank, the current owner of the land, gained possession of the site more than eight (8) months prior to RVI's amendment. MMI argues that RVI has failed to show "good cause" for such a delay in apprising the Commission of such changes. MMI also raises questions of fact concerning RVI's original site certification. The individual signing RVI's original site certification was Walter A. Zinn. Although Mr. Zinn signed RVI's certification on October 15, 1985, MMI alleges that Mr. Zinn had sold the site on October 6, 1981, more than four years prior to the filing of RVI's application. According to MMI, David and Rene Disick, the owners of the land from October 6, 1981 until October 26, 1986, who owned the site at the time of filing, were never contacted by RVI. The Disicks sold the land to its current owner, First Vermont Bank on October 26, 1986. First Vermont Bank, MMI alleges, has also not been contacted about using the site for a transmitter. All of MMI's allegations in this regard are uncontroverted by RVI. Therefore, although MMI's allegations directed towards Selectronics are unsupported by affidavits, being undisputed by RVI, the allegations do raise a question sufficient to warrant the specification of an appropriate site availability issue. Furthermore, the Commission has held that a contingent misrepresentation issue should be specified for hearing in circumstances similar to those found here. *See e.g., Dutchess Communications Corp.*, 101 FCC 2d 243, 58 RR 2d 381 (Rev. Bd. 1985); *Cannon Communications Corp.*, 101 FCC 2d 169, 58 RR 2d 950 (Rev. Bd. 1985), *review denied*, FCC 86-244 (May 15, 1986); *Houston Family Television, Ltd.*, 101 FCC 2d 661, 58 RR 2d 1557 (Rev. Bd. 1985). Accordingly, an appropriate contingent misrepresentation issue will be specified regarding whether RVI failed to comply with 47 C.F.R. § 1.65 with respect to its site availability and timely report the above matters to the Commission.

10. *MMI*. Engineering study indicates that this proposal may significantly exceed the ANSI C95.1-1982 exposure guidelines for human exposure to radio frequency ("RF") radiation in the transmitter building as outlined in OST Bulletin No. 65 (October 1985). Consequently, the Commission is concerned that MMI may have failed to comply with the newly revised environmental criteria forth in the *Report and Order* in GEN Docket No. 79-163, 51 Fed. Reg. 14,999 (April 22, 1986). Under the newly revised rules, applicants must determine whether their proposals would have a significant enviromental effect under the criteria set out in the newly added 47 C.F.R. § 1.1307. If the application is determined to be subject to environmental processing under the 47 C.F.R. § 1.1307 criteria, the applicant must then submit an Environmental Assessment (EA) containing the information delineated in the newly revised 47 C.F.R. § 1.1311. 47 C.F.R. § 1.1307(b) states that an EA must be prepared if the proposed operation would cause exposure of workers or the general public to levels of RF radiation exceeding specific standards. Since MMI's proposal may have a significant enviromental impact as defined by 47 C.F.R. § 1.1307, it will be equired to submit the enviromental impact information described in 47 C.F.R. § 1.1311. Accordingly, MMI will be required to file, within 30 days of the release of this Order, an EA with the presiding Administrative Law Judge. In addition, a copy shall be filed with the Chief, Audio Services Division, who will then proceed regarding this matter in accordance with the provisions of 47 C.F.R. § 1.1308. Accordingly, the comparative phase of the case will be allowed to begin before the enviromental phase is completed. *See Golden State Broadcasting Corp.*, 71 FCC 2d 229 (1979), *recon. denied sub nom. Old Pueblo Broadcasting Corp.*, 83 FCC 2d 337 (1980).

11. *Selectronics*. On October 16, 1987, Selectronics filed a Petition for Leave to Amend and an accompanying amendment proposing a new transmitter site, explaining that Selectronics' originally proposed site is no longer available. Selectronics explains that through no fault of its own, the landowner of the originally proposed site unilaterally withdrew the option for Selectronics to construct. Selectronics' October 16, 1987, Petition for Leave to Amend contains nothing more than a bare allegation by its attorney and a signed statement by the president of Selectronics that the information contained within the Petition is true. We find that this does not suffice as good cause for us to accept a late-filed amendment. Bare assertions without accompanying supporting affidavits cannot be regarded as establishing good cause for acceptance under any set of criteria. Selectronics' Petition for Leave to Amend is therefore denied and the accompanying amendment is hereby returned.

12. On October 22, 1987, RVI and Selectronics filed a Joint Request for Approval of Agreement. Under the terms of the Agreement, Selectronics would dismiss its application for the grant of RVI's application. In light of the matters discussed in paragraph 12, above, and the resultant contingent issue specified below, we do not find that approval of this agreement would serve the public interest. Therefore, approval of the Joint Agreement is denied, Selectronics application will not be dismissed, and both RVI's and Selectronics' applications are designated for hearing.

13. *Other Matters*. The applicant below has petitioned for leave to amend its application on the dates shown. The accompanying amendments were filed after the last date for filing minor amendments as of right. Under Section 1.65, the amendments are accepted for filing. However, an applicant may not improve its comparative

position after the time for amendments as of right has passed. Therefore, any comparative advantage resulting from the amendments will be disallowed.

APPLICANT	AMENDMENTS FILED
RVI	March 30, 1987; August 6, 1987

14. Data submitted by the applicants indicates that there would be significant difference in the size of the areas and populations which would receive service from the proposals. Consequently, the areas and populations which would receive FM service of 1 mV/m or greater intensity, together with the availability of other primary aural services in such areas, will be considered under the standard comparative issue for the purpose of determining whether a comparative preference should accrue to any of the applicants.

15. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

16. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

> 1. If a final environmental impact statement is issued with respect to MMI in which it is concluded that the proposed facility is likely to have an adverse effect on the quality of the environment, to determine whether the proposal is consistent with the National Environmental Policy Act, as implemented by 47 C.F.R. §§ 1.301-1319.
>
> 2. (a) To determine whether RVI has reasonable assurance that the transmitter site specified will be available to it.
>
> (b) To determine, in light of the facts and circumstances adduced pursuant to issue 1(a) above, whether RVI timely apprised the Commission of site availability pursuant to 47 C.F.R. § 1.65.
>
> (c) To determine, in light of the facts and circumstances adduced pursuant to issues 1(a) and 1(b), above, whether RVI misrepresented facts to or concealed information from the Commission.
>
> (d) To determine, in light of the facts adduced pursuant to the foregoing issues, whether RVI possesses the the basic qualifications to be the licensee of the facilities sought here.
>
> 3. To determine which of the proposals would, on a comparative basis, best serve the public interest;
>
> 4. To determine, in light of the evidence adduced pursuant to the foregoing issues, which of the applications should be granted, if any.

17. IT IS FURTHER ORDERED, That the Petition to Dismiss or Deny filed by Selectronics IS HEREBY DENIED.

18. IT IS FURTHER ORDERED, That in accordance with paragraph 10 heeinabove, MMI shall submit the environmental assessment required by 47 C.F.R. § 1.311 to the presiding Administrative Law Judge within 30 days of the release of this Order, with a copy to the Chief, Audio Services Division.

19. IT IS FURTHER ORDERED, That the petitions for leave to amend filed by RVI on March 30, 1987, and August 6, 1987, ARE HEREBY GRANTED, and the corresponding amendments ARE HEREBY ACCEPTED to the extent indicated herein.

20. IT IS FURTHER ORDERED, That the October 16, 1987 petition for leave to amend filed by Selectronics IS DENIED, and the corresponding amendment IS HEREBY RETURNED.

21. IT IS FURTHER ORDERED, That the October 22, 1987 Request for Approval of the Joint Agreement filed by RVI and Selectronics IS HEREBY DENIED.

22. IT IS FURTHER ORDERED, That in addition to the copy served on the Chief, Hearing Branch, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall be served on Chief, Date Management Staff, Audio Services Division, Mass Media Bureau, Room 350, 1919 M St., N.W., Washington, D.C. 20554.

23. IT IS FURTHER ORDERED, That to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date specified in this Order.

24. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: January 15, 1991

SOUTHWESTERN BELL TELEPHONE COMPANY FILES PETITION FOR WAIVER OF PART 69 OF THE COMMISSION' S RULES REGARDING INTERSTATE DIRECTORY ASSISTANCE SERVICE

Pleading Cycle Established

On December 3, 1990, the Southwestern Bell Telephone Company (Southwestern) filed a petition for waiver of Part 69 of the Commission's Rules to permit establishment of a new rate element within the Information category. The new rate element would enable Southwestern to separate a portion of the expense of white page directory publication from the expense of providing interstate directory assistance (IDA) service.

Interested parties should file comments regarding Southwestern's waiver petition no later than January 29, 1991. Reply comments concerning the waiver petition may be filed no later than February 5, 1991.

Parties are requested to furnish one copy of each pleading to the Downtown Copy Center (DCC), the Commission's duplicating contractor, at its office in Room 246, 1919 M Street, N.W., Washington, D.C. 20554, and to the Chief, Tariff Division, Room 518, 1919 M Street, N.W., Washington, D.C. 20554.

Copies of the Southwestern waiver petition, along with other related documents, may be obtained from DCC. The documents are also available for public inspection and copying in Room 518, 1919 M Street, N.W. An original and four copies of all pleadings and replies must be filed, in accordance with Section 1.51(c) of the Commission's Rules.

For further information, contact Terry S. Conway, Tariff Division, Common Carrier Bureau at (202) 632-6917.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

New England Telephone & Telegraph Co. Revisions to Tariff F.C.C. No. 40	Transmittal No. 1095
New York Telephone Co. Revisions to Tariff F.C.C. No. 41	Transmittal No. 1089
Pacific Bell Revisions to Tariff F.C.C. No. 128	Transmittal No. 1505
Southwestern Bell Telephone Co. Revisions to Tariff F.C.C. No. 68	Transmittal No. 2031
U S West Communications Revisions to Tariff F.C.C. No. 1	Transmittal No. 119

ORDER

Adopted: January 9, 1991; Released: January 11, 1991

By the Chief, Common Carrier Bureau:

1. New England Telephone and Telegraph Company, New York Telephone Company, Pacific Bell, Southwestern Bell Telephone Company, and U S West Communications (the BOCs) have filed the captioned tariff revisions which amend the definition of the term "channel termination" as used in their tariffs for Special Access service. These tariff revisions are scheduled to become effective January 13, 1991. The BOCs filed the captioned revisions after the Commission found that the currently-effective definition of a channel termination contained in their Special Access tariffs did not apply to intrabuilding circuits.[1] Metropolitan Fiber Systems (MFS) has filed a petition requesting suspension and investigation of the captioned filings and each of the BOCs has filed a reply.

2. MFS asserts that the BOCs have failed to justify the proposed definitional changes. MFS contends that the BOCs have made no attempt to demonstrate that rates for intrabuilding circuits are designed to reasonably reflect cost differences among subelements as is required by Section 69.114(d) of the Commission's Rules, 47 C.F.R. § 69.114(d). MFS Petition at 4-5. In addition, MFS asserts that intrabuilding circuits are functionally different from other channel terminations and contends that the BOCs have not justified charging the same rates for them. *Id.* at 5-7. Finally, MFS asserts that these transmittals raise important policy issues of the BOCs' ability to disadvantage their competitors through their control of bottleneck facilities. *Id.* at 7-8.

3. NYNEX's reply is typical of the BOCs' responses to MFS's petition.[2] NYNEX notes that the Commission stated in the *Western Union Order* that it should be simple for the BOCs to include intrabuilding circuits in the channel termination definition by revising their tariffs as they now have done. NYNEX Reply at 2-3. NYNEX further states that MFS incorrectly assumes that intrabuilding circuits are a separate subelement of Special Access. *Id.* at 4. In addition, NYNEX argues, intrabuilding circuits provide the same functionality as other channel terminations, *i.e.*, a communications path between two customer designated premises. *Id.* at 5-6. Finally, NYNEX asserts that MFS has not shown that the pending tariff revisions would be harmful to competition. *Id.* at 7.

4. The Common Carrier Bureau has reviewed the captioned transmittals, MFS's petition, and the BOCs' replies. We conclude that no question has been presented that warrants suspension or investigation at this time.

5. Accordingly, IT IS ORDERED that the petition to suspend and investigate the captioned transmittals filed by Metropolitan Fiber Systems, Inc., IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Firestone
Chief, Common Carrier Bureau

FOOTNOTES

[1] Western Union Corp. v. Southern Bell Tel. & Tel. Co., File Nos. E-87-47 through E-87-53, 5 FCC Rcd 4853 (1990) (*Western Union Order).*

[2] Because the NYNEX reply is typical of the BOC responses, it is the only one summarized in this Order.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Ameritech Operating Companies Revisions to Tariff F.C.C. No. 2 — Transmittal No. 478

ORDER

Adopted: January 10, 1991; Released: January 10, 1991

By the Chief, Common Carrier Bureau:

1. On October 12, 1990, the Ameritech Operating Companies (Ameritech) filed Transmittal No. 478 to introduce a charge for unauthorized primary interexchange carrier (PIC) changes. Currently, Ameritech imposes a $5.00 PIC change charge payable by the end user at the time the end user authorizes a PIC change. Ameritech imposes a $5.00 charge on the interexchange carrier (IC) if the IC claims an end user requested a PIC change, and that change is later found to be unauthorized. Ameritech plans to increase the charge for these unauthorized PIC changes to $23.00 for business and residential accounts, and $52.30 for payphone accounts. US Sprint Telecommunications Company Limited Partnership (Sprint) filed a petition for rejection or suspension and investigation, and Ameritech filed a reply. Transmittal 478 is scheduled to take effect on January 10, 1991.

2. Ameritech intends to retain the existing $5.00 charge for authorized PIC changes. Ameritech Transmittal No. 478, Description and Justification (D&J) at 1-2. It contends that the current $5.00 charge does not compensate Ameritech for the costs it incurred in investigating disputed PIC changes. *Id.* at 2-3. Ameritech asserts that it developed its rates using the Task Orientation Costing (TOC) methodology. *Id.* at 5. Ameritech proposes to charge $18.00 for investigations relating to business and residential accounts, $31.70 for investigations relating to payphone accounts, and $15.60 per location for visiting the payphone premises, in addition to the existing $5.00 charge. *Id.* at Exh. 4.

3. According to Sprint, interexchange carriers (ICs) could incur Ameritech's unauthorized PIC change charge whenever the IC could not produce a letter of agency (LOA), even though the PIC change might be legitimate. Sprint maintains that Ameritech's charge would give Ameritech an incentive to find all disputed PIC changes to be unauthorized. *Id.* at 5.

4. Sprint also maintains that Ameritech has not made an adequate showing of the labor time required to perform the functions associated with PIC change investigations.[1] It suggests that Ameritech should be required to perform a time and motion study. *Id.* at 7. Sprint also argues that Ameritech has not explained why the investigations for payphone PIC changes are more costly than the investigations for PIC changes relating to business and residential accounts. *Id.* at 7-8. Sprint alleges that the total charge for an unauthorized payphone PIC change under Transmittal 478 would be $52.30, an amount which is significantly higher than the PIC change charges imposed by Bell Atlantic and BellSouth.[2] *Id.* at 2. Sprint asserts that BellSouth and Bell Atlantic found that the only additional cost associated with payphone PIC changes result from the trip to the payphone site. *Id.* at 8.

5. Ameritech replies that the Commission placed the responsibility on ICs for producing LOAs in the event of a PIC change dispute, and that Sprint attempts to shift some of this responsibility away from itself. Ameritech Reply at 3-4, *citing* Illinois Citizens Utility Board Petition for Rule Making, 2 FCC Rcd 1726 (1987). Ameritech argues that it has provided the same level of cost support information as that previously supplied by Bell Atlantic and BellSouth for their unauthorized PIC change charges. *Id.* at 5-6. Also, Ameritech asserts that its rates are developed on a per location basis rather than the per line basis used by Bell Atlantic and BellSouth to develop their rates. Ameritech alleges that its rates computed on a per line basis in the case of payphone PIC changes would be $44.50, which it claims to be similar to BellSouth's and Bell Atlantic's rates. *Id.* at 6 n.13.

6. We have examined Sprint's petition, Ameritech's reply, and related materials in the record, and we conclude that the transmittal is not so patently unlawful as to require rejection and that an investigation is not warranted at this time.

7. Accordingly, IT IS ORDERED that the petition to reject or suspend and investigate Ameritech Operating Companies, Tariff F.C.C. No. 2, Transmittal No. 478, filed by US Sprint Telecommunications Company Limited Partnership IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Firestone
Chief, Common Carrier Bureau

FOOTNOTES

[1] In response to Sprint's assertions regarding inadequate data regarding labor costs, Ameritech supplied additional cost information to the Bureau on December 19, 1990.

[2] Sprint asserts that Bell Atlantic's unauthorized payphone PIC change charge is $39.96, and BellSouth's unauthorized payphone PIC change charge is $35.68.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-460

In the Matter of

Amendment of Section 73.202(b), Table of Allotments, FM Broadcast Stations. (Van Buren, Arkansas)	RM-7377

REPORT AND ORDER
(Proceeding Terminated)

Adopted: January 14, 1991; Released: January 25, 1991

By the Acting Chief, Allocations Branch:

1. The Commission considers herein the *Notice of Proposed Rule Making*, 5 FCC Rcd 6244 (1990), issued in response to a petition filed on behalf of LKR Communications, Inc. ("petitioner"), licensee of Station KLSZ-FM, Channel 272A, Van Buren, Arkansas, proposing the substitution of Channel 274C2 for Channel 272A, and modification of its license to specify operation on the higher-powered channel. Petitioner filed comments in support of the proposal. No other comments were received.

2. As indicated in the *Notice*, Channel 274C2 can be allotted to Van Buren, Arkansas, at the petitioner's specified site, which is located 17 kilometers (10.5 miles) south of the community,[1] consistent with the minimum distance separation requirements of Section 73.207(b) of the Commission's Rules, to avoid a short-spacing to the site specified in the construction permit issued to Station KHOZ-FM, Channel 275C, Harrison, Arkansas, to decrease its facilities to Class C1 standards (*see* File No. BPH-891017IC).[2]

3. We believe the public interest would be served by substituting Channel 274C2 for Channel 272A at Van Buren, Arkansas, since it could provide an expanded coverage FM service to the community. Therefore, in accordance with the provisions of Section 1.420(g) of the Commission's Rules, we are modifying the license of Station KLSZ-FM to specify operation on Channel 274C2 in lieu of Channel 272A, as requested.

4. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **March 11, 1991,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED with respect to the community listed below, as follows:

City	Channel No.
Van Buren, Arkansas	274C2

5. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the license issued to LKR Communications, Inc. for Station KLSZ-FM, Van Buren, Arkansas, IS MODIFIED to specify operation on Channel 274C2 in lieu of Channel 272A, subject to the following conditions:

> (a) Within 90 days of the effective date of this *Order*, the licensee shall submit to the Commission a minor change application for a construction permit (Form 301), specifying the new facility;
>
> (b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620; and
>
> (c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

6. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

7. For further information concerning the above, contact Nancy Joyner, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Andrew J. Rhodes
Acting Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

FOOTNOTES

[1] Coordinates at the petitioner's specified site for Channel 274C2 at Van Buren are 35-17-55 and 94-25-26.

[2] Coordinates at the site specified in the construction permit issued to Station KHOZ-FM are 36-26-11 and 93-14-43.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-486

In the Matter of

Amendment of Section 73.202(b), RM-7379
Table of Allotments,
FM Broadcast Stations.
(Asbury, Missouri)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: January 14, 1991; Released: January 24, 1991

By the Acting Chief, Allocations Branch:

1. The Commission has before it for consideration the *Notice of Proposed Rule Making*, 5 FCC Rcd 6447 (1990), issued in response to a petition filed by William Bruce Wachter ("petitioner"). The *Notice* proposed the allotment of Channel 278A to Asbury, Missouri, as that community's first FM broadcast service. Petitioner filed comments in support of the *Notice* and stated his intention to apply for the channel. No other comments were received.

2. We believe the public interest would be served by the allotment of Channel 278A to Asbury, Missouri, since it would provide the community with its first FM broadcast service. Channel 278A can be allotted to Asbury in compliance with the minimum distance separation requirements of the Commission's Rules without a site restriction.[1]

3. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **March 11, 1991,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, to read as follows:

Community	Channel No.
Asbury, Missouri	278A

4. The window period for filing applications will open on **March 12, 1991,** and close on **April 11, 1991.**

5. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

6. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Andrew J. Rhodes
Acting Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

FOOTNOTE

[1] The coordiantes for Channel 278A are 37-16-24 and 94-36-24.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 87-110

In re Applications of

EMPIRE STATE BROADCASTING CORPORATION (WWKB) Buffalo, New York	File No. BR-840201WQ
For Renewal of License	
BURSAM COMMUNICATIONS CORPORATION (WTHE) Mineola, New York	File No. BP-840430AC
For a Construction Permit	

MEMORANDUM OPINION AND ORDER

Adopted: January 11, 1991; Released: January 25, 1991

By the Commission:

1. Before the Commission for consideration is a Review Board Decision, *Empire State Broadcasting Corporation*, 5 FCC Rcd 2999 (Rev. Bd. 1990), affirming a summary decision granting Empire State Broadcasting Corporation's application for renewal of the license of WWKB(AM), and denying the mutually exclusive application of Bursam Communications Corporation to increase the operating power of WTHE(AM). *See Empire State Broadcasting Corporation*, 4 FCC Rcd 7008 (S.D. 1989). After careful consideration of the Review Board decision and the parties' pleadings,[1] we affirm the Board's decision in this matter. We wish, however, to comment on certain matters.

I. BACKGROUND

2. Bursam's proposal to increase the operating power of WTHE(AM) would cause objectionable interference to WWKB(AM) in violation of 47 C.F.R. § 73.187, which limits the signal that WTHE(AM), a Class II AM station, may radiate during critical hours toward a co-channel Class I station.[2] The staff of the Mass Media Bureau denied Bursam's request for a waiver of 47 C.F.R. § 73.187. Bursam's application was tendered during the renewal period filing window for WWKB(AM). Therefore, it was designated for hearing with Empire State's application for renewal of WWKB(AM)'s license since, in the absence of a waiver, the proposals were made mutually exclusive by the interference Bursam's proposal would cause. *See Empire State Broadcasting Corporation*, 2 FCC Rcd 2439 (M.M. Bur. 1987), *vacated and reissued*, 2 FCC Rcd 2793 (M.M. Bur. 1987). The hearing designation order specified a Section 307(b) issue to determine which proposal would better provide fair, efficient, and equitable distribution of radio service. [3] In an interlocutory order, the Review Board directed the ALJ to determine, in addition, whether Bursam was entitled to waiver of 47 C.F.R. § 73.187. *See Empire State Broadcasting Corporation*, 2 FCC Rcd 7554, 7556 ¶ 10 (Rev. Bd. 1987), *erratum*, 3 FCC Rcd 313 (Rev. Bd. 1988). The ALJ found that Bursam failed to justify a waiver of the rule, and that Empire State was entitled to a dispositive preference under the Section 307(b) issue. The Board affirmed the ALJ's Section 307(b) finding, but declined to consider the merits of Bursam's exceptions concerning denial of the waiver. In doing so, the Board questioned whether Bursam's application should have been designated for hearing and whether the waiver issue should have been considered. *See Empire State Broadcasting Corporation*, 5 FCC Rcd at 3002-3 ¶ 11, 3005 ¶ 16.

II. DISCUSSION

3. In light of the questions raised by the Board, we wish to state our views as to the legal principles applicable to this case. Bursam's application to increase the operating power of WTHE(AM) conflicts with the interference protection for Class I stations mandated by 47 C.F.R. § 73.187. However, Bursam's application, timely filed during the renewal period filing window for WWKB(AM), is mutually exclusive with Empire State's renewal application, and therefore was accepted for filing. Pursuant to 47 C.F.R. § 73.3516(e),[4] the mutual exclusivity between Bursam's application to increase operating power and Empire State's renewal application gave Bursam a right to a comparative hearing. *See also*, 47 U.S.C. § 309(e); *Ashbacker Radio Corp. v. FCC*, 326 U.S. 327, 330 (1945). Thus, the staff correctly designated Bursam's application for hearing.[5] *See Ramapo Indian Hills Regional High School District*, 3 FCC Rcd 4859, 4860 ¶ 6 (1988); *Westinghouse Broadcasting Co., Inc.*, 64 FCC 2d 643, 645 ¶¶ 5-6 (1977); *Bronco Broadcasting Co., Inc.*, 50 FCC 2d 529, 531 ¶ 5, 536 ¶ 15 (1974), *recon. denied* 52 FCC 2d 836 (1975).

4. We note however, that Bursam's burden of proof under the Section 307(b) issue to be determined in the comparative hearing is virtually insurmountable. Had the Board not directed the ALJ to consider whether Bursam was entitled to a waiver of 47 C.F.R. § 73.187, the ALJ could have issued a summary decision without a hearing, granting Empire State's renewal, since Bursam concedes that Empire State prevails on the Section 307(b) issue. Oral Argument Tr. 2030-31; 5 FCC Rcd at 3005 ¶ 17. As the Board now acknowledges, no waiver issue should have been tried in the context of the Section 307(b) inquiry. 5 FCC Rcd at 3005 ¶ 16. *See Fort Collins Telecasters, A Partnership*, 60 RR 2d 1401, 1405-6 ¶ 8 (Rev. Bd. 1986), *rev. denied*, FCC 87-172 (May 13, 1987); *Frank H. Yemm*, 39 RR 2d 1657, 1659 ¶¶ 6-7 (1977). Bursam had no right to a hearing on its waiver request, since Bursam failed to make allegations of fact sufficient to justify a waiver of 47 C.F.R. § 73.187; therefore, the staff properly designated no waiver issue for hearing.[6] *See Loves Park Broadcasting Co.*, 8 RR 2d 998, 999-1000 ¶ 5 (1966), *citing Storer Broadcasting Co.*, 351 U.S. 192, 205 (1956).

5. Similarly, an inevitable summary decision in favor of the incumbent would apparently be the outcome of future renewal challenges in which a Class II station files an

application to improve its facilities that is mutually exclusive with a Class I station's renewal application. We believe that the unnecessary use of hearing procedures does not serve the public interest, and indeed, undermines the Commission's emphasis on efficient use of its limited staff and other resources. *See, e.g., Star Signal Corporation*, 1 FCC Rcd 405, 405-6 ¶ 7 (1986). Accordingly, we direct the Mass Media Bureau to consider appropriate rule changes to permit the summary rejection of renewal challenges such as Bursam's, where allocations rules mandate the outcome of any hearing in favor of the incumbent.

6. However, given Bursam's present right to a comparative hearing, we reaffirm *KPLT* insofar as it mandates a comparison under Section 307(b) between the gains in service area and population that would result from increasing the power of WTHE(AM) and the loss of *all* service by WWKB(AM). We reject Bursam's suggestion that *KPLT* should be modified to permit a comparison of the gains in service resulting from its proposal with *only* the losses in coverage by WWKB(AM) that would result from Bursam's proposal.[7]

7. Although *KPLT* is not cited frequently because few stations seek coverage changes by challenging the renewal of a clear channel facility, it remains good law and has been followed consistently when this kind of renewal challenge is designated for hearing. *See Interstate Broadcasting Company, Inc.*, 2 FCC Rcd 4051 ¶ 7 (M.M. Bur. 1987). The rules governing AM interference do not allow the comparison of gains and losses to resolve AM interference conflicts. Rather, the Commission follows a "go/no-go" approach that categorically prohibits the types of interference set forth in the rules. *See The Audio House, Inc.*, 2 FCC Rcd 3171 ¶ 4 (1987); *Amendment of Part 73 of the Commission's Rules, Regarding AM Station Assignment Standards and the Relationship Between AM & FM Broadcast Services*, 45 FCC 1515, 1522 ¶¶ 13-15 (1964), *recon. denied*, 4 RR 2d 1567 (1965). *KPLT*'s prohibition against weighing the potential gains in service area and population against the loss of listeners by the clear channel station simply reflects the "go/no-go" approach of the overall AM allocation scheme.

8. Grant of both Bursam's proposed power increase and Empire State's renewal would amount to a *de facto* grant of a waiver of 47 C.F.R. § 73.187 to Bursam, when no waiver issue was designated for hearing and when Bursam was not entitled to a hearing on its waiver request.[8] The remedy Bursam seeks, grant of both applications, conflicts with both the Commission's scheme for the allocation of AM service and the premise that the Commission cannot grant an application which fails to comply with the fundamental protection standards set forth in the rules to the detriment of a station entitled to rely on that protection. *See The Audio House*, 2 FCC Rcd at 3172 ¶ 11. There is no reason to disregard valid rules of general applicability, such as the interference rules, merely because the context is a comparative hearing. *See U. S. v. Storer Broadcasting Co.*, 351 U.S. 192, 202-205 (1956); *Simmons v. FCC*, 145 F.2d 578, 579 (D.C. Cir. 1944); *Rio Grande Family Radio Fellowship*, 28 FCC 2d 326, 328 ¶¶ 8-9 (1971). Consequently, the Section 307(b) inquiry mandated by *KPLT* was correctly followed in this case.

III. ORDERS

9. ACCORDINGLY, IT IS ORDERED, That the Application for Review filed June 22, 1990 by Bursam Communications Corporation IS DENIED; and that the Chief of the Mass Media Bureau IS DIRECTED to take action in accordance with paragraph 5, above.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

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[1] The following pleadings are before the Commission: (1) an Application for Review filed June 22, 1990 by Bursam; (2) an Opposition to the Application for Review filed July 6, 1990 by the Mass Media Bureau; and (3) an Opposition to the Application for Review filed July 9, 1990 by Empire State. Bursam was granted an extension of time, to June 22, 1990, in which to file its application for review. *Empire State Broadcasting Corp.*, FCC 90I-60 (Jun. 12, 1990).

[2] The period of critical hours is defined as the two hours after local sunrise and the two hours preceding local sunset. *See* 47 C.F.R. §§ 73.14, 73.187.

[3] Pursuant to *Pillar of Fire*, 2 FCC Rcd 519 (1987), the Section 307(b) issue could be dispositive only if Empire State were not entitled to a renewal expectancy. A contingent comparative issue was also designated.

[4] 47 C.F.R. § 73.3516(e) provides:

> An application for a construction permit for a new broadcast station or for modification of construction permit or license of a previously authorized broadcast station will not be accepted for filing if it is mutually exclusive with an application for renewal of license of an existing broadcast station unless it is tendered for filing by the end of the first day of the last full calendar month of the expiring license term.

[5] We disagree with the Board's suggestion in *dicta* that the Bureau's failure to return Bursam's application as unacceptable for filing implied that the Bureau believed that the Commission's interference rules do not apply to applications filed against a license renewal. *See* 5 FCC Rcd 3002-3 ¶¶ 10-11. The cases cited by the Board do not support its observation that all applications which violate interference rules are subject to summary rejection, since those cases do not involve mutually exclusive applications filed during the renewal filing window for an existing licensee. Compare *KPLT, Inc.*, 1 FCC 2d 961 (1965). In KPLT, a daytime-only AM station filed an application to increase its power during the renewal window for a co-channel Class I station. The daytime-only applicant requested a waiver of the interference rules because its proposal would cause objectionable interference to the Class I station. *See* 1 FCC 2d 961 ¶ 2. The Commission denied the waiver request but ordered a hearing because the proposals were mutually exclusive.

[6] Even if a waiver issue had been warranted, we see no error in the ALJ's rejection of Bursam's evidence concerning its waiver request and the ALJ's subsequent denial of a waiver. Bursam contends that 47 C.F.R. § 73.187 is no longer necessary because the importance of interference protection for Class I

stations has declined. However, by attacking the rule itself, Bursam does not advance an appropriate basis for a waiver since a waiver inquiry assumes the rule's validity. *See WAIT Radio v. FCC,* 418 F.2d 1153, 1157 (D.C. Cir. 1969). The ALJ properly rejected evidence of Bursam's past programming and community service. Non-technical service related arguments do not justify a waiver of technical "go/no-go" AM allocations standards. *See ICBC Corp. v. FCC,* 716 F.2d 926, 930 (D.C. Cir. 1983). The ALJ was also justified in rejecting evidence Bursam presented to demonstrate that WWKB(AM)'s skywave signal causes interference to its own groundwave signal, since the Commission was aware of the effects of such a distortion zone when it adopted the protection standards for clear channel stations, one of which is 47 C.F.R. § 73.187. *See* 4 FCC Rcd at 7018 ¶ 65. Additionally, the ALJ properly excluded this evidence as untimely, since it was not offered as part of Bursam's direct case. *See General Electric Cablevision Corp.,* 11 FCC 2d 667, 668-69 ¶¶ 3,5 (Rev. Bd. 1968).

[7] In this connection, we note that the area Bursam proposes to serve by increasing its power during critical hours contains no area or population served by fewer than five other aural services and partially served by at least four additional aural services during critical hours. 4 FCC Rcd at 7019. Thus, the public interest benefits of Bursam's proposal are marginal at best.

[8] Bursam also argues that a waiver is appropriate pending the outcome of a Commission Rule Making which concerns the validity of the protection standards of 47 C.F.R. § 73.187. *See Notice of Proposed Rule Making, Review of the Technical Assignment Criteria for the AM Broadcast Service,* 5 FCC Rcd 4381 (1990). We disagree. Bursam cites *News America Publishing, Inc. v. FCC,* 844 F.2d 800 (D.C. Cir. 1988) as support for its argument. In that case, the Court noted that the Commission had extended *temporary* waivers of the cross-ownership rules while those rules were the subject of a Rule Making. 844 F.2d at 815. The waivers deferred requirements to divest broadcast properties pending a proposal to relax certain provisions of the cross-ownership rules. Here, however, Bursam did not merely seek the temporary deferral of a divestiture, but proposed that a *new* service be authorized contrary to a still valid rule. In any event, the pending Rule Making on AM allocation standards does not contemplate altering the interference protection which Bursam must afford to WWKB(AM). *See Notice of Proposed Rule Making,* 5 FCC Rcd at 4464 ¶ 31 (1990).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-351

In re Applications of

NORTHPORT BROADCASTING, INC.	File No. BPH-880913MC
DAVID M. BAUGHN	File No. BPH-880914MT
NORTHPORT COMMUNICATIONS, LTD.	File No. BPH-880915ME
WARRIOR BROADCASTING, INC.	File No. BPH-880915MO

For Construction Permit
for new FM Station,
Channel 264A,
Northport, Alabama

ORDER

Adopted: January 15, 1991; Released: January 25, 1991

By the Review Board: MARINO (Chairman), and BLUMENTHAL.

1. On November 13, 1990, Northport Broadcasting, Inc. filed an Appeal from an Order enlarging issues. Thereafter, all the parties to the case entered into a joint settlement agreement which was recently approved by *Memorandum Opinion and Order*, FCC 91M-86 released January 9, 1991, mooting the appeal before us.

2. ACCORDINGLY, IT IS ORDERED, That the appeal filed November 13, 1990, as supplemented December 7, 1990, by Northport Broadcasting, Inc. IS DISMISSED as moot.

FEDERAL COMMUNICATIONS COMMISSION

Joseph A. Marino
Chairman, Review Board

Before the
Federal Communications Commission
Washington, D.C. 20554

In Re: Applications of

Big Island
Broadcasting
Company, Ltd.

For Authority to Construct Three FM Broadcast Booster Stations

File No. BPFTB-881114TC
Keauhou, Hawaii

File No. BPFTB-881114TD
Puueo, Hawaii

File No. BPFTB-881114TE
Waikii, Hawaii

MEMORANDUM OPINION AND ORDER

Adopted: December 21, 1990; Released: January 25, 1991

By the Commission:

1. The Commission has before it for consideration the above-captioned applications for construction permits for three proposed new FM broadcast booster stations filed by Big Island Broadcasting Company, Ltd. (Big Island); a request for waiver of Sections 74.1231(h), 74.1232(e), 74.1235(c) and, 74.1237(d) of the Commission's Rules; informal objections filed by Sirius Communications, Inc. (Sirius), permittee of station KLUA(FM), Kailua-Kona, Hawaii; a "response" to the informal objections filed by Big Island; and other relevant pleadings.

2. An FM booster station receives the signal of a full service FM station and simultaneously retransmits that signal to areas that are unable to receive satisfactory service from the co-owned full service station due to intervening terrain obstructions. An FM booster station operates on the same carrier frequency as its primary full service FM station and may operate with up to 20% of the maximum permissible effective radiated power for the class of primary station that it rebroadcasts. An authorization for an FM booster station is granted only to the licensee or permittee of the full service FM station whose signal it rebroadcasts and is permitted to serve only areas within the predicted service contour of that station. Big Island is the licensee of station KIPA(FM), Hilo, Hawaii. The three booster stations will be located outside the service contour (1 mV/m, 60 dBu contour) of station KIPA(FM). Hence, Big Island has requested a waiver of the rules.

3. In support of its waiver request Big Island asserts that its original application for a construction permit for a Class C facility was designated for comparative hearing (MM Docket 87-63). It further asserts that it reached a settlement with the other applicant. Upon approval of that settlement agreement, the Administrative Law Judge granted Big Island's application for the Class C facility. However, when the authorization was issued, it specified a Class C1 facility and not the requested full Class C. Big Island states that it filed a petition for reconsideration because Class C1 facilities would not provide island-wide coverage. At that time Big Island believed it could acquire a site that would permit full-island coverage. After further investigation, Big Island's consulting engineer concluded that a transmitter located at the potential site would not place a city grade signal over any part of Hilo, the city of license. Big Island therefore requested dismissal of its petition for reconsideration. At the same time it continued to search for a suitable site which would permit coverage of the entire island.

4. Big Island now asserts that it cannot locate the transmitter of station KIPA(FM) at a site where it can provide service to more than the limited Hilo area because of the unique terrain of the island of Hawaii. In particular, the island is roughly triangular in shape and consists of five volcanic mountains about 20 miles apart, connected by saddles 3,000 to 7,000 feet high, formed by overlapping lava flows. There are two high mountains located in the middle of the island, Mauna Kea which is approximately 14,000 feet above sea level and Mauna Loa which is 11,000 feet above sea level.[1] However, the University of Hawaii has an observatory located on Mauna Kea. If Big Island were to locate its radio transmitter there, it would interfere with the data being received through sensitive detectors installed on the observatory telescopes. Consequently, it is unable to obtain authorization for use of that site. A potential site on Mauna Loa was located but it is in a national park, where the tower height is restricted to fifty feet above ground level. This would prevent satisfactory broadcast service to Hilo, KIPA(FM)'s city of license. Other sites at high elevations would have similar restrictions.

5. Big Island states that the only alternative is to use a series of boosters to provide the island-wide coverage it contemplated when it filed its Class C application. Since these boosters would extend KIPA's coverage beyond the 1 mV/m service contour of its C1 authorization (but not a hypothetical Class C facility), Big Island seeks a waiver of the rules. Big Island contends that grant of the waiver would serve the public interest. According to its engineering showing, the three boosters will provide the following service: nighttime, a first aural service to 1,346 persons, a second to 426 persons and a third to 11,446 persons;[2] daytime, a second aural service to 1,329 persons and a third to 2,946 persons. Big Island states that this additional service is essential in view of the many natural disasters that occur on the island and the resulting need for at least one station capable of communicating with the island's entire population. In this respect, it submitted a list of natural disasters that have occurred on the Island of Hawaii between October 1983 and September 1988. These include earthquakes, flash floods, tropical storms, waterspouts and volcanic eruptions. Big Island also submitted documentation from the Federal Emergency Management Agency in San Francisco, California, supporting the notion that the Island of Hawaii is unique within the United States for frequency and diversity of its natural disasters. In addition, Big Island provided letters from Mr. Harry Kim, Administrator, Hawaii County Civil Defense Agency, in support of the proposed boosters. Mr. Kim explains that use of the boosters will expand the reach of station KIPA(FM) "to the entire Island, including many areas which currently receive no radio reception." According to Mr. Kim, the boosters will be "extremely beneficial" to

the districts of Kau and Kona, which currently receive little or no local radio broadcasts when the civil defense system is activated.

6. Sirius objects to the waiver request. It states that other broadcast stations licensed by the Commission and not listed by Big Island in its waiver request are operating in areas where Big Island alleged there was no service. In addition, Sirius asserts that there are outstanding construction permits for new service in other areas where Big Island states there is no service. In support of its contentions, Sirius submits a contour map of the broadcast stations serving the relevant parts of the Island of Hawaii which, in its view, demonstrates that the "claims of KIPA as to these areas being unserved are patently false and incorrect." Sirius also argues that boosters will permit station KIPA(FM) to extend its service contour and circumvent the mileage separation requirements of Section 73.207 which could cause interference to co-channel and adjacent channel stations. Sirius explains that this is so because such assignments are allocated on the basis of mileage separation to station KIPA(FM) and not to the booster stations. In addition, Sirius asserts that waiver of the rules would permit Big Island to provide service outside station KIPA(FM)'s 1 mV/m contour without an opportunity for other applicants to apply for the facilities. It would be more appropriate, according to Sirius, for Big Island to petition for Rule Making to allot new channels to the alleged unserved areas and then file applications for construction permits to build full service stations. Sirius claims that Big Island's attempt to extend its service beyond the 1 mV/m contour of station KIPA is closely related to the issues in MM Docket 88-140 [3] where licensee efforts to extend service beyond the 1 mV/m contour of the primary station is being considered and a freeze has been imposed on the acceptance of new and major change applications for commercial FM translator stations. In Sirius' view, even if the Commission determines that the waiver requests are "meritorious," action must be deferred pending the outcome of Docket 88-140.

7. Big Island, in its response, denies the allegations and alleges that the engineering studies submitted with its waiver request considered all licensed stations and outstanding construction permits, including those listed by Sirius. In addition, Big Island contends that the contour map submitted by Sirius does not refute the maps submitted by it (Big Island). Big Island continues to assert that grant of its waiver request would serve the public interest.

8. The purpose of FM broadcast booster stations is to provide service to areas within the primary station's predicted service contour that are not served by the signal of the primary station due to intervening terrain obstructions. The booster rules are designed to assure that booster stations operate in a manner that preserves the existing service areas of the full-service stations they retransmit. FM booster stations are not to be used for competitive purposes to expand the service areas of the primary stations they retransmit. Such use would alter the fundamental secondary fill-in service intended for FM boosters. Applicants for waiver of the booster rules must demonstrate that the goal or results to be achieved by the proposal for which the waiver is sought would serve the public interest and that the same results could not be achieved consistent with the rules by any other means. Applicants must also demonstrate that grant of the waiver request would not undermine the goals and policies the rules were designed to promote. The Commission is obligated to give all waiver requests a "hard look." *WAIT Radio v. FCC*, 418 F.2d 1153, 1157 (D.C. Cir. 1969). However, an "applicant for waiver faces a high hurdle." *Rio Grande Radio Fellowship, Inc. v. FCC*, 406 F.2d 664 (D.C. Cir. 1968). Applicants requesting waiver of our rules must plead specific facts that demonstrate waiver would serve the public interest.

9. The contour map submitted by Sirius and the contour maps submitted by Big Island show that approximately one-half of the area to be served by KIPA's proposed Puueo booster is presently unserved by any other broadcast station. We thus find no merit in Sirius's allegation that the information submitted by Big Island is false or misleading. Nor do we agree with Sirius's contention that the proposed boosters would cause interference to other FM stations. There is no showing that existing facilities would be adversely affected. Further, if the booster stations were granted and were subsequently shown to cause interference due to modification of existing full service FM stations or new allocations, Big Island would be required to suspend operation. This would be consistent with the secondary nature of boosters, which are not permitted to continue to operate where they cause interference to the direct reception by the public of the off-the-air signal of any authorized broadcast station.[4]

10. Turning to the specific proposals before us, Big Island first asserts that its original intent was to serve the entire island of Hawaii. Big Island supports its contention by stating that it applied for and was granted authorization for Class C facilities which, if centrally located, would have encompassed the island with a 1 mV/m signal and no waiver would have been necessary. However, the centrally located site was only hypothetical and because of island-wide site restrictions, Big Island was unable to meet the minimum antenna height requirements of the rules for Class C facilities. An authorization for Class C1 facilities was therefore issued. We conclude that the intent of a broadcaster to serve a wider area than it is ultimately licensed to serve furnishes no independent basis for waiver of our rules, especially where these rules are specifically intended to limit the broadcaster's ability to extend its signal beyond its authorized service area. We therefore reject this argument as a basis for granting Big Island's waiver requests.

11. Big Island also contends that waiver is necessary because the numerous and severe natural disasters that occur on the Island require that there be one station that can serve all inhabited areas. We do not agree that an unusual number of severe natural disasters requires a single station to cover the entire area. Our experience suggests that broadcasters consistently cooperate to provide disaster information to residents of affected areas. Since there are a number of broadcast stations serving most parts of the Island, we also reject Big Island's second contention as a basis for granting the waiver requests.

12. Finally, Big Island argues that its proposals will provide service to unserved areas. We find that the areas to be served by the Keauhou and Waikii boosters are already receiving service from at least one authorized broadcast facility. Most of the areas covered by these proposed boosters receive coverage from two or more facilities. Therefore, we see no need for Big Island to extend its signal into these particular areas, and reject Big Island's third contention as a basis for granting the Keauhou and Waikii boosters.

13. It is unrefuted, however, that the booster proposed for Puueo will provide a first service to over 1,300 people. Given that fact and the severity of the natural disasters that are known to occur in that area, we find sufficient justification to grant a waiver of the rules to allow Big Island to construct the booster station proposed for Puueo, Hawaii.[5] In granting this waiver we recognize that the booster station will be used in a manner inconsistent with its established purpose. As noted, booster stations may only be operated within a primary FM station's predicted service area. This helps assure that the booster station is not used by full service FM station permittees or licensees to extend the service contour of their full service stations. More recently we reiterated our concern in this regard. *See In the Matter of Amendment of Part 74 of the Commission's Rules Concerning FM Boosters Stations and Television Booster Stations*, 2 FCC Rcd. 4625 (1987). We have consistently held that FM booster stations may only be used to fill in terrain-shadowed areas within the service contour of the primary station where the actual coverage of the primary station does not conform to its predicted coverage area. However, we are confronted in the case of the Puueo proposal with a unique combination of circumstances: recurring natural disasters, a small geographically isolated unserved area, no foreseeable prospects for receiving broadcast service from any other source, including a new stand-alone broadcast station, and the lack of any constraints on the introduction of other broadcast services in nearby areas. Given these facts, and the lack of viable alternatives, we will grant this waiver request.

14. Although in Sirius's view it would be more appropriate for Big Island to petition for Rule Making to add new channels for the unserved areas and then file applications for new FM stations, grant of the Puueo booster application will not preclude applications for new full service facilities in the same area. In this regard, applications for new full service FM stations or for modification of existing FM facilities are reviewed without consideration of existing booster facilities. As a secondary service, a booster station must give way to any conflicting full service proposal. Big Island has demonstrated that there is a current need for broadcast service in Puueo. The question before us is whether grant of Big Island's proposal for Puueo will serve the public interest and we have found this to be the case.

15. Accordingly, for the reasons stated herein, the informal objections filed by Sirius Communications, Inc. ARE GRANTED, to the extent indicated above and DENIED in all other respects; the request for waiver of Sections 74.1231(h), 74.1232(e), 74.1235(c) and 74.1237(d) of the Commission's Rules filed by Big Island Broadcasting Company, Ltd., to permit the above-referenced booster stations to operate outside the 1 mV/m contour of station KIPA-FM, IS GRANTED for application BPFTB-881114TD, Puueo, Hawaii and is DENIED for applications BPFTB-881114TC, Keauhou, Hawaii, and BPFTB-881114TE Waikii, Hawaii. The application for Puueo, Hawaii IS GRANTED and the applications for Keauhou, Hawaii and Waikii, Hawaii ARE DISMISSED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

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[1] Big Island indicates that most of the population of the island resides near the coastal areas, with the center of the island being essentially uninhabited.

[2] None of the areas to be served receive more than four aural services at night.

[3] *Notice of Inquiry, In the Matter of Amendment of Part 74* of the Commission's Rules Concerning FM Translator Stations, 3 FCC Rcd. 3664 (1988); *Notice of Proposed Rulemaking, In the Matter of Amendment of Part 74 of the Commission's Rules Concerning FM Translator Stations,* 5 FCC Rcd. 2106 (1990); *Report and Order,* FCC 90-375, released December 4, 1990.

[4] Section 74.1203(a) of the Commission's Rules, 47 CFR 74.1203(a) (1990).

[5] The Island of Hawaii is covered by an existing Emergency Broadcast System (EBS) plan. Grant of the Puueo booster station will improve this plan by providing emergency information to a larger number of people.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

AMERICAN TELEPHONE & TELEGRAPH COMPANY

File No. I-T-C-90-174

Application for authority to reassign circuits in the PTAT-1 Cable and to acquire connecting circuitry for service between the U.S. and Belgium, France, the Netherlands, Spain, Sweden and Switzerland.

ORDER AND AUTHORIZATION

Adopted: January 15, 1991; Released: January 24, 1991

By the Chief, International Facilities Division:

1. The captioned application, filed by American Telephone and Telegraph Co. (AT&T), requests authority pursuant to Section 214 of the Communications Act of 1934, as amended, to reassign circuits in the Private Transatlantic Telecommunications Cable System (PTAT-1) and to acquire and operate connecting facilities for service between the U.S., on the one hand, and Belgium, France, the Netherlands, Spain, Sweden and Switzerland, on the other hand, and beyond. The application was placed on public notice on September 12, 1990. No comments were received.

2. AT&T is a common carrier engaged in the provision of interstate and foreign telecommunications services. AT&T currently provides service to all the points for which service is requested in the captioned application and seeks to supplement this service by use of PTAT-1 capacity. AT&T has been authorized to acquire and operate circuits in the PTAT-1 cable.[1] AT&T now seeks authority to reassign eight E-1 circuits[2] in the PTAT-1 cable, jointly held by AT&T and its correspondent in the United Kingdom, from service to the United Kingdom to service with Belgium, France, the Netherlands, Spain, Sweden and Switzerland. Since the Commission has previously considered AT&T's need for these circuits, we find that the reassignment of these circuits and the acquisition of necessary connecting circuits will serve the public interest.

3. Accordingly, IT IS ORDERED that application File No. I-T-C-90-174 IS GRANTED, and AT&T is authorized to:

a. reassign a total of eight E-1 circuits in the PTAT-1 cable, jointly held by AT&T and its correspondent in the United Kingdom, from service to the United Kingdom to service with Belgium (one E-1), France (one E-1), the Netherlands (one E-1), Spain (two E-1), Sweden (one E-1), and Switzerland (two E-1);

b. acquire, on an Indefeasible Right of User (IRU) basis, a one-half interest in one E-1 circuit in the UK-France No. 3 cable for service to France;

c. lease a one-half interest in two E-1 circuits in the UK-France No. 3 cable for service to Spain;

d. acquire, on an IRU basis, a one-half interest in one E-1 circuit in the UK-Denmark No. 4 cable for service to Sweden;

e. acquire, on an IRU basis, a one-half interest in three E-1 circuits in the UK-Netherlands No. 12 cable (two for service to Switzerland and one for service to Belgium);

f. lease and operate necessary connecting facilities; and

g. use said facilities to provide AT&T's regularly authorized services between the U.S., on the one hand, and Belgium, France, the Netherlands, Spain, Sweden and Switzerland, on the other hand, and beyond.

4. IT IS FURTHER ORDERED that this authorization is issued subject to the terms and conditions of any license issued to PSI herein under the act entitled "An Act relating to the landing and operation of submarine cables in the United States" (47 U.S.C. §§34-39).

5. This order is issued under Section 0.291 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of the date of public notice of this order (*See* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

FOOTNOTES

[1] *See American Telephone and Telegraph Co.*, 4 FCC Rcd 7005 (1989) and 5 FCC Rcd 2593 (1990).

[2] An E-1 circuit is equivalent to a capacity of 2.048 Megabits per second (Mbps).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

TRT INTERNATIONAL, INC. File No. I-T-C-91-013

Application for authority to acquire and operate facilities for service between the U.S. and Nicaragua and beyond.

ORDER, AUTHORIZATION AND CERTIFICATE

Adopted: January 15, 1991; Released: January 24, 1991

By the Chief, International Facilities Division:

1. The captioned application, filed by TRT International, Inc. (TRTI), requests authority pursuant to Section 214 of the Communications Act of 1934, as amended, to acquire and operate facilities for direct service between the U.S. and Nicaragua. The application was placed on public notice on October 18, 1990. No comments were received. Upon consideration of the application, IT IS HEREBY CERTIFIED that the present and future public convenience and necessity require the provision of direct service between the U.S. and Nicaragua and beyond by TRTI.

2. Accordingly, IT IS ORDERED that application File No. I-T-C-91-013 IS GRANTED, and TRTI is authorized to:

a. lease from Comsat and operate four voice-grade satellite half-circuits between the Roaring Creek, Pennsylvania earth station and an appropriate satellite over the Atlantic Ocean, connecting with similar circuits between the satellite and an earth station in Nicaragua, furnished by TRTI's correspondent in Nicaragua;

b. lease and operate four voice-grade circuits in the Roaring Creek, Pennsylvania earth station;

c. lease and operate connecting facilities between the Roaring Creek, Pennsylvania earth station and TRTI's New York City operating office; and

d. use said facilities to provide TRTI's regularly authorized services, including switched voice service, between the U.S. and Nicaragua and beyond.

3. The Commission retains jurisdiction over this matter to reallocate circuits in the satellite system among the various international common carriers and other authorized users as required to ensure nondiscriminatory use of, and equitable access to, the communications satellite system.

4. No material changes inconsistent with this or any other relevant Commission order shall be made before final execution of an operating agreement between TRTI and its correspondent in Nicaragua, and a copy of the agreement shall be filed with the Commission within 30 days of its execution.

5. IT IS FURTHER ORDERED that the applicant shall file the annual reports of overseas telecommunications traffic required by Section 43.61 of the Commission's Rules, 47 C.F.R. §43.61 (October 1, 1989).

6. This order is issued under Section 0.291 of the Commission's Rules and is effective upon release. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of the date of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

GEN Docket No. 89-605

In the Matter of

Revision of Parts 15 RM-6537
and 68 of the Commission's
rules regarding
cordless telephones

REPORT AND ORDER

Adopted: January 8, 1991; Released: January 25, 1991

By the Commission: Commissioner Duggan issuing a separate statement.

INTRODUCTION

1. By this action, the Commission is amending Parts 15 and 68 of its rules to require cordless telephones to be equipped with security features that protect the public switched telephone network from unintentional line seizure and telephone dialing.[1] We are taking this action to reduce the harm being caused by some cordless telephones to the "911" Emergency Services Telephone System and to the telephone network in general.

BACKGROUND

2. A cordless telephone is a two-way low power communication system consisting of two parts: the "base" unit which connects to the telephone network and the handset or "remote" unit. The base unit and the handset are connected by a radio link that is designed to eliminate the connecting handset cord of a standard telephone, thus allowing the user to move a short distance from the base unit while carrying on a telephone conversation. The radio frequency components of cordless telephones operate under the provisions of Part 15 of the Commission's rules. The base unit must also meet the provisions of Part 68 of the Commission's rules.

3. The rules for cordless telephones were adopted by the Commission on December 22, 1983.[2] In the proceeding which led to the adoption of these rules, the issue of cordless telephone security was raised. [3] Although comments expressed concern that cordless telephones might initiate unintentional dialing and cause operational problems for telephone companies, the Commission chose to let the marketplace decide whether to provide security features that would avoid such problems. However, the Commission did propose, and subsequently adopt, a requirement to attach a label on cordless telephones to inform consumers of the security features incorporated.[4]

4. On September 1, 1988, the Personal Communications Section of the Telecommunications Industry Association (TIA) filed a petition requesting that the Commission consider rules requiring that cordless telephones provide increased protection to the telephone network from unintentional line seizure and dialing, and protection to the user from unintentional ringing. TIA recommended that this be achieved by requiring the transmission and use of a digital security code, or an equivalent method, so that a cordless telephone would not inadvertently respond to either electronic noise or another cordless telephone with a different security code. TIA expressed concern that, based on its studies, cordless telephones not equipped with security coding were causing significant interference to many telephone company services, to customers with low digit telephone numbers, and to the "911" Emergency Services Telephone System.[5]

5. Primarily in an attempt to reduce harm to the "911" Emergency Services Telephone System, the Commission, on December 11, 1989, adopted a *Notice of Proposed Rule Making (NPRM)* in this proceeding.[6] The *NPRM* proposed rules requiring that each access of the telephone network by a cordless telephone and each ringing of a cordless telephone handset be preceded by the transmission of a digital security code word. Access to the telephone network would be permitted only if the security code transmitted by the handset matched the security code set in the base unit. In addition, in order to prevent unintentional ringing of cordless telephones, ringing of the handset would be permitted only if the security code transmitted by the base unit matched the security code in the handset.

6. The Commission proposed, in the *NPRM*, that cordless telephones provide for at least 256 different security code combinations. To further reduce the likelihood of interference, the Commission proposed measures to make it unlikely that two cordless telephones with overlapping operating areas would use the identical security code. The Commission proposed to allow manufacturers to choose from among two plans to facilitate use of different security codes: (1) provide a means for the user to readily select from among at least 256 possible discrete digital codes; or, (2) provide a means for the cordless telephone to automatically select a code from among at least 256 possible discrete digital codes. The proposed rules would also permit cordless telephones to be provided with a combination of these methods. The Commission indicated that it intended to consider alternative plans, including allowing cordless telephones to incorporate a fixed digital code as long as the manufacturing process provided for varying the code. The Commission also invited comments regarding TIA's proposal that manufacturers be permitted to use an alternative security method that would provide protection equivalent to that offered by the proposed methods.

7. The Commission, in the *NPRM*, proposed that, within 60 days following the effective date of a final order in this proceeding, all cordless telephone applications submitted to the Commission for equipment authorization be required to demonstrate compliance with the proposed regulations. Further, within one year from the effective date, all cordless telephones manufactured or imported would be required to comply with the regulations.

8. Twenty-two parties submitted comments or reply comments in response to the *NPRM*. A list of those filing comments is contained in Appendix A.

DISCUSSION

9. The commenters were unanimous in supporting a requirement for cordless telephones to use digital security codes. Most of the commenters also supported the Commission's proposal as detailed in the *NPRM*; however, many commenters were divided on the precise requirements, such as the minimum number of code combinations, the desirable schemes for code implementation, how to adequately achieve variations in security codes, and the implementation dates.

10. From the evidence presented in this proceeding, it appears that interference to the public switched telephone network from cordless telephones, as well as the unintentional ringing of cordless telephones, is a growing problem. Furthermore, there appears to be evidence that the Emergency Services Telephone System is being adversely affected by unintentional dialing by cordless telephones. It also appears that security coding of cordless telephones, which could provide an effective solution to these problems, is not being implemented by manufacturers at a satisfactory rate on a voluntary basis. There is no indication that the percentage of cordless telephones being marketed with security coding is significantly increasing or that marketplace forces will eventually cause such features to become standard on cordless telephones.

11. Thus, it appears that regulation is needed to protect the public switched telephone network from unintentional line seizure and dialing by cordless telephones and to ensure that cordless telephones do not ring unintentionally when in the presence of signals from other cordless telephones or other interfering electrical or electromagnetic emissions. Based on the comments, digital security coding appears to offer a satisfactory means for achieving these objectives. Therefore, the Commission is adopting regulations requiring digital security coding requirements, as contained in Appendix B and outlined below.

12. *Minimum number of code combinations.* The commenters all agreed that a minimum of 256 possible code combinations should be sufficient to achieve the Commission's objectives in this proceeding. GTE and PhoneMate indicated, however, that an even greater number of code combinations would be desirable to provide a further improvement in cordless telephone security.[7]

13. A requirement for a minimum of 256 code combinations by itself ensures that the likelihood of an interaction between two cordless telephones is less than 0.4 percent. Other factors reduce the likelihood of interaction even further. For example, the coding technologies employed by different manufacturers are often incompatible (i.e., use different coding rates, algorithms or subcarrier frequencies) so that two cordless telephones from different manufacturers may not interact even if they appear to be set to the same code. Further, we fully expect that many cordless telephones will be offered with more than 256 combinations in response to demand from that segment of the market interested in greater security.[8] Also, while two cordless telephones may have overlapping service areas, they may be set to different channels since ten channels are available. In light of these factors, we agree with the commenters that a requirement for a minimum of 256 code combinations will provide reasonable protection against interference to the public switched telephone network from cordless telephones and the unintentional ringing of cordless telephones.

14. *Code implementation.* The *NPRM* proposed, *inter alia*, two specific schemes for implementing security coding: allowing the user to select a security code and allowing the cordless telephone itself to automatically select a security code each time it is activated. Based on the comments, both of these schemes appear to offer adequate security without imposing an unreasonable burden upon cordless phone manufacturers. Accordingly, the rules we are adopting will allow these schemes to be used.

15. The *NPRM* also sought comments on permitting fixed security codes. Most commenters supported allowing fixed security codes provided the manufacturer establishes an adequate system for varying the fixed code as cordless telephones are manufactured. GTE suggests that the codes should be changed on a continuous basis. TIA, on the other hand, argues that frequent code changes would be adequate. However, GTE points out that allowing frequent changes could still result in multiple cordless telephones with the same security code being sent to a single retail outlet. Because neighbors often shop in the same stores, GTE concludes that sequentially-manufactured units should be required to have different security codes. AT&T and Uniden suggest that the codes should be varied randomly, while GTE and Dynascan recommend the codes be varied sequentially. Tandy indicates that it is impractical to vary the fixed code during manufacturing, yet Southwestern Bell submits that some manufacturers are already doing so.

16. Comments from Southwestern Bell and AT&T indicate that the initial settings of user-selectable security codes should also be varied in order to achieve geographic separation. AT&T suggests that "a very large number of buyers will not change the code that is pre-set into their telephone."

17. The Commission continues to believe that there must be some means of assuring that cordless telephones, in the same geographic area, have different security codes. We have considered the various comments and have concluded that the only practical way to ensure that cordless telephones operating in the same geographic area are set to different security codes is to require manufacturers to continuously vary the security code of each telephone as it is manufactured. In order to provide manufacturers with the flexibility they seek, we are allowing security codes to be varied either randomly, sequentially, or by using any other systematic method. In addition, manufacturers of cordless telephones that utilize user-selectable security coding may either continuously vary the initial security code or provide cordless telephones that are incapable of transmitting until the user selects a security code.[9] We are also allowing combinations of fixed, automatic, and user-selectable coding provided the coding schemes are consistent with these policies. We believe that the flexibility we have provided by allowing several coding schemes should provide manufacturers with a number of reasonable alternatives for complying with these requirements.

18. *Alternative Security Methods.* The Commission, in the *NPRM*, sought comment on TIA's proposal to allow manufacturers to use alternative security methods for cordless telephones that would provide protection equivalent to that offered by the proposed digital coding methods.[10] It was the consensus of the commenters that alternative methods for providing security coding should be handled through the Commission's waiver process. We anticipate that alternative methods for providing security

coding will be devised that fully satisfy the objectives and fundamental policies described above. We do not intend to impede development of such new technology. We agree with the commenters, however, that such alternative methods are appropriately treated on a case-by-case basis by waivers. To expedite the waiver process, the Commission authorizes the Chief Engineer to grant waivers allowing other equivalent security coding methods.

19. *Clarifications.* Commenting parties expressed concern that the proposed rules were unclear as to how often the security code needs to be transmitted. Southwestern Bell, for example, questioned whether the Commission was suggesting that the digital security code should precede only the initial dialed digit or each dialed digit. Although the *NPRM* did refer to security codes "used in the dialing function", the *NPRM* also stated that "whenever the user initiates a call, the transmitter first sends its digital code and then follows with the dialing signals."[11] In the final rules, in the interest of clarity, we are eliminating the reference to dialing and are indicating that the security code must be transmitted in order to access the telephone network.

20. O'Neill Communications, Inc., in an *ex parte* presentation, stated that it is currently in the advanced stages of developing a fully digital wireless telephony system. O'Neill expressed concern that the proposed rules might require sophisticated communications systems, that already pass unique transmitter identification for billing and other purposes, to transmit an additional security code solely for telephone network access. Obviously, in such cases the transmission of additional security coding information is unnecessary and would be an inefficient use of communications. Therefore, we are specifically stating in the rules that the security code may also be used for other communications purposes.

21. *Repairs.* APCO, in its comments, proposes that the Commission require security coding be added to all noncompliant cordless telephones if they are refurbished or repaired. Most of the comments oppose APCO's proposal.[12] Southwestern Bell states that adding digital coding to an existing unit requires the addition of up to two integrated circuits and ten to twenty electronic components in both the handset and the base unit. Southwestern Bell further states that such reconditioned units would be less reliable, since the cordless telephones were not engineered to operate with the retrofitted circuits. Southwestern Bell states that for smaller models, the size of the handset case may prohibit the addition of the components necessary for reconditioning.

22. The Commission finds that the impact of requiring a retrofit, which in many instances would cost more than a new unit, is not supported by the record. Furthermore, because it is likely that only a small fraction of existing cordless telephones would be returned for repair, there is little benefit to be achieved from such a proposal. Therefore, the Commission is persuaded that a requirement to install security coding on cordless telephones being repaired or refurbished is not in the public interest.

23. *Low voltage detection.* In the *NPRM*, the Commission indicated that low voltage in a cordless telephone's battery supply can cause spurious pulsing, sometimes resulting in the cordless telephone dialing an unintentional call.[13] APCO states that the Commission should require manufacturers to design cordless telephones with a circuit capable of detecting low voltage and disabling operation of the unit before it makes false calls. US West supported APCO's proposal. Neither APCO nor US West submitted any data indicating that the problems associated with low battery voltage are either significant or would not be adequately addressed by our security coding requirements. The majority of the comments state that the problem being encountered by APCO results not from low voltage but from cordless telephones operating at the edge of their usable service area. Southwestern Bell states that, when digital security coding is properly implemented, access to the telephone network will occur only within the range of where the unit can function properly.

24. Based on the comments, the Commission does not believe that it should require cordless telephones to employ circuitry that will disable the connections to the telephone network when the handset battery voltage is low. We do not have sufficient evidence that such a requirement is justified. Further, the comments indicate that the security coding requirements we are adopting may be sufficient to alleviate many false dialing problems caused by cordless telephones with low battery voltage.

25. *Label requirements.* Some of the commenters point out that, when the new regulations go into effect, the label requirement of Section 15.233(k) would become redundant.[14] They requested that this requirement be removed because of the limited space available on a cordless telephone and its packaging. We agree that, since security coding will be mandatory on all cordless telephones, this label requirement serves no useful purpose. Therefore, we are removing this requirement for cordless telephones that are certificated to comply with the security coding requirements we are adopting herein.

26. *Other Matters.* Although not discussed in the *NPRM*, we are also taking this opportunity to consolidate, under the new Section 15.214, the general requirements for cordless telephones currently contained in Sections 15.233(h), (i), and (j). Prior to March 30, 1989, Section 15.235, a note following Section 15.235, and Section 15.236(a) of the former rules contained certain equipment authorization, label, and information requirements that were intended to apply to all cordless telephones regardless of operating frequency. In the *First Report and Order* in GEN Docket No. 87-389, these requirements were moved to Sections 15.233(h), (i), and (j). The title of Section 15.233, however, improperly suggests that these requirements apply only to cordless telephones operating on certain frequencies. Because Section 15.214 clearly applies to all cordless telephones regardless of operating frequency, it is more appropriate that the general cordless telephone requirements be contained therein. This change constitutes a minor amendment to our rules. It imposes no new requirement but, rather, eliminates possible confusion in the existing rules. Therefore, we find for good cause that, for this change, compliance with the notice and comment procedure of the Administrative Procedure Act is unnecessary. *See* 5 U.S.C. 553(b)(B).

27. *Implementation dates.* In the *NPRM*, the Commission proposed that equipment applications filed 60 days following the effective date of the order must demonstrate compliance with the rules adopted herein. The Commission further proposed that within one year of the effective date, all cordless telephones manufactured or imported must comply with the rules adopted herein. DU-COMM argues that, because the Commission is aware of the problems that cordless telephones without security coding can cause, the Commission should immediately cease processing equipment authorization requests, and revoke existing

quipment authorization grants, for any cordless telehone that does not conform to the rules adopted in this roceeding. Such an action would prohibit the further manufacture of cordless telephones without security codng.

28. GTE suggests that, since the manufacturers themelves requested these coding rules, they are aware of its mpact and are presumably prepared to implement it. Tandy, however, states that the mere fact that TIA submited a petition for rule making does not constitute notice hat the ruling requested by TIA will be adopted by the Commission. Tandy points out that in 1983 the Commision proposed telephone security requirements which the Commission subsequently declined to adopt.[15] Tandy beieves that there is a substantial uncertainty as to whether he measures proposed by TIA will be adopted and that here is a substantial uncertainty as to the requirements which the rules will entail.

29. The Commission agrees with Tandy that there was ome uncertainty about the exact rules that would be adopted by the Commission; however, the Commission also takes note of the fact that the marketplace has aleady had seven years to voluntarily implement security coding, which it has failed to do. Based on the comments, he Commission believes that, when it is estimated that 10 million cordless telephones will be sold in the next year and that about half of these telephones could cause harmul interference to the telephone network, swift action is necessary.[16] The Commission believes, based on the comments, that it is economically achievable for manufacturers and importers to comply with these requirements within six months. Therefore, the Commission will require that, within six months of the effective date, all cordless telephones manufactured in or imported into the U.S. employ security coding. In addition, applications for a grant of equipment authorization of cordless telephones without digital coding, as specified above, will not be accepted by the Commission 60 days after the effective date of these rules, as originally proposed. Cordless telephones that have already received equipment authorizaion and, without modification, already comply with the equirements of the rules that we are adopting herein, need not be reauthorized.

PROCEDURAL MATTERS

30. *Regulatory Flexibility Final Analysis*: Pursuant to the Regulatory Flexibility Act of 1980, 5 USC 601 *et seq*., the ollowing final flexibility analysis has been prepared:

I. Need for and objective of the rules.

Cordless telephones without digital coding appear to be causing significant interference to many telephone company services. In some cases, telephone line seizures have nearly closed down central offices and are causing significant unnecessary interference to many telephone company services, particularly to customers with low elephone numbers and to the "911" Emergency Services Telephone System. The objective of the rules being adopted is to reduce the amount of harm that is being caused by cordless telephones to the public switched telephone network and the "911" Emergency Services Telephone System.

II. Summary of issues raised by public comments in response to the Initial Regulatory Flexibility Analysis, Commission assessment of such comments, and changes made as a result.

No commenting parties raised issues specifically in response to the initial regulatory flexibility analysis. The regulations being adopted in this *Report and Order* require cordless telephones to incorporate circuitry which makes use of a security code to provide protection against unintentional access to the public switched telephone network by the base unit of a cordless telephone and unintentional ringing by the handset of a cordless telephone. These functions will be required to operate such that each access of the telephone network or ringing of the handset is preceded by the transmission of a code word. Access to the telephone network will occur only if the code transmitted by the handset matches the code set in the base unit. Similarly, ringing of the handset is to occur only if the code transmitted by the base unit matches the code set in the handset. The proposed regulations are technically and economically achievable without undue burden on any entity. Manufacturers are being given substantial flexibility on how to implement security coding. Because these changes to the regulations will have an impact on a number of manufacturers, requiring redesign of their equipment, transition periods are being adopted. These transition periods will lessen the impact to manufacturers, allowing manufacturers sufficient time to implement any needed design changes before compliance with the regulations adopted by this *Report and Order* is required.

III. Significant alternatives considered.

The Commission has considered all of the alternatives presented in this proceeding and has adopted standards that can be achieved by industry while still providing adequate protection to the public switched telephone network. Alternatives that were considered include deleting all standards and restrictions on the marketing of noncomplying equipment, retaining the present regulations, adopting the regulations proposed in the *NPRM*, or adopting tighter standards than proposed.

31. The Office of Management and Budget has approved the collection of information requirement contained in this rule. The OMB control number for this collection of information requirement is 3060-0436.

ORDERING CLAUSES

32. Accordingly, IT IS ORDERED that under the authority contained in Sections 4(i), 301, 302, 303(e), 303(f), 303(r), 303(s), 304 and 307 of the Communications Act of 1934, as amended, Parts 15 and 68 of the Commission's Rules and Regulations ARE AMENDED as set forth in Appendix B below. These rules and regulations are effective **March 11, 1991.** IT IS ALSO ORDERED that authority is delegated to the Chief Engineer to grant waivers to manufacturers employing alternative security coding methods, provided there is basis for finding that the coding employed will provide at least the same level of protection as that provided in the rules adopted herein. IT IS FURTHER ORDERED that this proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX A

Parties Filing Formal Comments

1. Dynascan Corporation; Cobra Electronics Group
2. Associated Public-Safety Communications Officers, Inc. (APCO)
3. United States Telephone Association (USTA)
4. The Bell Atlantic Telephone Companies (Bell Atlantic)
5. GTE Service Corporation (GTE)
6. Ameritech Operating Companies (Ameritech)
7. BellSouth Corporation and its operating telephone companies, Southern Bell Telephone and Telegraph Company and South Central Bell Telephone Company
8. Pacific Bell and Nevada Bell (The Pacific Companies)
9. Southwestern Bell Corporation
10. Contel Material Management Co.
11. Uniden America Corporation (Uniden)
12. DuPage Public Safety Communications (DU-COMM)
13. Central Telephone Company (CENTEL)
14. National Telephone Cooperative Association (NTCA)
15. O'Neill Communications, Inc.
16. Personal Communications Sections of the Telecommunications Industry Association (TIA)
17. State of California, Telecommunications Division
18. Tandy Corporation (Tandy)
19. PhoneMate, Inc.
20. American Telephone and Telegraph Company (AT&T)
21. New York Telephone Company and New England Telephone and Telegraph Company (NYNEX)
22. U S West Communications

APPENDIX B

A. Title 47 of the Code of Federal Regulations, Part 15 is amended as follows:

1. The authority citation for Part 15 continues to read as follows:

AUTHORITY: Sections 4, 302, 303, 304, and 307 of the Communications Act of 1934, as amended, 47 U.S.C. Sections 154, 302, 303, 304, and 307.

2. Section 15.37, is amended by adding a new paragraph (e) to read as follows:

Section 15.37 Transition provisions for compliance with the rules.

* * * * *

(e) For cordless telephones: The manufacture and importation of cordless telephones not complying with Section 15.214(d) shall cease on or before (insert date six months after effective date). These provisions will not apply to cordless telephones which are repaired or refurbished, or re-imported after repair or refurbishment. Applications for a grant of equipment authorization of cordless telephones not complying with Section 15.214(d) will not be accepted by the Commission after (insert date 60 days after effective date). Cordless telephones that have previously received equipment authorization and that, without modification, already comply with the requirements of Section 15.214(d), need not be reauthorized.

3. A new Section 15.214 is added, prior to the heading "Radiated Emission Limits, Additional Provisions", to read as follows:

Section 15.214 Cordless telephones.

(a) For equipment authorization, a single application form, FCC Form 731, may be filed for a cordless telephone system, provided the application clearly identifies and provides data for all parts of the system to show compliance with the applicable technical requirements. When a single application form is submitted, both the base station and the portable handset must carry the same FCC identifier. The application shall include a fee for certification of each type of transmitter and notification or certification, if appropriate, for each type of receiver included in the system.

(b) A cordless telephone which is intended to be connected to the public switched telephone network shall also comply with the applicable regulations in Part 68 of this Chapter. A separate application for registration under Part 68 is required.

(c) The label required under Subpart A shall also contain the following statement: "Privacy of communications may not be ensured when using this phone."

(d) Cordless telephones shall incorporate circuitry which makes use of a digital security code to provide protection against unintentional access to the public switched telephone network by the base unit and unintentional ringing by the handset. These functions shall operate such that each access of the telephone network or ringing of the handset is preceded by the transmission of a code word. Access to the telephone network shall occur only if the code transmitted by the handset matches the code set in the base unit. Similarly, ringing of the handset shall occur only if the code transmitted by the base unit matches the code set in the handset. The security code required by this Section may also be employed to perform other communications functions, such as providing telephone billing information. This security code system is to operate in accordance with the following provisions.

(1) There must be provision for at least 256 possible discrete digital codes. Factory-set codes must be continuously varied over at least 256 possible codes as

each telephone is manufactured. The codes may be varied either randomly, sequentially, or using another systematic procedure.

(2) Manufacturers must use one of the following approaches for facilitating variation in the geographic distribution of individual security codes:

(i) Provide a means for the user to readily select from among at least 256 possible discrete digital codes. The cordless telephone shall be either in a non-operable mode after manufacture until the user selects a security code or the manufacturer must continuously vary the initial security code as each telephone is produced.

(ii) Provide a fixed code that is continuously varied among at least 256 discrete digital codes as each telephone is manufactured.

(iii) Provide a means for the cordless telephone to automatically select a different code from among at least 256 possible discrete digital codes each time it is activated.

(iv) It is permissible to provide combinations of fixed, automatic, and user-selectable coding provided the above criteria are met.

(3) A statement of the means and procedures used to achieve the required protection shall be provided in any application for equipment authorization of a cordless telephone.

4. Section 15.233 is amended by removing paragraphs (h), (i), (j), and (k), and adding new paragraph (h) to read as follows:

Section 15.233 Operation within the bands 46.60 - 46.98 MHz and 49.66 - 50.0 MHz.

* * * * *

(h) For cordless telephones that do not comply with Section 15.214(d), the box or other package in which the individual cordless telephone is to be marketed shall carry a statement in a prominent location, visible to the buyer before purchase, which reads as follows:

> NOTICE: The base units of some cordless telephones may respond to other nearby units or to radio noise resulting in telephone calls being dialed through this unit without your knowledge and possibly calls being misbilled. In order to protect against such occurrences, this cordless telephone is provided with the following features: (to be completed by the responsible party).

An application for certification of a cordless telephone shall specify the complete text of the statement that will be carried on the package and indicate where, specifically, it will be located on the carton.

B. Title 47 of the Code of Federal Regulations, Part 68 is amended as follows:

1. The authority citation for Part 68 continues to read as follows:

AUTHORITY: Secs. 4, 201, 202, 203, 204, 205, 208, 215, 218, 313, 314, 403, 404, 410, 602, 48 Stat. as amended, 1066, 1070, 1071, 1072, 1073, 1076, 1077, 1087, 1094, 1098, 1102; 47 U.S.C. 154, 201, 202, 203, 204, 205, 208, 215, 218, 313, 403, 404, 410, 602, unless otherwise noted.

2. Section 68.200 is amended by adding a new paragraph (k), to read as follows:

Section 68.200 Application for equipment registration.

* * * * *

(k) Any application for registration of a cordless telephone operating under the provisions of Part 15 of this Chapter shall be accompanied by a statement indicating that the device contains appropriate provision for protection of the public switched telephone network, pursuant to the requirements in Section 15.214.

FOOTNOTES

[1] Security provisions referred to in this proceeding are cordless telephone features that prevent unauthorized access to the telephone line, the dialing of calls in response to signals other than those from the owner's handset and the unintentional ringing of a cordless telephone's handset. These terms do not refer to the ability of someone else to listen in on a conversation.

[2] *See Report and Order* in GEN Docket No. 83-325, 49 FR 1512 (adopted December 22, 1983).

[3] *See id.* at para. 20-27.

[4] *See Second Report and Order* in GEN Docket No. 83-325, 50 FR 24513 (adopted May 20, 1985).

[5] TIA indicated that these problems typically occur when such telephones respond to random radio noise bursts and signals from other cordless telephones on the same channel and, in turn, generate random hook switch closures that are interpreted by the telephone network as dialing sequences.

[6] *See Notice of Proposed Rule Making* in GEN Docket No. 89-605, 4 FCC Rcd. 8808.

[7] If all cordless were set to a single code combination, the telephone network would be protected from false dialing and line seizures from random noise bursts; however, it would not eliminate problems caused by cordless telephones placing calls through a neighbor's base unit. By requiring a minimum of 256 code combinations, these problems should also be avoided.

[8] According to AT&T's comments, all cordless telephones offered by AT&T have, for some time, incorporated a digital security coding feature. The AT&T 5500 provides 65,000 possible code combinations and operates on all ten available channels, thereby offering 650,000 possible code and channel combinations. It sells for under $150.

[9] We note that, in some existing cordless telephones, the security code is pre-set at a value for which no security coding is provided. The new rules would prohibit cordless telephones from being capable of operating under these conditions.

[10] *See Notice of Proposed Rule Making* in GEN Docket No. 89-605, *supra.* at para. 17.

[11] *See id.*, n. 6.

[12] The Pacific Companies requested that the Commission initiate a study to determine if the proposed rules should be extended to deal with existing cordless telephones that lack security provisions. NYNEX joined in this request.

[13] *See NPRM*, footnote 8, *supra.*

[14] The required statement reads as follows: "NOTICE: The base units of some cordless telephones may respond to other nearby units or to radio noise resulting in telephone calls being dialed through this unit without your knowledge and possible calls being misbilled. In order to protect against such occurrences, this cordless telephone is provided with the following features: (to be completed by the responsible party)." Prior to the *First Report and Order* in GEN Docket No. 87-389, 4 FCC Rcd 3493 (1989), this label requirement was in Section 15.236(b).

[15] *See Notice of Proposed Rulemaking,* GEN. Docket No. 83-325, 48 FR 16,298, April 15, 1983.

[16] Ameritech states that approximately 29 million cordless telephones have been imported into this country in the last three years and that about 60% have no form of security coding.

Separate Statement
of
Commissioner Ervin S. Duggan

In Re: Revision of Parts 15 and 68 of the Commission's Rules Regarding Cordless Telephones (Gen. Docket No. 89-605).

Roughly seven years ago --- in an act of stunning, even dangerous, naivete --- the Commission declined to adopt cordless telephone security rules. Instead of imposing such rules, the Commission dealt with the "potential problem of inadequate cordless telephone security" by merely hoping "that the marketplace would provide appropriate features . . . ". Amendment of Part 15 to Add New Interim Provisions for Cordless Telephones, FCC 83-597, at paragraph 27.

In the intervening years, cordless telephones lacking security features have been responsible for interference with telephone company operations. They have, as predicted seven years ago, inconvenienced many telephone users. In some cases, they have even interfered with "911" emergency services --- services upon which human life and safety often critically depend.

I am pleased, then, that the Commission has finally concluded that the public interest does, after all, require rules to preserve the integrity of the public switched telephone network.

Before the
Federal Communications Commission
Washington, D.C. 20554

GEN Docket No. 89-626

In the Matter of

Amendment of Part 15 of the
Commission's Rules to Permit
Cordless Telephone Operation
on Offset Frequencies

REPORT AND ORDER

Adopted: January 8, 1991; Released: January 25, 1991

By the Commission:

1. By this action, the Commission amends Part 15 of the Rules to permit cordless telephone manufacturers to position channels at other than the center of the ten frequency pairs set forth in Section 15.233 of the Rules, provided emissions remain within the specified bandwidth limitation.

BACKGROUND

2. On December 22, 1983, the Commission allocated ten duplex channels in the 46 and 49 MHz bands for the operation of cordless telephones pursuant to Part 15 of the rules. Under the rules originally adopted, transmissions from cordless telephones must fall on one or more of the ten authorized duplex channels, must be centered on the channel, and must be within a specific bandwidth. This allocation, which is in spectrum allocated to the Federal Government, was intended to be temporary.[1]

3. Subsequently, the Electronic Industries Association (EIA) filed a petition for rule making seeking a permanent allocation for cordless telephones in the 800/900 MHz band. Finding that an allocation in that portion of the spectrum for cordless telephones was not justified, the Commission denied EIA's proposal on November 19, 1987.[2] Instead, with the cooperation of the Executive Branch of the Federal Government, the Commission amended Part 15 of its Rules to allow cordless telephones to use the 46/49 MHz band indefinitely. [3] The Commission also concluded that users should be permitted to position channels at other than the center of the ten frequencies set forth in the rules, provided emissions remained within the specified bandwidth.[4] As a result of this decision, cordless telephones could, for example, incorporate a design that split the current twenty kilohertz bandwidth into two ten kilohertz channels. This new provision became known as the offset channel rule.

4. EIA petitioned the Commission for partial reconsideration of the latter *Order* to the extent that it permitted cordless telephone operation on offset channels. EIA predicted increased interference between cordless telephone users if the offset channel rule were adopted. EIA further contended that modifying the rules to allow cordless telephones to operate on offset channels required a rule making proceeding. On December 20, 1989, the Commission granted the EIA petition for reconsideration in a *Memorandum Opinion and Order* (*MO & O)* staying the rule change that permitted the use of offset channels.[5] Subsequently, the Commission issued a *Notice of Proposed Rule Making* (*NPRM)*, proposing to allow cordless telephone operation on offset channels.[6] The *NPRM* also sought comments on a proposal made by ASCII of America (ASCII) suggesting that the spread spectrum technique of frequency hopping be permitted during the transmission of voice communications.

DISCUSSION AND DECISION

Offset Channels

5. *Comments*. Although most parties agree that additional channels are needed for cordless telephones, they believe that the channel offset proposal would result in an unacceptably high level of interference.[7] Commenters point out that about half the current cordless telephones being used have a "guard" or "pilot tone" offset 4 to 7 kHz from the carrier frequency for "hook switch" operations.[8] Commenters argue that a 5 kHz channel offset could overlap the "guard tone" and substantially increase the likelihood of interference to "hook switch" operations because of false "guard tone" signals that might be transmitted. Uniden observes that such interference would have several adverse consequences for central office operations. This result, according to Uniden, would be inconsistent with the Commission's ongoing effort to eliminate such interference by establishing digital security coding standards for "hook switch" operations[9] and might also result in greater interference to voice communications. AT&T and TIA state that false dialing of 911 emergency numbers and "busying-out" of entire central offices have already occurred in some cases because of interference to "guard tone" operations and believe this phenomenon will occur more frequently if channel offsets are permitted. Additionally, AT&T and Uniden observe that because some of the cordless telephone channels are separated by only 15 kHz, using offsets on these channels would have even a greater likelihood of causing adjacent channel interference. They point out that positioning the "guard tone" signal, used to contact the central office regarding the engaged status of the device, too close to the fringe of the adjacent channel, would increase the the likelihood of false 911 calls and tie ups of the central office equipment. AT&T points out that both the cordless telephone user and his neighbors could experience the interference. In reply, some commenters propose that the Commission delay the effect of the proposed offset channel rule until the concept can be further analyzed.

6. *Decision*. We do not anticipate any substantial increase in interference from cordless telephones operating on offset channels. Contrary to Uniden's contentions, we do not consider it very likely that offset channels will increase co-channel and adjacent channel interference to voice communications. Interference between devices is most prevalent when both devices are centered on the same frequency. As the center frequency of each device is moved away from the other, interference is generally reduced. Offset channels will result in fewer cordless tele-

phones being centered precisely on the same frequency and, therefore, should reduce interference to voice communications.

7. Only half the cordless telephones on the market use a "guard tone" design. Further, many of the "guard tone" cordless telephones employ two guard tones in an effort to avoid interference.[10] We do not expect these telephones to suffer any interference from cordless telephones operating on offset channels. As for the remainder of the "guard tone" cordless telephones, interference from an offset channel operation should be no more of an interference problem than that currently experienced from cordless telephones operating on the center frequency because the permitted frequency tolerance for cordless telephones can easily vary more than 5 kHz.[11] We recently addressed the problem of false dialing in GEN Docket No. 89-605, wherein we proposed requiring digital security coding for "hook switch" operations. In a separate item today,[12] we are adopting the rules associated with that proposal. We are requiring that all cordless telephones manufactured in or imported into the United States on or after 6 months from effective date of GEN Docket No. 89-605 incorporate digital encoding. We expect that it will take several years before manufacturers can design, develop, and substantially market new cordless telephones that use offset channels. Whatever little interference that might have been experienced by central offices or 911 operations, permitting the use of offset channels can be minimized by requiring that the introduction of offset channel equipment coincide with the effective date of the new digital security coding requirement. Further, we find that, the offset channel option should increase the spectrum efficiency that will be achieved. We also believe that "hook switch" type interference will not be intensified by offset channel operation.

Miscellaneous Matters

8. Commenters contend that the ASCII proposal allowing frequency hopping could significantly increase the risk of interference to other cordless telephones. According to Southwestern Bell, frequency hopping is not a viable technique for cordless telephones, which operate over only ten channels. In addition, AT&T asserts that intermittent transmissions falling at a "guard tone" frequency would have a greater potential for causing interference than a steady state carrier.

9. We agree that frequency hopping would not be effective for cordless telephone communications in the 46/49 MHz band. Because the likelihood of interference occurring from such operations could be significant, we will not adopt ASCII's proposal.

10. Uniden and TIA took the opportunity to recommend several non-related rule changes. They suggest that Section 15.233(a) be amended to permit an intentional radiator that is used as part of a cordless telephone system to operate on one or more frequency pairs. By this request, TIA intended to clarify the issue of whether a cordless telephone may scan the assigned channels for the purpose of finding a channel with the least interference.[13] We agree that an automatic channel selection feature, might be useful to enable a cordless telephone to select the channel with the least interference. A rule change is not necessary. This method is available and this practice is already permitted. Also, Uniden proposes that cordless telephones be relieved of the obligation of complying with the radiated emission limits of Section 15.209 of the Commission's Rules. Uniden's proposal is beyond the scope of this proceeding. Although Uniden is free to renew its request in a separate rule making petition, our initial view is that reducing the requirements for unwanted emissions would result in an unacceptable potential to cause harmful interference to authorized radio services.

11. Accordingly, under the authority contained in Sections 4(i), 301, 302, and 303 of the Communications Act of 1934, as amended, IT IS ORDERED that Part 15 of the Commission's Rules and Regulations ARE AMENDED as set forth in the Appendix. IT IS FURTHER ORDERED THAT this proceeding IS TERMINATED. The rules adopted in this proceeding will be effective **September 11, 1991.**

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX

Title 47 of the Code of Federal Regulations, Part 15, is amended as follows:

1. The authority citation for Part 15 continues to read as follows:

AUTHORITY: Section 4, 302, 303, 304, and 307 of the Communications Act of 1934, as amended, 47 U.S.C. 154, 302, 303, 304, and 307.

2. In Section 15.233, paragraphs (b) and (d) are revised, paragraph (e) is republished to read as follows:

Section 15.233 Operation Within the Bands 46.60-46.98 MHz and 49.66-50.0 MHz.

* * * * *

(b) An intentional radiator used as part of a cordless telephone system shall operate on one or more of the following frequency pairs:

CHANNEL	BASE TRANSMITTER (MHz)	HANDSET TRANSMITTER (MHz)
1	46.610	49.670
2	46.630	49.845
3	46.670	49.860
4	46.710	49.770
5	46.730	49.875
6	46.770	49.830
7	46.830	49.890
8	46.870	49.930
9	46.930	49.990
10	46.970	49.970

* * * * *

(d) The fundamental emission shall be confined within a 20 kHz band centered on the actual carrier frequency listed in paragraph (b), as adjusted by the frequency tolerance of the transmitter at the time testing is performed. Modulation products outside of this 20 kHz band shall be attenuated at least 26 dB below the level of the unmodulated carrier or to the general limits in Section 15.209, whichever permits the higher emission levels. Emissions on any frequency more than 10 kHz removed from this 20 kHz band shall consist solely of unwanted emissions and shall not exceed the general radiated emission limits in Section 15.209. Tests to determine compliance with this requirement shall be performed using an appropriate input signal as prescribed in Section 2.989 of this Chapter.

(e) All emissions exceeding 20 microvolts/meter at 3 meters are to be reported in the application for certification.

* * * * *

FOOTNOTES

[1] *See Report and Order*, GEN Docket No. 83-325, 49 FR 1512 (January 1, 1984), 55 RR 2d 279 (1984). *See* 47 CFR Section 15.233 (1989), Operation within bands 46.60-46.98 MHz and 49.66-50 MHz.

[2] *See Order*, RM-4780, 2 FCC Rcd 7278 (1987).

[3] *See Order*, RM-4780, 2 FCC Rcd 7278 (1987).

[4] *See Order*, RM-5320, 2 FCC Rcd 7276 (1987).

[5] *See Memorandum Opinion and Order*, 5 FCC Rcd 307 (1989).

[6] *See Notice of Proposed Rule Making*, 5 FCC Rcd 309, adopted December 20, 1989 and released January 17, 1990.

[7] Five parties filed comments in this proceeding including: American Telephone and Telegraph Company (AT&T); Dynascan Corporation, Cobra Electronics Group (Dynascan); Southwestern Bell Corporation (Southwestern Bell); Telecommunications Industry Association (TIA), Personal Communications Section (TIA is a subgroup of the Electronics Industry Association); and Uniden America Corporation (Uniden). Reply comments were filed by AT&T, TIA, GTE Service Corporation, and United States Telephone Association

[8] The guard tone signals the base unit's "hook switch" that the telephone is engaged so that the base unit can activate a "hook relay" in order to communicate that fact to the telephone company's central office. AT&T and Dynascan claim that up to 15 million cordless telephones use the guard tone technology today. According to commenters, another 15 million cordless telephones in use today employ a digital coding technology for "hook switch" operations.

[9] *See Notice of Proposed Rule Making,* GEN Docket No. 89-605, 4 FCC Rcd 8808, (1989).

[10] Both guard tones must be detected in these devices before he hook relay is engaged. Thus, the probability of false dialing n these devices is most unlikely.

[11] A +/− 5 kHz frequency stability tolerance can already produce this degree of channel overlap; i.e., if one transmitter is 5 kHz low and the other 5 kHz high in frequency, the overlap would amount to as much as a 10 kHz offset.

[12] *See Report and Order,* Gen Docket No. 89-605, adopted XXX.

[13] On September 25, 1990 the FCC staff contacted Mr. Eric J. Schimmel, Vice President, Telecommunications Industry Association, to verify the intent of his comments filed in this proceeding on March 8, 1990.

Before the
Federal Communications Commission
Washington, D.C. 20554

GEN Docket No. 88-372

In the Matter of

Amendment of Parts 2 and 80 of the Commission's Rules Applicable to Automated Maritime Telecommunications Systems (AMTS). RM-5712

FIRST REPORT AND ORDER

Adopted: January 10, 1991; Released: January 25, 1991

By the Commission:

I. INTRODUCTION

1. By *Notice of Proposed Rule Making*, 3 FCC Rcd 4736 (1988) (*NPRM*) we proposed to amend our Rules to permit Automated Maritime Telecommunications Systems (AMTS) operations in the 216-220 MHz band on a nationwide basis and to relax mileage restrictions on coast stations operating on frequencies below 217.000 MHz in the vicinity of a TV channel 13 station.[1]

2. In this *First Report and Order* we are amending the rules to permit AMTS operations on a nationwide basis. Our consideration of issues pertaining to restrictions on coast stations use of frequencies below 217.000 MHz in the vicinity of a TV channel 13 station will be addressed in a Second Report and Order. We will address these issues after consideration of the TV Answer, Inc. (TV Answer) petition for rule making (RM-6196) seeking a portion of the 216-222 MHz band for a new interactive video and data service.

II. BACKGROUND

3. As a result of a U.S. proposal, the 1979 World Administrative Radio Conference (WARC) allocated the 216-220 MHz band to the maritime mobile service in Region 2, which includes the Americas and Greenland. The Commission allocated this band for use on the Mississippi River System by AMTS. *Inland Waterways Communications System*, 84 FCC 2d 875, *recon.*, 88 FCC 2d 678 (1981), *aff'd sub nom. WJG Tel. Co., Inc. v. F. C. C.*, 675 F.2d 386 (D.C. Cir. 1982). Subsequently the Commission expanded the authorized service area of the AMTS to the Gulf Intracoastal Waterway (GIWW), 51 RR 2d 440 (1982), and the Gulf of Mexico, 56 RR 2d 1613 (1984). The AMTS provides automated, integrated, interconnected ship-to-shore communications. The AMTS is similar to a cellular phone system, which includes non-voice services, for tugs, barges, and other vessels to use as they move along a waterway. It offers improved services over those available from individual public coast stations.

4. In establishing the AMTS, the Commission considered the potential for interference to television reception, particularly channels 13 and 10, and conditioned the operation of AMTS coast stations on the requirement that "no harmful interference will be caused to television reception." *See* Section 80.215(h), 47 C.F.R. § 80.215(h). Channel 13 (210-216 MHz) is adjacent to the AMTS band and thus there is a potential for adjacent channel interference. Channel 10 (192-198 MHz) is one-half the TV intermediate frequency (IF) below the AMTS band so there is also a potential for "half-IF interference."[2]

5. As a result, the AMTS rules include specific provisions to minimize the possibility of interference to television reception. There are 80 channels in the AMTS, divided into four groups of 20 -- Groups A, B, C and D. *See* Section 80.385, 47 C.F.R. § 80.385. Applicants proposing to locate a coast station within 169 kilometers (105 miles) of a TV channel 13 station or within 129 kilometers (80 miles) of a TV channel 10 station must submit an engineering study showing the means of avoiding interference within the Grade B contour of the TV station. *See* Sections 80.475(b)(1) and 80.215(h)(2)-(4), 47 C.F.R. §§ 80.475(b)(1) and 80.215(h)(2)-(4). Additionally, Group C and D channels cannot be used for coast stations within 105 miles of a TV channel 13 station, as they are closer in frequency to TV channel 13 than are the Group A and B channels. *See* Sections 80.215(h)(5) and 80.385(a)(2). Finally, if despite these precautions interference to TV reception is caused, Section 80.215(h)(4) requires the licensee to eliminate any interference caused within the Grade B contour of the TV station within 90 days of being notified of the interference by the Commission. If the interference is not eliminated within the 90 day period, operation of the offending coast station must be discontinued. That rule also encourages the licensee to help resolve all complaints of interference outside the Grade B contour.

6. The Commission conducted a study to analyze the interference potential from AMTS systems to TV reception. R. Eckert, *Guidance for Evaluating the Potential for Interference to TV from Stations of the Inland Waterways Communications Systems*, FCC/OST TM 82-5 (July 1982)(*Guidance*). This report is a model for applicants to use in performing any required engineering analysis of potential interference from AMTS systems to TV reception. The analysis was based on very conservative interference protection criteria. For example, the TV picture quality used for the analysis was "just perceptible" interference.

7. There is presently only one AMTS system, licensed to Watercom, serving the Mississippi River System and the GIWW. Watercom was initially granted authority to construct and operate an AMTS on the Group A channels in 1982, and its authorization was modified to include the Group B channels in 1984. Watercom built its system and put it on the air in segments in 1986 and 1987. During the time it has been operating there have been no complaints of interference to television reception.

8. We issued the *NPRM* in this proceeding in response to a petition for rule making filed by Watercom, requesting that AMTS be extended nationwide and that the prohibition on operating within 105 miles of a TV channel 13 on Group C and D channels be eliminated or modified.[3]

III. DISCUSSION

9. The *NPRM* proposed to permit nationwide (*i.e.*, throughout the 50 states) expansion of AMTS and the use of Group C and D channels subject to the same restrictions against interference to TV reception that apply to Group A and B channels. Additionally, we proposed to delete the requirement of Section 80.475(b) that an AMTS system cover 60 percent of a waterway (or its entirety if less than 150 miles (240 kilometers)) to permit greater flexibility in design. We requested comment, however, on whether there was a need for some requirement to encourage interoperability over a substantial portion of a waterway or coastline. Finally, we proposed blanket licensing of an AMTS system without licensing the individual mobiles.

10. The commenters included TV interests, Watercom and Maritel. Watercom and Maritel supported nationwide expansion and full use of Group C and D channels, and the broadcasters opposed both because of concerns about interference to TV reception. Further, in its comments TV Answer opposes the proposed rule changes to the extent that such changes would preclude the grant of its petition for rule making (RM-6196) which seeks a portion of the 216-222 MHz band for a new interactive video and data service. Specifically, TV Answer requested that the AMTS Group D channels assigned for ship stations be reallocated for interactive video and data service. We conclude that nationwide expansion of the A and B channels should proceed and the issue of the C and D channels should be addressed after full consideration of TV Answer's petition.

11. Because these proposed rule changes pertaining to interference and expansion are inseparable we will discuss them first. We then will address the other proposals pertaining to the 60 percent coverage requirement and blanket licensing.

A. Need for Nationwide Expansion

12. In large part the comments of TV interests argue that there has not been a sufficient showing of need for geographic expansion of AMTS operations in view of the potential for interference they perceive could occur if nationwide expansion is permitted. These comments reiterate concerns they had brought to our attention in previous proceedings involving AMTS. That is, they are concerned about the possibility of interference to TV reception and suggest the proposal lowers the level of interference protection for TV reception. *See, e.g.*, Association of Maximum Service Telecasters (AMST) Comments, *passim*. As discussed below, this is not the case. They make arguments, based on the *Guidance* memo, which the Commission considered and found unpersuasive in the *NPRM* and previous decisions involving AMTS. They also argue that Watercom's experience with a "ribbon" system along a river may not be comparable in interference potential to use of AMTS in a harbor, bay or lake. WRLH, Inc., Comments, Att. at 6. These commenters also assert that the threat of potential interference to TV reception is now even greater because the consumer can turn to interference free video services such as cable and video tapes in lieu of over-the-air TV, so over-the-air TV needs even more stringent protection. WLOX Comments at 4; AMST Comments at 7.

13. We discussed the question of television reception interference in the *NPRM* and tentatively concluded that the proposed expansion of AMTS would not cause interference problems to TV channels 13 and 10.[4] The comments submitted do not persuade us to reach a different conclusion. We emphasize again that we are not proposing to permit increased interference. We would require the same level of interference protection to TV reception for any future use. This means that, in addition to the requirement that "no harmful interference will be caused to television reception," the technical standards and interference analysis requirements of Sections 80.215(h)(1)-(4) and (6) and 80.475(b)(1) and (2) will apply. That is, applicants must design their systems in accordance with the requirements to avoid interference and must notify TV stations that may be affected of their applications. We are also amending Section 80.215(h)(3), which requires the applicant's plan to limit its interference contour to fewer than 100 residences or to take measures described in Section 80.215(h)(3)(i)-(iii), to make clear that, where more than one of the applicant's coast stations affects reception of a given TV station, we will count the total number of residences affected. Finally, if these requirements prove to be insufficient, and interference does occur, Section 80.215(h)(6) requires the licensee to eliminate it or cease operation. Thus, a fundamental premise of our AMTS rules is that no harmful interference be caused to television reception. If such interference does occur, the AMTS coast station must eliminate any interference to TV reception it causes within the Grade B contour or discontinue operation.

14. We emphasize also that no one has brought to our attention any indication that interference has occurred from Watercom's operations, including WLOX, whose channel 13 station at Biloxi, Mississippi, is bracketed by Watercom coast stations at Mobile and Bay St. Louis. Watercom, Reply Comments at 5. Similarly the comments of WRLH, Inc., licensee of WEAU-TV, channel 13, Eau Claire, Wisconsin, which is positioned near three AMTS coast stations, did not mention any actual interference problem that it had experienced. Maritel, Reply Comments at 6. Watercom has stated that its AMTS coast stations transmit continuously. Watercom, Reply Comments at 3. Because of the concerns they have articulated in their comments, we are confident that channel 13 stations such as WEAU-TV and WLOX-TV, which are located in an area of Watercom's AMTS operations, have been carefully monitoring the situation and would have detected interference if any had occurred.

15. During its nearly four years of operation Watercom received only one complaint alleging that it was causing interference. Watercom investigated this complaint from WOWK-TV, Huntington, West Virginia, and determined that the problem was unrelated to Watercom's operation but was caused by faulty TV antenna preamplifiers used by residents in the remote community where the complaint originated. WOWK-TV acknowledged Watercom's cooperation and noted that Watercom's engineer convinced the owners of the faulty equipment to remove it, resulting in much improved reception to the entire community. Letter from Martin W. Bercovici to Ralph Haller (June 16, 1989); letters from Al Grossniklaus, Chief Engineer, WOWK-TV to Chief, Private Radio Bureau (June 7 and 13, 1989).

16. Broadcasters state that an absence of complaints of interference does not mean that there is no interference. They say that viewers are not likely to complain and that they do not know where to complain. *See, e.g.*, WRLH, Inc., Comments, Att. at 2.[5] AMST cites *Digital Organs*, 56

RR 2d 840, 842 (1984) for the proposition that lack of complaints does not establish lack of interference. It would not, however, be necessary for a viewer to know that AMTS might be a source of interference and complain to the operator. The viewer who perceived interference on channel 13 and desired to complain could complain to the channel 13 station, which would of course be aware of AMTS. As to the concern that viewers might tolerate a great deal of interference without complaining, or deal with the interference by changing to another channel, we must assume that channel 13 stations would carefully monitor reception of channel 13 for any sign of interference which could be attributed to AMTS. Finally, the fact that interference from some sources is hard to trace, as pointed out in *Digital Organs*, *supra*,[6] is not relevant here; the AMTS coast stations are in fixed locations, operate continually, and are well known to channel 13 stations in their areas.

17. Experience with other private radio services operating in spectrum adjacent to TV is relevant here. Specifically, we note that private land mobile stations have operated in spectrum adjacent to TV channels 14 and 69 for years without any adverse effects to TV reception. In fact, experience has shown that it is more likely that land mobile stations will receive interference from TV stations than cause it. In this regard, in a recent proceeding examining the issue of land mobile operating in spectrum adjacent to a TV allocation, we stated,

> We have also considered the degree to which television stations should be protected from interference caused by subsequently authorized land mobile operations. While we could impose technical criteria or limitations on land mobile operations to provide such protection, land mobile to television interference, in our view, given current [TV] transmission standards, does not appear to be a significant problem or at least a problem of a sufficient magnitude to warrant government regulation. We note that, in recent years, in excess of thirty television stations on channel 14, and three on channel 69, have been successfully operating in communities with adjacent-channel land mobile operations. Based on that experience, we predict that the new television stations operating on those UHF channels should continue to be able to provide a quality signal to their viewing audience notwithstanding the presence of additional adjacent-band land mobile operations in their area. *Resolution of Interference between UHF channels 14 and 69 and Adjacent-channel Land Mobile Operations*, 2 FCC Rcd 7328, 7331 (1987).

18. Broadcasters also argue that future Advanced Television (ATV) will be particularly sensitive to interference. AMST Comments at 16. Since ATV is to be accommodated within spectrum allocated to the broadcasting service, not maritime mobile service, this should not be a concern. As discussed in paragraph 13 above, the rules provide that no harmful interference be caused to television reception by AMTS. *See Advanced Television Systems*, 3 FCC Rcd 6520, 6521, 6530 (1988).

19. Although we are not deciding the expansion of the Group C and D channels at this time, we note that broadcasters argue that there will be greater risk of interference from operation on the Group C and D channels. Judging from these and other comments, it appears many broadcasters misconstrued the *NPRM*. The *NPRM* proposed to allow operation on the Group C and D channels at distances closer than 105 miles to TV channel 13 stations provided an engineering analysis shows no greater risk of interference than if the Group A and B channel were used. The *Guidance* memo, which is used to determine if there is interference, takes into account the poorer interference rejection characteristics of TV receivers to interfering signals on frequencies closer to TV channel 13 such as the Group C and D channels. In other words, the necessary additional interference protection for the Group C and D channels must be taken into account in performing the required engineering analysis of interference. Thus we reject the argument that the proposed rule amendments will create an increased risk of interference to TV reception. Given the provisions of the rules, we conclude that TV reception interference concerns have been thoroughly considered and resolved. We are, however, holding the Group C and D frequencies in abeyence, as discussed above, until such time as the TV Answer Notice of Proposed Rule Making is concluded.

20. Finally, the United States sought and obtained an allocation of 216-220 MHz for the maritime mobile service in Region 2 at the 1979 WARC. When we initiated the AMTS service we restricted it to the Mississippi and adjacent waterways because of extreme caution regarding potential interference to TV reception. We are satisfied that we have sufficient experience to move forward now with expansion of this service. Watercom indicates that it desires to expand. Watercom Comments at 3-4. This will bring modern communication services to the maritime user community outside of the inland waterways network. Enhancements such as direct-dial telephony service to vessels for voice, data and facsimilie communications as well as vessel tracking and locations will be available to more of the maritime community.

21. In sum, we are not persuaded by the broadcasters' arguments that nationwide expansion of AMTS will cause interference to TV reception. We are confident that the safeguards built into our rules concerning the design and operation of AMTS are sufficient to protect against any potential for interference. Our conclusion is further bolstered by our experience with Watercom's AMTS system and with land mobile operations adjacent to TV channels 14 and 69. Therefore, we conclude that the A and B channels should be made available to the maritime community on a nationwide basis.

B. Sixty Percent Coverage Rule

22. In a related issue, Section 80.475(b) of the Rules requires an AMTS system to cover 60 percent of a navigable waterway. Waterways less than 240 kilometers (150 miles) long must be covered in their entirety. The purpose of these requirements is to provide for integrated systems that offer coverage over marine shipping routes and to exclude from the AMTS band individual VHF coast stations. In the *NPRM*, we proposed to delete these requirements from the rules to permit greater flexibility in the design of AMTS systems. Although we proposed to delete the specific percentage and mileage requirements, we requested comment on whether there is a need for some minimal area coverage requirement or other incentive to encourage interoperability over a substantial portion of a waterway or coastline.

23. Watercom recommends that the 60 percent rule should be retained for inland waterways. Watercom Comments at 5-9. It states that continuity of service has always been a goal. Local coverage is available through conventional VHF public coast stations. Complaints about the inconvenience of dealing with a series of individual coast stations, in fact, led to the creation of the AMTS. Watercom acknowledges that a different standard would be needed for coastal and other areas due to different geography and different navigational needs. It suggests that an applicant be held to a systematization concept by being required to define a navigational area based on demographic and other considerations. Similarly, AWO urges continuation of the system concept and the 60 percent rule for inland waterways. It points to past problems with gaps and quality with VHF public coast stations. AWO Comments at 2.

24. Maritel feels that the 60 percent rule could be eliminated without any substitute. It argues that market forces would prevent any undesirable fractionalization of service. Maritel also argues that the expense of an AMTS is too great to set up just one station. Maritel Comments at 22-23; Reply Comments at 12. Some broadcasters also commented favorably on eliminating the 60 percent rule. They feel it would permit greater flexibility in design of systems and permit locating stations where they would be less likely to cause interference to TV reception. AMST Comments at 13 n. 3; WNET(TV) and Wilson Comments at 5.

25. On balance, we are persuaded by Watercom's reasoning and will retain the 60 percent rule for inland waterways. Retaining the 60 percent rule will assure substantial coverage of a river by an AMTS system. Because there are other adequate protections against interference to TV reception, the rule need not be changed for that reason. Additionally, it is unlikely that system operators would want to bypass populated areas in the coverage of a river. We will, however, ensure continuity of service along portions of the Atlantic, Pacific and Gulf of Mexico coasts by requiring the applicant to define and serve a major navigational area rather than satisfy the 60 percent area coverage requirement for the entire coast line.

C. Blanket Licensing

26. Currently we license the AMTS operator and the ship users. We proposed to include the ship users' units under the AMTS operator's license as a part of the system, and to eliminate licensing the users individually. This plan would simplify licensing. An example of this type of blanket or system licensing is found in the common carrier Domestic Public Land Mobile Service. *See Individual Radio Licensing Procedures*, 77 FCC 2d 84 (1980). A similar approach is used in the cellular radio service and for private carriers operating on frequencies below 800 MHz in the private land mobile radio services (*See* 47 C.F.R. § 90.179 (c)). Blanket or system licensing would not free the users from complying with operational rules, but it would free them of any requirement to obtain an FCC license before beginning AMTS operations. As soon as a service agreement was reached with the AMTS licensee, service could begin. This proposal was not opposed and was supported by Watercom, Maritel and AWO. Watercom observed that mobiles cannot operate independent of the AMTS operator. Watercom Comments at 10-11. Maritel observed that individual licensing of AMTS users has proved to be of little utility. Maritel Comments at 21. Therefore, we are amending the rules as proposed to provide for blanket licensing of AMTS users.

IV. CONCLUSION

27. We believe that the changes proposed in this proceeding will enhance the use of the electromagnetic spectrum by allowing more AMTS operators to provide service and, in turn, more users to benefit from AMTS service while fully protecting TV reception. Accordingly, we are amending Parts 2 and 80 to provide for nationwide (*i.e.*, throughout the 50 states) use of AMTS on channels A and B. We also are implementing blanket licensing of AMTS systems. We are modifying the 60 percent rule to accommodate the needs of AMTS systems along the coasts, lakes and bays. We will address the issue of expanding the AMTS on channels C and D at a later date.

28. In accordance with Section 605 of the Regulatory Flexibility Act of 1980, 5 U.S.C. § 605, we certify that these rules will not have a significant economic impact on a substantial number of small entities. The rules make additional frequencies available to maritime users in the U.S. A negative impact is not expected for any entity. An increase in the communications services available to the maritime industry should result.

29. The rules adopted herein have been analyzed with respect to the Paperwork Reduction Act of 1980 and found to contain no new or modified form, information collection and/or record keeping, labeling, disclosure, or record retention requirements; and will not increase or decrease burden hours on the public.

V. ORDERING CLAUSES

30. Accordingly, IT IS ORDERED that pursuant to the authority contained in Section 4(i) and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i) and 303(r), Parts 2 and 80 of the Commission's Rules ARE AMENDED as set forth in the Appendix below effective **March 11, 1991.**

31. IT IS FURTHER ORDERED that a copy of this Report and Order will be sent to the Chief Counsel for Advocacy of the Small Business Administration.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX

Parts 2 and 80 of Chapter I of Title 47 the the Code of Federal Regulations are amended as follows:

Part 2: Frequency Allocations and Radio Treaty Matters; General Rules and Regulations

1. The authority citation for Part 2 continues to read as follows:

AUTHORITY: Secs. 4, 303, 48 Stat. 1066, 1082, as amended; 47 U.S.C. 154, 303, unless otherwise noted.

2. Section 2.106, the Table of Frequency Allocations, is amended by removing footnote NG 121 from column 5 of the 216-220 MHz band and by removing the text of the footnote at the end of the table, Section 2.106 Table of Frequency Allocations.

Part 80 -- Stations in the Maritime Services

1. The authority citation for Part 80 continues to read as follows:

AUTHORITY: Secs. 4, 303, 48 Stat. 1066, 1082, as amended; 47 U.S.C. 154, 303, unless otherwise noted. Interpret or apply 48 Stat. 1064-1068, 1081-1105, as amended; 47 U.S.C. 151-155, 301-609; 3 U.S.T. 3450, 3 U.S.T. 4726, 12 U.S.T. 2377, unless otherwise noted.

2. Section 80.5 is amended by revising the definition of Automated maritime telecommunications system to read as follows:

§ 80.5 Definitions.

* * * * *

Automated maritime telecommunications system (AMTS). An automatic, integrated and interconnected maritime communications system.

* * * * *

3. Section 80.29(a) is amended by adding one additional entry at the end of the table, to read as follows:

§ 80.29 Changes during license term.

(a) * * *

Type of Change	Required action
* * * * *	
Increased number of mobiles (AMTS)	Written notice to the Commission.

* * * * *

4. A new section 80.54 is added to read as follows:

§ 80.54 Automated Maritime Telecommunications System (AMTS)-System licensing.

AMTS licensees will be issued blanket authority for a system of coast stations and mobile units (subscribers). AMTS applicants will specify the maximum number of mobile units to be placed in operation during the license period.

5. Section 80.215 is amended by revising paragraph (h)(3), by removing paragraph (h)(5) and redesignating paragraph (h)(6) as (h)(5) to read as follows:

§ 80.215 Transmitter power.

* * * * *

(h) * * *

(3) When located as described in paragraph (h)(2) o this section, the coast station (or stations affecting the same TV Grade B contour) will be authorized if the applicant's plan has limited the interference contour(s) to fewer than 100 residences or if the applicant:

* * * * *

6. Section 80.385 is amended by revising paragraph (a)(1) to read as follows:

§ 80.385 Frequencies for automated systems.

* * * * *

(a) * * *

(1) The Automated Maritime Telecommunications System (AMTS) is an integrated and interconnected maritime communications system.

* * * * *

7. Section 80.475 is amended by removing paragraph (a), redesignating paragraphs (b) and (c) as paragraphs (a) and (b); and by revising new paragraph (a) introductory text to read as follows:

§ 80.475 Scope of Service of the Automated Maritime Telecommunications System (AMTS).

(a) AMTS applicants proposing to serve inland waterways must show how the proposed system will provide continuity of service along more than 60% of each o one or more navigable inland waterways. Inland waterways less than 240 kilometers (150 miles) long mus be served in their entirety. AMTS applicants proposing to serve portions of the Atlantic, Pacific or Gulf of Mexico coastline must define a substantial navigational area and show how the proposed system will provide continuity o service for it. A separate Form 503 is not required fo each coast station in a system. However, the applican must provide the technical characteristics for each proposed coast station, including transmitter type, operating frequencies, emissions, transmitter output power, antenna arrangement and location.

* * * * *

8. Section 80.1169 and the title "AUTOMATED SYSTEMS" immediately preceding it are removed and reserved.

FOOTNOTES

[1] Comments and/or Reply Comments were timely filed by Waterway Communications System, Inc. (Watercom); the Association of Maximum Service Telecasters (AMST); WJG Marite Corporation and Riverphone, Inc. t/a Maritel (Maritel); TV Answer, Inc.; Westinghouse Broadcasting Company, Inc.; WOK Partners and WTVT Holdings, Inc.; WLOX Television, Inc.; th Association of American Railroads; American Waterways Operators (AWO); WRLH, Inc.; the Rocky Mountain Corporation fo Public Broadcasting; CBS, Inc.; Viacom International Inc.; Wabash Valley Broadcasting Corporation; Great Western Broadcast

ing Corp. and WVEC Television, Inc.; Educational Broadcasting Corporation and Wilson Communications, Inc. (WNET(TV) and Wilson); Cosmos Broadcasting Corporation; KCOP Television, Inc.; KTVE, Inc.; KTRK, Inc.; Narragansett Television Company of California, Inc.; Kelly Television Co. and WTVG, Inc.; VideoIndiana, Inc.; and Post-Newsweek Stations, Florida, Inc.

[2] Half-IF interference is a phenomenon caused by mixing of radio frequency signals within a TV receiver. Nonlinearities in the receiver produce a second harmonic of an interfering signal (*e.g.* an AMTS signal), which mixes with the second harmonic of the TV receiver local oscillator to create interference which will be passed through the TV receiver IF filter.

[3] *See Maritel,* 3 FCC Rcd 4690 (1988), in which we denied Maritel's request for waiver of the mileage separation requirement for Group C and D channels from TV channel 13. We stated there that such action should be considered in a rule making proceeding.

[4] *NPRM* at paras. 3-4, 13, 15-17.

[5] In contrast, WLOX suggests that the lack of complaints shows that the current system is working (*i.e.,* no interference) and should not be changed. WLOX Comments at 3.

[6] In *Digital Organs* we denied a request for exemption from the verification procedures for manufacturers of organs used in churches. Verification essentially requires the manufacturer to test each device for complance with specified parameters before marketing it. We noted there, among other things, that sources of radio frequency interference are often difficult to identify and locate.

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: January 9, 1991

PLEADING CYCLE ESTABLISHED FOR COMMENTS ON CONAP'S PETITION FOR INVESTIGATION OF ADVANCED INTELLIGENT NETWORK

On November 16, 1990, the Coalition of Open Network Architecture Parties (CONAP) filed a petition requesting that the Commission initiate an investigation pursuant to Section 218 of the Communications Act. CONAP specifically requests that the Commission investigate: (1) the architecture that the Regional Bell Operating Companies (RBOCs) intend to use in implementing the Advanced Intelligent Network (AIN); (2) the architecture of the switches that the RBOCs have purchased or intend to purchase in 1990-93; and (3) the RBOCs' intentions with respect to implementation of a modular and transparent network architecture. CONAP proposes a set of questions that it believes will assist the Commission in framing an investigation. CONAP also requests that the Commission require the BOCs to address the issues raised in its petition when the BOCs file their upcoming ONA amendments.

Interested parties should file comments on this petition by *February 21, 1991*, and reply comments by *March 11, 1991*,with the Secretary, FCC, 1919 M Street, N.W., Washington, D.C. 20554. A copy should also be sent to Peggy Reitzel, Common Carrier Bureau, FCC, Room 544, 1919 M Street, N.W., Washington, D.C. 20554, and to the Commission's contractor for public service records duplication: Downtown Copy Center, 1114 21st Steet, N.W., Suite 140, Washington, D.C. 20037. Copies of CONAP's petition can be obtained from Downtown Copy Center at (202) 452-1422.

For further information contact Peggy Reitzel, Policy and Program Planning Division of the Common Carrier Bureau, at (202) 632-4047.

Federal Communications Commission

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

AT&T COMMUNICATIONS,
Complainant,

v. File No. E-90-08

SOUTHWESTERN BELL
TELEPHONE COMPANY,
Defendant.

ORDER

.dopted: January 17, 1991; Released: January 25, 1991

By the Chief, Enforcement Division, Common Carrier
ureau:

1. On October 3, 1989, AT&T Communications
AT&T) filed the above-captioned complaint alleging that
efendant's rates for 1988 were unjust and unreasonable
n violation of 47 U.S.C. § 201(b). AT&T maintained
efendant had overstated its interstate revenue require-
nents. On January 2, 1991, the parties filed a joint mo-
on to dismiss the complaint with prejudice. The parties
ate that all claims in the action have been compromised
nd settled between the parties, with defendants admitting
o liability.

2. We are satisfied that dismissal of the complaint will
erve the public interest by eliminating the expenditure of
urther time and resources of the parties and of this
ommission.

3. Accordingly, IT IS ORDERED, pursuant to author-
y delegated under 47 C.F.R. § 0.291, that the request for
ismissal of the above-captioned complaint IS GRANT-
.D.

4. IT IS FURTHER ORDERED that the above-cap-
oned complaint IS DISMISSED WITH PREJUDICE and
1e proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Mary Beth Richards
Chief, Enforcement Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: January 25, 1991

AT&T AND LOCAL EXCHANGE CARRIERS FILE REVISIONS TO THEIR COST ALLOCATION MANUALS

PUBLIC COMMENT INVITED

The American Telephone and Telegraph Company and the following local exchange carriers filed proposed revisions to the cost categories of their permanent cost allocation manuals for the separation of regulated and unregulated costs for the quarter ended December 31, 1990: The Ameritech Operating Companies, Bell Atlantic, BellSouth Corporation, Central Telephone Company, NYNEX Telephone Companies, Rochester Telephone Corporation, Southwestern Bell Telephone Company, Southern New England Telephone Company and U S West.

Parties may file comments on the proposed revisions to the cost manuals no later than **February 22, 1991.** Replies should be filed by **March 11, 1991.** A copy of each pleading should be sent to Alicia Dunnigan, FCC, Common Carrier Bureau, 2000 L Street, N.W., Room 812, Washington, D.C. 20554 and to Downtown Copy Center (DCC), 1114 21st Street, N.W., Washington, D.C. 20036, (202) 452-1422. Copies are available for public inspection and copying the Accounting and Audits Division public reference room 2000 L Street, N.W., Room 812, Washington, D.C. Copies are also available from DCC.

For further information contact Alicia Dunnigan, (202) 634-1861.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

PR Docket No. 90-481

In the Matter of
Amendment of Part 90 of the
Commission's Rules Concerning
the Construction, Licensing, and
Operation of Private Land Mobile
Radio Stations

ORDER EXTENDING REPLY COMMENT PERIOD

Adopted: January 16, 1991; Released: January 25, 1991

By the Chief, Private Radio Bureau:

1. On October 11, 1990, the Commission adopted a *Notice of Proposed Rule Making* in the above captioned matter. *Notice of Proposed Rule Making*, PR Docket No. 90-481, 5 FCC Rcd 6401 (1990). The original deadlines for comments and reply comments were December 24, 1990 and January 8, 1991, respectively. On November 29, 1990, the Special Industrial Radio Service Association, Inc. (SIRSA) filed a motion requesting an extension of the deadlines for comments and reply comments by approximately two weeks. We approved SIRSA's request and extended the deadlines until January 8, 1991 for comments and January 24, 1991 for reply comments. *Order Extending Comment Period,* PR Docket No. 90-481, DA 90-1775 (released December 11, 1990).

2. On January 15, 1991, the American SMR Network Association, Inc. (ASNA) filed a motion requesting an extension to file reply comments until February 11, 1991. Because of the number of comments submitted to the Commission, ANSA believes that a brief additional period to review all comments would well-serve the public interest.

3. Extensions of time are not routinely granted. *See* 47 C.F.R. § 1.46(a). As we stated in the order extending the comment period, the rules proposed in this proceeding have a potential impact on virtually every private radio licensee. In some instances, the loss of operating authority could result. The brief length of the requested extension would ensure the development of a complete record in this proceeding without causing undue delay. We therefore find good cause to grant the extension requested.

4. Accordingly, IT IS ORDERED, pursuant to the authority set forth in Section 0.331 of the Commission's Rules and Regulations, 47 C.F.R. § 0.331, that all interested parties will have until **February 11, 1991** to file reply comments in this proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Ralph A. Haller
Chief, Private Radio Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

The BellSouth Telephone Companies — Transmittal No. 350

Revisions to Tariff
F.C.C. No. 4

ORDER

Adopted: January 15, 1991; Released: January 16, 1991

By the Chief, Common Carrier Bureau:

1. On October 19, 1990, the BellSouth Telephone Companies (BellSouth) filed Transmittal No. 350, to offer a rate stability plan (Plan) for their special access voice grade local and interoffice channels. The Plan provides that a customer may be eligible for a freeze of recurring rates, lasting for any period selected by the customer ranging from 36 to 60 months, if the customer has at least 500 voice grade access lines. In return for the rate freeze, the customer must agree to increase its special access voice grade demand by at least 10 percent per year for each of the first three years of the chosen period and to convert to the Plan all of its existing voice grade lines, and to include any new ones as well. BellSouth Tr. 350 Description and Justification (D&J) at 1-3. If the customer fails to meet the demand growth requirement in a given year or if the customer terminates its Plan before the end of its elected period, it must pay certain charges. *Id.* at 6-9. In addition, the customer must pay a nonrecurring charge for the administrative costs of BellSouth's conversion of the associated billing operations to the frozen rate status. *Id.* at 9-10. The tariff is scheduled to take effect on January 17, 1991.

2. US Sprint Communications Company Limited Partnership (Sprint) filed a petition to suspend and investigate BellSouth Transmittal 350 for the same reasons it advanced against a "very similar" rate stability plan proposed by Bell Atlantic, which took effect on January 31, 1989.[1] Sprint then summarily lists and incorporates by reference the arguments it made in its petition against the Bell Atlantic plan.[2] The substantive points in Sprint's previous petition against Bell Atlantic Transmittal 266 include lack of cost support, arbitrary conditions for customer eligibility and the imposition of penalties, the potential for cross-subsidies, and concerns regarding assertedly unreasonable discrimination.

3. BellSouth responds that the Bell Atlantic Plan and the BellSouth Plan are not completely similar in all material respects. BellSouth argues that to the extent they are not similar, Sprint's instant petition is irrelevant, and to the extent they are similar, the Commission has already rejected Sprint's arguments in its action on the Bell Atlantic Plan. Accordingly, BellSouth concludes, Sprint's instant petition should be summarily denied. BellSouth Reply at 2. BellSouth also replies that: there is adequate cost support for its Plan; the 500-circuit cut-off requirement is justified by the structure of BellSouth's marketing organization and the cost/benefit considerations regarding preservation of its voice grade demand; no cross-subsidy will result from the Plan; and the Plan is not discriminatory because it is entirely optional and open to any qualified customer willing to agree to it. *Id.* at 2-5

4. The Common Carrier Bureau has reviewed Transmittal 350, the description and justification supporting it, and the pleadings. We conclude that no compelling argument has been presented that the tariff revisions filed by BellSouth warrant suspension or investigation at this time.

5. Accordingly, IT IS ORDERED that the petition to suspend and investigate BellSouth Telephone Companies Tariff F.C.C. No. 4, Transmittal No. 350, filed by US Sprint Communications Company Limited Partnership, IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Firestone
Chief, Common Carrier Bureau

FOOTNOTES

[1] *See* Bell Atlantic Telephone Companies, Revisions to Tariff F.C.C. No. 1, Transmittal No. 266, 4 FCC Rcd 1393 (Com.Car.Bur. 1989).

[2] Bell Atlantic Telephone Companies Transmittal No. 266, US Sprint Petition for Rejection or Alternatively Suspension and Investigation, filed Oct. 13, 1988.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Southwestern Bell Telephone Company Transmittal No. 2033

Revisions to Tariff F.C.C. No. 68

ORDER

Adopted: January 15, 1991; Released: January 15, 1991

By the Chief, Common Carrier Bureau:

1. On October 18, 1990, Southwestern Bell Telephone Company (SWB) filed Transmittal No. 2033, to modify its application of non-recurring charges (NRCs) associated with customer-initiated moves of certain SWB switched, special, and MegaLink access facilities. Transmittal 2033 Description and Justification (D&J) at 1-2. Presently, SWB treats such moves as separate transactions, consisting of disconnection of an existing facility and then connection of a new one. Under Transmittal 2033, such moves would be treated as a single transaction, called a "rollover," and would involve a reduced NRC charge, plus the normal access order charge, for moves from voice grade to DS1 facilities, from DS1 to DS3 facilities, and from copper to fiber optic facilities. *Id.* at 2-4. Metropolitan Fiber Systems, Inc. (MFS) filed a petition to reject or, alternatively, to suspend and investigate Transmittal 2033,[1] and SWB replied.

2. MFS contends that SWB's application of rollover charges amounts to discounts designed to induce large customers to migrate from SWB's existing high capacity services to even higher ones, leaving in their wake unneccessary duplication of facilities and services and stranded plant. MFS Petition at 1-3. In addition, MFS describes SWB's cost support as flawed and inadequate under the requirements of Section 61.38 of the Commission's Rules, especially with respect to SWB's projections of demand for DS3 facilities. *Id.* at 3-7. MFS also claims that SWB's rollover proposal is geographically discriminatory because, in practice, the discounted charge will be available only to customers in dense urban locations where fiber optic facilities have been or will be installed. *Id.* at 7-9.

3. SWB replies that all of the Bureau's concerns about cost support for Transmittal 2002, its previous rollover filing which the Bureau rejected,[2] have now been cured in Transmittal 2033. According to SWB, MFS has not challenged this material under the criteria set forth in that Order. SWB Reply at 2. SWB next claims that the other arguments in the instant MFS petition are nearly identical with those in MFS's petition against Transmittal 2002. and that the Bureau has denied them in the *Rollover Rejection Order. Id.* SWB then responds to MFS's claim that its cost support data are inadequate, stating that there is sufficient demand for rollovers. *Id.* at 3-7. Finally, SWB responds that rollover charge discounts do not discriminate in favor of customers in urban areas since rollovers are offered at the same rates to all customers, regardless of location. Moreover, SWB states, the lower cost of rollovers is not the product of discounting, but rather reflects the lower cost of treating the intra-premise move as a single transaction. *Id.* at 8-10.

4. The Common Carrier Bureau has reviewed SWB's Transmittal 2033, MFS's petition, and SWB's reply. We conclude that no compelling argument has been presented that the tariff revisions filed by SWB are patently unlawful so as to require rejection, and that an investigation is not warranted at this time.

5. Accordingly, IT IS ORDERED that the petition to reject or, alternatively, to suspend and investigate Southwestern Bell Telephone Company's Tariff F.C.C. No. 68, Transmittal No. 2033, filed by Metropolitan Fiber Systems, Inc., IS DENIED.

6. IT IS FURTHER ORDERED that the motion to accept late-filed pleading by Metropolitan Fiber System, Inc., IS GRANTED.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Firestone
Chief, Common Carrier Bureau

FOOTNOTES

[1] Petitions against Transmittal 2033 were due on Friday, November 2, 1990. MFS filed its petition against Transmittal 2033 on Monday, November 5, accompanied by a motion to accept late-filed pleadings, citing unanticipated and unavoidable problems with its word processing system. SWB opposed the motion in its reply, stating that it was burdensome to SWB because the due date for its reply remained the same. On balance, we believe that MFS has demonstrated sufficient cause for its short delay in filing a petition against Transmittal 2033, and we therefore grant the motion.

[2] Southwestern Bell Telephone Company, Revisions to Tariff F.C.C. No. 68, Tr. No. 2002, 5 FCC Rcd 5971 (Com.Car.Bur. 1990) (*Rollover Rejection Order).*

Before the
Federal Communications Commission
Washington, D.C. 20554

GEN Docket No. 91-1

In the Matter of

Amendment of Part 15 of the
Commission's rules to
Implement the Provisions
of the Television Decoder
Circuitry Act of 1990

NOTICE OF PROPOSED RULE MAKING

Adopted: January 3, 1991; Released: January 4, 1991

By the Commission:

INTRODUCTION

1. By this action, the Commission proposes to amend its rules to amplement the provisions of the Television Decoder Circuitry Act of 1990 (Decoder Act).[1] This legislation requires that most new television receivers marketed in the United States after July 1, 1993, be equipped with built-in decoder circuitry designed to display closed-captioned television transmissions.[2] The legislation also requires that the Commission promulgate rules providing performance and display standards for such built-in decoder circuitry.

BACKGROUND

2. Closed-caption information is permitted to be transmitted as part of the television broadcast signal in accordance with Section 73.682(a)(22) of the Commission's rules. [3] However, the rules do not specify either the information encoding format or the resulting display characteristics. In a 1980 engineering report, the Public Broadcasting Service (PBS) established signal and display specifications for closed captioning.[4] The National Captioning Institute (NCI) also established closed-caption decoder performance specifications in 1985.[5]

3. The Decoder Act was enacted into law on October 15, 1990. The purpose of this legislation is to serve the needs of the deaf and hearing-impaired and others by expanding the accessibility of closed-caption technology. The legislation is intended to reduce significantly the cost to consumers to receive closed captioning, make closed captioning more widely available, and create market incentives for broadcasters to invest in and provide more closed-captioned programming.[6]

4. The Decoder Act amends the Communications Act of 1934 by:

(1) assigning the Commission responsibility for requiring that television receivers with picture screens 13 inches or greater in size, when manufactured or imported for use in the United States, be equipped with built-in decoder circuitry designed to display closed-captioned television transmissions;

(2) making it illegal to ship in interstate commerce, manufacture, assemble, or import any television receiver that is subject to closed-caption decoder requirements except in accordance with Commission rules;

(3) requiring the Commission to promulgate rules providing performance and display standards for such built-in decoder circuitry;

(4) requiring that the built-in decoder circuitry be able to receive and display closed captions that are transmitted on line 21 of the vertical blanking interval and that conform to the PBS/NCI specifications; and,

(5) directing the Commission to take appropriate action to ensure that closed-captioning service continues to be available as new video technology is developed.

The changes to the Communications Act will become effective on July 1, 1993. However, the Decoder Act directs the Commission to promulgate rules implementing the legislation within 180 days.[7]

5. Congress indicated that the Commission's performance and display standards must ensure that television viewers can receive and read closed captions with the same clarity and consistency, and to the same extent, as viewers would be able to receive and read closed captions produced entirely in accordance with the PBS/NCI specifications.[8] Congress did not intend, however, to require the standardization of a specific decoding chip or specific decoding circuitry, but simply to mandate that television receivers be capable of decoding and displaying closed captions adequately.[9] It was envisioned that television receiver manufacturers would be permitted to develop cost-effective approaches to closed-caption decoding, and the Commission was instructed to "pay due regard to considerations of cost-effectiveness and evolving technical capability, as well as the benefits to the competitive process of allowing manufacturers latitude consistent with the purposes of the bill."[10]

DISCUSSION

6. In response to the legislation, a task force consisting of representatives from the Electronic Industries Association (EIA) R-4 Television Receiver Committee,[11] and from several organizations that provide television-program captioning, prepared a receiver performance and display standard.[12] This standard was derived from the PBS/NCI specifications. The task force considered the costs associated with implementing certain aspects of the PBS/NCI specifications, as well as alternatives. The task force also considered the effects of any proposed changes on existing closed-caption decoders and programming that has already been closed captioned. Finally, the task force considered whether additional features were needed.

7. We have included a copy of the task force's report and proposed standard in the Appendix of this Notice. This standard contains certain new features. In addition, other existing features of the PBS/NCI specifications are changed to make them optional or to allow them to be

implemented in new ways. The Senate Report accompanying this legislation points out that the Commission has some flexibility in complying with the Congressional intent. For instance, even though Congress found that the technology will soon exist to provide closed captioning at a nominal cost, we are permitted to take manufacturers' costs into consideration. Whether we may make optional certain features of the PBS/NCI specifications without functional alternatives, as the task force has recommended in some instances, is less clear. Furthermore, we question if the Congress intended to permit decoders built into television receivers to have fewer capabilities than existing decoders.[13] In order to determine whether we should adopt in our rules this standard, with or without change, we urge interested parties to comment on the task force's proposed standard in general, and on the specific issues discussed below in particular.

A. New Features

8. The task force added features to their standard that would give closed-caption service providers new flexibility and efficiency in performing closed captioning. These features would allow the display of captions anywhere on a television screen,[14] and would provide four new instructions that would make closed-caption transmissions more efficient.[15]

9. In determining whether to require these new features, we are mindful of ongoing endeavors to develop decoding circuits that would be used in television receivers subject to our forthcoming regulations. Present efforts, some nearing completion, are based solely on the PBS/NCI specifications and have not contemplated the new features proposed by the task force. Adopting requirements embodying these features could delay the introduction of decoding chips under development, and therefore delay the widespread availability of closed captioning. One alternative might be to adopt the new features but to make their inclusion in any decoding circuitry optional. A second alternative might be to establish a transition period during which incorporation of the new features would be optional. We request comments on these alternatives and suggestions on how long a transition period might be necessary.

B. Changed Features

10. *Color Characters*. The PBS/NCI specifications permit a closed-caption provider to change the color of characters in a caption. Color can be used to provide clarity, such as identifying different speakers, or can be used for emphasis. It is regularly used in closed captioning in other parts of the world. However, current U. S. closed-caption decoders operate external to television receivers and, due to technical difficulties and cost considerations associated with that external operation, do not display color characters. Once closed-caption decoding circuitry is built into television receivers, as is required by the Decoder Act, it should be easier to generate and display color characters. Nevertheless, the task force's proposed standard makes optional the display of characters in different colors. We request comments on whether the ability to display characters in color is a significant feature of modern closed-captioning systems, and whether it should be made optional or mandatory. In addition, we request specific information on the costs of providing color characters.

11. *Italic Characters*. Closed-caption service providers maintain that italics are essential to properly conveying the information in a caption.[16] Television manufacturers, on the other hand, have expressed concern about the difficulty of generating legible italic characters. The task force proposes to allow the use of either italic characters or standard characters that are modified by slanting. The task force also proposes to allow italics to be displayed by reversing the color of a character with that of the character background. We ask comment on the adequacy of these alternatives.

12. *Lower-case Characters*. Lower-case characters are not currently transmitted during the closed captioning of live programming. In addition, they are not used extensively in the closed captioning of words spoken during recorded programs. Lower-case characters are, however, used to indicate sound effects or whispered speech, to display speakers' names, and for certain plural and possessive words. In addition, to the extent that closed captioning may be used for education purposes as envisioned by the Congress (*e.g.*, to teach reading), the ability to display lower-case characters may be important. Television receiver manufacturers are concerned, however, that lower-case characters on inexpensive television receivers would be illegible. The task force's proposed standard provides a transition period, until January 1, 1996, during which television receivers that use a character resolution of 5 by 7 dots, or less, may be manufactured to display upper-case characters in lieu of lower-case characters. This transition period would allow manufacturers to develop the necessary cost-effective technology to display legible lower-case characters on inexpensive television receivers. Any television receiver which does not display lower-case characters would be required to have a label, and information in the owner's manual, indicating that the receiver displays closed captioning in upper-case only. We invite specific comment on the costs and difficulties of incorporating the display of lower-case characters into inexpensive television receivers, and whether the transition provisions proposed by the task force would impose a particular difficulty on the users of closed captioning.

13. *Character Background*. The PBS/NCI specifications require that all characters be displayed against a black background to enhance readability. Television receiver manufacturers want some flexibility to use, instead, characters that are edged, highlighted, or would otherwise stand out. This would allow more of the television picture to be viewable when closed captioning is displayed. The task force's proposed standard does not require the black background. Rather, characters are required to be separated clearly from the video background over which they are placed.[17]

14. The ability to distinguish characters from their background is absolutely essential to closed captioning. The use of a black background virtually assures this. However, television sports and news programs routinely display legible characters over video pictures without a black background. We recognize the desirability of being able to see both the caption and the complete video picture, and we believe that television receiver manufacturers should be given flexibility to develop circuitry that would clearly display closed-caption characters without a black background. We are concerned, however, that the task force's proposed standard may not provide enough specificity to ensure that closed captions can be read clearly over all kinds of video pictures. Thus, we invite

comment on this aspect of the task force's proposed standard. We request specific discussion on changes that may be needed or whether a black background should be required.

15. *Smooth Scrolling*. There are three styles used in presenting captions: roll-up, pop-on, and paint-on. In roll-up style captioning, which is often used to caption live programs, new words are displayed on the bottom row of the caption. When that row is complete, the characters roll upwards (or scroll) so that a new row of characters can be displayed. The PBS/NCI specifications include detailed requirements that attempt to provide smooth scrolling of the displayed rows. Television manufacturers, in discussions during the task force's meetings, have indicated that they intend to provide smooth scrolling of roll-up captions. However, they desire more flexibility than is provided in the PBS/NCI specifications. The task force's proposed standard does not address smooth scrolling. We believe that smooth scrolling is an essential element of roll-up captioning and propose to make it a requirement. We realize the determination of what constitutes smooth scrolling may be subjective. Thus, we invite comment on whether more specific requirements are needed.

16. *Caption Location and Size*. The PBS/NCI specifications allow the display of closed captions on four lines at the top and four lines at the bottom of the television screen.[18] As a practical matter, however, closed captions of more than four lines are rarely used, perhaps because so much of the television picture would be obscured. The task force's proposed standard would add new flexibility for closed-caption service providers to locate captions anywhere on the screen; however, no more than four lines of captions could be displayed at one time. We invite comment on whether this change is appropriate. We are particularly interested in whether the cost savings and flexibility of the task force's proposed standard outweighs the current ability to display more than four lines of captions.

17. *Caption Channels*. The transmission capabilities associated with using line 21 of the vertical blanking interval make it feasible for more than one channel of caption information to be transmitted. The PBS/NCI specifications permit two distinct channels to be used under certain circumstances so that a program could be captioned in two languages or for two types of audiences. At present, only single-channel captioning is provided routinely. Indeed, many existing closed-caption decoders only support a single caption channel. The task force's proposed standard requires just single-channel capability.

18. Questions have been raised as to whether line 21 transmissions can provide the data rate necessary to caption two channels simultaneously. We note that, because of the high word rate, live programs are captioned on a single channel as a matter of practice. The captioning of recorded programs can be done in a more planned manner, thereby facilitating captioning on two channels. Also, it is quite possible that the demand for, and use of, closed captioning will grow once the public has television receivers with decoding capability. At the same time, we are reluctant to require two-channel capability if it is unlikely to be used. Accordingly, we seek specific comments on the costs associated with providing for two caption channels and whether it is likely that two caption channel usage will develop.

19. *Text Services*. The Commission's rules, as well as the PBS/NCI specifications, allow the transmission of text information when no closed-caption information is being transmitted. This text information is displayed on the full television screen, making the television programming no longer visible. While we understand that there are a few organizations using this capability to provide desirable services to the public, it is not clear that the Decoder Act was intended to require television receivers to be able to display text information. Although most existing decoders can display such text information, the standard proposed by the task force allows the display of text information to be optional. We request comment on this approach.

PROCEDURAL MATTERS

20. *Initial Regulatory Flexibility Analysis*. Pursuant to the Regulatory Flexibility Act of 1980, 5 U.S.C. 603, the Commission's initial analysis is as follows:

> I. Reason for Action: The promulgation of these rules is mandated by the Television Decoder Circuitry Act of 1990, Pub. L. 101-431.
>
> II. Objective: These rules are intended to serve the needs of the deaf and hearing-impaired and others by expanding the availability of closed-caption television decoding equipment, thereby creating market incentives for the development of more closed-captioned programming. These rules would set performance and display standards for closed-caption decoder circuitry within television receivers, and would prohibit the manufacture, assembly, importation, or interstate shipment of noncompliant receivers.
>
> III. Legal Basis: This action is proposed in accordance with Sections 4(i) and 303(r) of the Communications Act of 1934, as amended, and in accordance with the Television Decoder Circuitry Act of 1990.
>
> IV. Description, potential impact and number of small entities affected: These rules would affect only the manufacturers of television receivers with picture screens 13 inches or larger. There are no known small entities manufacturing such television receivers.
>
> V. Recording, record keeping and other compliance requirements: The Commission's rules require television receivers to be verified for compliance with applicable FCC technical requirements. *See* Sections 15.101, 15.117, and 2.951, *et seq*. Documentation concerning the verification must be kept by the manufacturer or importer. The rules ultimately adopted in this proceeding will require that television receivers comply with a closed-caption performance and display standard. However, verification testing regarding closed captioning, and the associated record keeping requirements, is not necessary because compliance with the closed-caption standard can easily be determined during the television receiver design process. The Commission may, of course, ask manufacturers and importers to document upon occasion how a particular television receiver complies with the closed-caption requirements.

VI. Federal rules which overlap, duplicate or conflict with the proposed rule: None.

VII. Any significant alternatives minimizing the impact on small entities and consistent with the stated objectives: None.

21. *Comment Provisions*. Pursuant to applicable procedures set forth in Sections 1.415 and 1.419 of the Commission's rules, interested parties may file comments on or before February 15, 1991, and reply comments on or before March 4, 1991. In order to comply with the requirement of the Decoder Act that FCC rules be promulgated within 180 days of enactment, we will proceed with this *Notice* without furnishing a prior text as provided by Article 607 of the United States-Canada Free-Trade Implementation Act of 1988 (Pub. L. 100-499, 102 Stat. 1851). To do so would frustrate achievement of a legitimate domestic objective. In addition, the Commission is not likely to be able to accommodate requests for extension of these comment periods. All relevant and timely comments will be considered by the Commission before final action is taken in this proceeding. To file formally in this proceeding, participants must file an original and four copies of all comments, reply comments, and supporting comments. If participants want each Commissioner to receive a personal copy of their comments, an original plus nine copies must be filed. Comments and reply comments should be sent to Office of the Secretary, Federal Communications Commission, Washington, DC 20554. Comments and reply comments will be available for public inspection during regular business hours in the Dockets Reference Room (Room 239) of the Federal Communications Commission, 1919 M Street, N.W., Washington, DC 20554.

22. For purposes of this non-restricted notice and comment rule making proceeding, members of the public are advised that *ex parte* presentations are permitted except during the Sunshine Agenda period. *See generally* Section 1.1206(a). The Sunshine Agenda period is the period of time which commences with the release of a public notice that a matter has been placed on the Sunshine Agenda and terminates when the Commission (1) releases the text of a decision or order in the matter; (2) issues a public notice stating that the matter has been deleted from the Sunshine Agenda; or (3) issues a public notice stating that the matter has been returned to the staff for further consideration, whichever occurs first. Section 1.1202(f). During the Sunshine Agenda period, no presentations, *ex parte* or otherwise, are permitted unless specifically requested by the Commission or staff for the clarification or adduction of evidence or the resolution of issues in the proceeding. Section 1.1203.

23. In general, an *ex parte* presentation is any presentation directed to the merits or outcome of the proceeding made to decision-making personnel which (1) if written, is not served on the parties to the proceeding, or (2) if oral, is made without advance notice to the parties to the proceeding and without opportunity for them to be present. Section 1.1202(b). Any person who makes or submits a written *ex parte* presentation shall provide on the same day it is submitted two copies of same under separate cover to the Commission's Secretary for inclusion in the public record. The presentation (as well as any transmittal letter) must clearly indicate on its face the docket number of the particular proceeding(s) to which it relates and the fact that two copies of it have been submitted to the Secretary, and must be labeled or captioned as an *ex parte* presentation.

24. Any person who in making an oral *ex parte* presentation presents data or arguments not already reflected in that person's written comments, memoranda, or other previous filings in that proceeding shall provide on the day of the oral presentation an original and one copy of a written memorandum to the Secretary (with a copy to the Commissioner or staff member involved) which summarizes the data and arguments. The memorandum (as well as any transmittal letter) must clearly indicate on its face the docket number of the particular proceeding and the fact that an original and one copy of it have been submitted to the Secretary, and must be labeled or captioned as an *ex parte* presentation. Section 1.1206.

25. *Paperwork Reduction Act Statement*. The proposal contained herein has been analyzed with respect to the Paperwork Reduction Act of 1980 and found to contain no new or modified form, information collection and/or record keeping, labeling, disclosure, or record retention requirements; and will not increase or decrease burden hours imposed on the public.

26. For further information on this proceeding, contact the Technical Standards Branch, Room 7122, Office of Engineering and Technology, FCC, Washington, DC 20554, (202) 653-6288.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] Television Decoder Circuitry Act of 1990, Pub. L. 101-431.

[2] Closed captions are used to provide a visual depiction of information simultaneously being provided on the audio portion of a television signal. Captions are considered to be closed because they are only viewable if the user activates a decoder.

[3] This information is transmitted on line 21 of the vertical blanking interval.

[4] *See* Television Captioning for the Deaf: Signal and Display Specifications, Engineering Report No. E-7709-C, Public Broadcasting Service, dated May 1980.

[5] *See* TeleCaption II Decoder Module Performance Specification, National Captioning Institute, Inc., dated November 1985.

[6] *See* Report of the Senate Committee on Commerce, Science, and Transportation on S. 1974, Report 101-393, 101st Congress, 2d Session (1990).

[7] The Commission must, therefore, adopt the final rules in this proceeding by April 12, 1991.

[8] *See* Report of the Senate Committee on Commerce, Science, and Transportation on S. 1974, *supra.*, at 9.

[9] *See id.*

[10] *See id.*

[11] EIA operates the R-4 Television Receiver Committee to create voluntary industry standards for television receivers. This Committee consists, primarily, of representatives from various television manufacturing companies.

[12] *See* Television Receiver Performance Specification for Basic Closed Captioning Services, Draft Revision 6.0, EIA Standards Proposal, EIA/CEG Television Receiver Committee (R-4), December 7, 1990. A copy is provided in the Appendix.

[13] Most existing decoders do not fully implement the PBS/NCI specifications. For example, the PBS/NCI specifications allow a closed-caption provider to change the color of characters within a caption. Current decoders, however, display only white characters. Also, many existing decoders only support a single caption channel. The PBS/NCI specifications provide for two caption channels.

[14] The PBS/NCI specifications only permit captions to be displayed on the top and bottom portions of the television screen.

[15] *See* Television Receiver Performance Specification for Basic Closed Captioning Services, *supra.*, page 14. The new instructions use the mnemonics DER, TO1, TO2, and TO3. They would allow captions that are done on live programming to be easily corrected, and would reduce the number of characters required to specify a caption location.

[16] Closed-caption service providers use italics to indicate phrases in a foreign language, titles of publications, legal cases, names of vessels, and words heard by the audience but not by the dramatic characters, such as voiceovers or narration. Italics are also used to add emphasis.

[17] *See* Television Receiver Performance Specification for Basic Closed Captioning Services, *supra.*, p. 2.

[18] However, roll-up style captions are only allowed to be displayed on up to four rows at the bottom of the television screen.

APPENDIX

ELECTRONIC INDUSTRIES ASSOCIATION

December 7, 1990

RECEIVED
DEC 7 - 1990
Technical Standards Branch
Authorization and Evaluation Division

Mr. Richard B. Engleman
Chief, Technical Standards Branch
Office of Engineering & Technology
Federal Communications Commission
2025 M Street NW, Room 7122
Washington, DC 20554

Dear Mr. Engleman:

We are pleased to submit to you the draft proposed EIA Standard, **Television Receiver Performance Specification for Basic Closed Captioning Service.**

The EIA/CEG Television Receiver Committee (R-4) at its October 9th meeting established a Closed Captioning Task Force to develop a Display Standard based on the PBS Engineering Report (E-7709-C; May 1980) and the NCI TeleCaption II Decoder Module Specification (November 1985) as cited in the Television Decoder Circuitry Act of 1990. The task force is comprised of television receiver manufacturers and closed captioning service providers. A list of meetings and attendees is enclosed.

The task force's objective has been to establish display standards for a basic closed captioning service in order to insure compatibility with the existing service and the wide variety of television receivers to be manufactured in compliance with the law after July 1, 1993.

The attached document is the result of two months of hard work by the task force and represents a consensus of the membership with the exception of the National Captioning Institute (NCI). Nevertheless, it is a document that has resulted from the cooperative effort between the television receiver manufacturers and the caption service providers.

On behalf of the task force (with the previously noted exception) we respectfully request incorporation of this document in the forthcoming Notice of Proposed Rule Making.

Sincerely,

TDM/for JS
Julius Szakolczay
Chairman
Closed Captioning Task Force

Thomas Mock
Thomas Mock
Director of Engineering
Consumer Electronics Group

2001 PENNSYLVANIA AVENUE, NW • WASHINGTON, DC 20006-1813 • (202) 457-4900 • FAX (202) 457-4985

Closed Captioning Standard Task Force

Julius Szakolczay, Chair - Mitsubishi
(714) 220-6880 FAX 229-3894

Kenneth Skinner - Philips CEC
(615) 521-4761 FAX 521-4728

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John Teskey - Thomson
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C.B. Patel - Samsung
(609) 896-3738 FAX 896-3748

John Ball - NCI
(703) 998-2451 FAX 998-2458

Larry Goldberg - WGBH
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Richard Lowell - Sony
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Jeff Hutchins - Caption America
(412) 261-1458 FAX 261-6257

Bob Wolff - Matsushita
(708) 452-2237 FAX 452-2260

Jack Armstrong - Sanyo
(501) 633-5030 FAX 633-0650

Richard Engelman - FCC
(202) 653-6288 FAX 653-8773

Tom Mock - EIA
(202) 457-4975 FAX 457-4985

CLOSED CAPTIONING TASK FORCE MEETINGS

October 30, 1990 - Ramada O'Hare Hotel - Chicago, IL

NAME	ORGANIZATION
Larry Goldberg	The Caption Center/WGBH
Bob Wolff	Matsushita TV Company
Ed Murphy	EEG Enterprises, Inc.
Kenneth Skinner	Philips Consumer Electronics
Richard Lowell	Sony Corporation of America
Jeffery Puskas	Zenith Electronics
Steve Sigman	Zenith Electronics
John Tesky	Thomson Consumer Electronics
Amnon Salomon	National Captioning Institute
Linda Carson	National Captioning Institute
John Tanaka	JVC Manufacturing Co.
Jeff Hutchins	CaptionAmerica
David Broberg	Mitsubishi Electronics of America
Thomas Mock	EIA/CEG

November 14, 1990 - Wyndham Bristol Hotel - Washington, DC

NAME	ORGANIZATION
Julius Szakolczay	Mitsubishi Electronics of America
David Broberg	Mitsubishi Electronics of America
Larry Goldberg	The Caption Center/WGBH
Bill Posner	EEG Enterprises, Inc.
William Miller	Philips Consumer Electronics
Jack Armstrong	Sanyo Manufacturing Corporation
Richard Lowell	Sony Corporation of America
Kazuhiko Inagaki	Sony Corporation of America
Jeffery Puskas	Zenith Electronics
Steve Sigman	Zenith Electronics
John Tesky	Thomson Consumer Electronics
Linda Carson	National Captioning Institute
Ted Marks	JVC Manufacturing Co.
John Tanaka	JVC Manufacturing Co.
Jeff Hutchins	CaptionAmerica
Bob Burroughs	Panasonic Technologies
Ron Slaymaker	Texas Instruments
Thomas Mock	EIA/CEG

December 3, 1990 - Wyndham Bristol Hotel - Washington, DC

NAME	**ORGANIZATION**
Julius Szakolczay	Mitsubishi Electronics of America
Larry Goldberg	The Caption Center/WGBH
Dan Glisson	The Caption Center/WGBH
Richard Engleman	FCC
Bill Posner	EEG Enterprises, Inc.
Edward Murphy	EEG Enterprises, Inc.
Kenneth Skinner	Philips Consumer Electronics
Richard Lowell	Sony Corporation of America
Jeffery Puskas	Zenith Electronics
Steve Sigman	Zenith Electronics
John Tesky	Thomson Consumer Electronics
Linda Carson	National Captioning Institute
Ted Marks	JVC Manufacturing Co.
John Tanaka	JVC Manufacturing Co.
Jeff Hutchins	CaptionAmerica
Joe Foy	Texas Instruments
Thomas Mock	EIA/CEG

Television Receiver Performance Specification for Basic Closed Captioning Services

DRAFT REVISION 6.0
EIA Standards Proposal

EIA/CEG Television
Receiver Committee (R-4)
December 7, 1990

CLOSED CAPTIONING

TELEVISION RECEIVER

PERFORMANCE SPECIFICATION

FOR BASIC SERVICES

1. OPERATING MODES

The television receiver will employ customer-selectable modes of operation for TV and Caption. A third mode of operation, Text, may be included. The Caption and Text Modes may contain data in either of two operating channels, referred to in this document as C1 and C2. The minimum receiver implementation must decode and display C1 captioning. The TV Mode of operation allows the video to be viewed in its original form. The Caption and Text Modes define one or more areas (called "boxes") on the screen within which caption or text characters are displayed.

2. SCREEN FORMAT

The display area for captioning and text shall fall within the SAFE TITLE AREA as defined by SMPTE Recommended Practice # 27.3 - 1989. This display area will be further divided into 15 character rows of equal height and 32 columns of equal width, to provide accurate placement of text on the screen. Vertically, the display area begins on line 43 and is 195 lines high, ending on line 237 on an interlaced display. All captioning and text shall fall within these established columns and rows. The characters must be displayed clearly separated from the video over which they are placed.

2.1 CAPTION MODE

In the Caption Mode, text can appear on up to 4 rows simultaneously anywhere on the screen within the defined display area. In addition, a solid space equal to one column width may be placed before the first character and after the last character of each row to enhance legibility.

The caption area will be transparent anywhere that:

1) No standard space character or other character has been addressed and no accompanying solid space is needed;

2) An accompanying solid space is used and a "transparent space" special character has been addressed which does not immediately precede or follow a displayed character.

3. PRESENTATION FORMAT

In analyzing the presentation of characters, it is convenient to think in terms of a non-visible cursor which marks the screen position at which the next event in a given mode and data channel will occur. The receiver remembers the cursor position for each mode even when data are received for a different address in an alternate mode or data channel.

3.1 SCREEN ADDRESSING

Two kinds of control codes are used to move the cursor to specific screen locations. In Caption Mode, these addressing codes will affect both row and column positioning. In Text Mode, the codes affect only column positioning. In both modes, the addressing codes are optional. Default positions are defined for each mode and style when no addressing code is provided.

The first type of addressing code is the Preamble Address Code (PAC). It assigns a row number and one of eight "indent" figures. Each successive indent moves the cursor four columns to the right (starting from the left margin). Thus, an indent of 0 places the cursor at Column 1, an indent of 4 sets it at Column 5, etc.

The PAC indent is non-destructive. It will not affect the display to the left of the new cursor position on the indicated row.

Note that Preamble Address Codes also set initial attributes for the displayable characters which follow. See Section 6 and the Preamble Address Code table.

The second type of addressing code is the Tab Offset, which is one of three Miscellaneous Control Codes. Tab Offset will move the cursor one, two, or three columns to the right. The character cells skipped over will be unaffected; displayable characters in these cells, if any, will remain intact while empty cells will remain empty, in the same manner that a PAC indent is non-destructive.

3.2 CAPTION MODE

There are three styles of presenting text in Caption Mode: roll-up, pop-on, and paint-on.

Character display varies significantly with the style used, but certain rules of character erasure are common to all styles. A character, once displayed, can be erased by addressing another character to the same screen location or, in displayed memory, by backspacing over the character from a subsequent location on the same row. The entire displayed memory will be erased instantly by receipt of an Erase Displayed Memory command. Both displayed memory and non-displayed memory will be entirely erased simultaneously by:

- the user switching receiver channels or data channels (C1/C2) or fields (F1/F2) in decoders so equipped; or
- the loss of valid data (see Section 7); or
- selecting non-captioning receiver functions which use the display memory of the decoder.

These are the only instances in which caption memory will be erased. Receipt of an End of Caption command will cause a displayed caption to become non-displayed (and vice versa) without being erased from memory. Changing the receiver to a non-captioning mode which does not require use of the decoder's display memory will leave that memory intact, and the decoder will continue to process data as if the caption display were selected.

3.2.1 ROLL-UP

Roll-up style captioning is initiated by receipt of one of three Miscellaneous Control Codes that determine the maximum number of rows displayed simultaneously, either 2, 3 or 4 contiguous rows. These are the three Roll-Up Caption commands.

The bottom row of the display is known as the "base row". The cursor always remains on the base row. Rows of text roll upwards into the contiguous rows immediately above the base row to create a "window" 2 to 4 rows high.

The Roll-Up command, in normal practice, will be followed (not necessarily immediately) by a Preamble Address Code indicating the base row and the horizontal indent position. If no Preamble Address Code is received, the base row will default to Row 15 or, if a roll-up caption is currently displayed, to the same base row last received, and the cursor will be placed at Column 1. If the Preamble Address Code received contains a different base row than that of a currently displayed caption, the entire window will move intact (and without erasing) to the new base row immediately.

The base row given in the Preamble Address Code takes precedence over the number of roll-up rows given in the Roll-Up Caption command. If the Preamble Address Code indicates Rows 1, 2, or 3 as the base row, any rows which would display above the window will be lost.

Each time a Carriage Return is received, the text in the top row of the window is erased from memory and from the display. The remaining rows of text are each rolled up into the next highest row in the window, leaving the base row blank and ready to accept new text. The cursor is automatically placed at Column 1 (pending receipt of a Preamble Address Code).

Increasing or decreasing the number of roll-up rows instantly changes the size of the active display window, appropriately turning on or off the display of the top one or two rows. A row which is turned off should also be erased from memory.

Characters are always displayed immediately when received by the receiver. Once the cursor reaches the 32nd column position on any row, all subsequent characters received prior to a Carriage Return, Preamble Address Code, or Backspace will be displayed in that column replacing any previous character occupying that address.

The cursor moves automatically one column to the right after each character or Mid-Row Code received. A Backspace will move the cursor one column to the left, erasing the character or Mid-Row Code occupying that location. (A Backspace received when the cursor is in Column 1 will be ignored.)

If a solid space is used for legibility, it should appear when the first displayable character (not a transparent space) or Mid-Row Code is received on a row, not when the Preamble Address Code, if any, is given. A row on which there are no displayable characters or Mid-Row Codes will not display a solid space, even when rolled up between two rows which do display a solid space. If the reception of data for a row is interrupted by data for the alternate data channel or for Text Mode, the display of caption text will resume from the same cursor position if a

Roll-Up Caption command is received and no Preamble Address Code is given which would move the cursor.

Receipt of a Resume Caption Loading command (for pop-on style) or a Resume Direct Captioning command (for paint-on style) will not affect a roll-up display. Receipt of an End of Caption command will erase the roll-up caption.

Receipt of a Roll-Up Caption command will cause any pop-on or paint-on caption to be erased from displayed memory and non-displayed memory.

3.2.2 POP-ON

Pop-on style captioning is initiated by receipt of a Resume Caption Loading command. Subsequent data are loaded into a non-displayed memory and held there until an End of Caption command is received, at which point the non-displayed memory becomes the displayed memory and vice versa. (This process is often referred to as "flipping memories" and does not automatically erase memory.) An End of Caption command forces the receiver into pop-on style if no Resume Caption Loading command has been received which would do so. The display will be capable of 4 full rows, not necessarily contiguous, simultaneous anywhere on the screen.

If no Preamble Address Code is received, the cursor will begin at the same screen position where it was left after the previous caption (or at Row 1, Column 1 when the receiver is first turned on or after a screen erase caused by the user switching data channels or fields or by loss of valid data). Preamble Address Codes can be used to move the cursor around the screen in random order to place captions on Rows 1 to 15. Carriage Returns and Backspaces have no effect on cursor location during caption loading.

The cursor moves automatically one column to the right after each character or Mid-Row Code received. Once the cursor reaches the 32nd column position on any row, all subsequent characters received prior to an End of Caption, or a Preamble Address Code, will replace any previous character at that location.

If data reception is interrupted during caption loading by data for the alternate caption channel or for Text Mode, caption loading will resume at the same cursor position if a Resume Caption Loading command is received and no Preamble Address Code is given that would move the cursor.

Characters remain in non-displayed memory until an End of Caption command flips memories. The caption will be erased without being displayed upon receipt of an Erase Non-Displayed Memory command, a Roll-Up Caption command, or if the user switches receiver channels, data channels or fields, or upon the loss of valid data (see Section 7).

A pop-on caption, once displayed, remains displayed until one of the standard caption erasure techniques is applied or until a Roll-Up Caption command is received. Characters within a displayed pop-on caption will be replaced by receipt of the Resume Direct Captioning command and paint-on style techniques (see below).

3.2.3 PAINT-ON

Paint-on style captioning is initiated by receipt of a Resume Direct Captioning command. Subsequent data are addressed immediately to displayed memory without need for an End of Caption command.

If no Preamble Address Code is received, the cursor will begin at the same screen position where it was left after the previous caption (or at Row 1, Column 1 when the receiver is first turned on or after a screen erase caused by the user switching receiver channels or data channels or fields or by loss of valid data).

Preamble Address Codes can be used to move the cursor around the screen in random order to display captions on Rows 1 to 15. Carriage Returns have no affect on cursor location during direct captioning. The cursor moves automatically one column to the right after each character or Mid-Row Code is received. Receipt of a Backspace will move the cursor

Receipt of a Backspace will move the cursor one column to the left, erasing the character or Mid-Row Code occupying that location. (A Backspace received when the cursor is in Column 1 will be ignored.) Once the cursor reaches the 32nd column position on any row, all subsequent characters received prior to a Preamble Address Code or Backspace will be displayed in that column replacing any previous character occupying that location.

If the reception of data is interrupted during direct captioning by data for the alternate caption channel or for Text Mode, the display of caption text will resume at the same cursor position if a Resume Direct Captioning command is received and no Preamble Address Code is given which would move the cursor.

Characters remain displayed until one of the standard caption erasure techniques is applied or until a Roll-Up Caption command is received. An End of Caption command leaves a paint-on caption fully intact in non-displayed memory. In other words, a paint-on style caption behaves precisely like a pop-on style caption which has been displayed.

4. CHARACTER FORMAT

Characters are to be displayed on the screen within a character "cell" which is the height and width of a single row and column. The following codes define the displayable character set. Television receivers manufactured prior to January 1, 1996 and having a character resolution of 5 x 7 or less may display the allowable alternate characters in the character table. A label must be on the receiver and information in the owner's manual indicating the receiver displays closed captioning in upper case only.

CHARACTER SET TABLE

SPECIAL CHARACTERS

These require two bytes for each symbol. Each hex coder as shown will be preceded by a 11h for data channel 1 or by a 19h for data channel 2. For example: 19h 37h will place a musical note in data channel 2.

HEX	EXAMPLE	ALTERNATE	DESCRIPTION
30	®	* see note	registered mark symbol
31	°		degree sign
32	½		1/2
33	¿		inverse query
34	™	* see note	trademark symbol
35	¢		cents sign
36	£		Pounds Sterling sign
37	♪		music note
38	à	A	lower-case a with grave accent
39			transparent space
3A	è	E	lower-case e with grave accent
3B	â	A	lower-case a with circumflex
3C	ê	E	lower-case e with circumflex
3D	î	I	lower-case i with circumflex
3E	ô	O	lower-case o with circumflex
3F	û	U	lower-case u with circumflex

* NOTE: The registered mark and trademark symbols are used to satisfy certain legal requirements. There are various legal ways in which these symbols may be drawn or displayed. For example, the trademark symbol may be drawn with the "T" next to the "M" or over the "M". It is prefered that the trademark symbol be superscripted, i.e., XYZ™. It is left to each individual manufacturer to interpret these symbols in any way that meets the legal needs of the user.

STANDARD CHARACTERS

HEX	EXAMPLE	ALTERNATE	DESCRIPTION
20			standard space
21	!		exclamation mark
22	"		quotation mark
23	#		pounds (number) sign
24	$		dollar sign
25	%		percentage sign
26	&		ampersand
27	'		apostrophe
28	(		open parentheses
29	)		close parentheses
2A	á	A	lower-case a with acute accent
2B	+		plus sign
2C	,		comma
2D	-		minus (hyphen) sign
2E	.		period
2F	/		slash
30	0		zero
31	1		one
32	2		two
33	3		three
34	4		four
35	5		five
36	6		six
37	7		seven
38	8		eight
39	9		nine
3A	:		colon
3B	;		semi-colon
3C	<		less than sign
3D	=		equal sign
3E	>		greater than sign
3F	?		question mark
40	@		at sign
41	A		upper-case A
42	B		upper-case B
43	C		upper-case C
44	D		upper-case D
45	E		upper-case E
46	F		upper-case F
47	G		upper-case G
48	H		upper-case H
49	I		upper-case I
4A	J		upper-case J
4B	K		upper-case K
4C	L		upper-case L
4D	M		upper-case M
4E	N		upper-case N
4F	O		upper-case O

HEX	EXAMPLE	ALTERNATE	DESCRIPTION
50	P		upper-case P
51	Q		upper-case Q
52	R		upper-case R
53	S		upper-case S
54	T		upper-case T
55	U		upper-case U
56	V		upper-case V
57	W		upper-case W
58	X		upper-case X
59	Y		upper-case Y
5A	Z		upper-case Z
5B	[		open bracket
5C	é	E	lower-case e with acute accent
5D	]		close bracket
5E	í	I	lower-case i with acute accent
5F	ó	O	lower-case o with acute accent
60	ú	U	lower-case u with acute accent
61	a	A	lower-case a
62	b	B	lower-case b
63	c	C	lower-case c
64	d	D	lower-case d
65	e	E	lower-case e
66	f	F	lower-case f
67	g	G	lower-case g
68	h	H	lower-case h
69	i	I	lower-case i
6A	j	J	lower-case j
6B	k	K	lower-case k
6C	l	L	lower-case l
6D	m	M	lower-case m
6E	n	N	lower-case n
6F	o	O	lower-case o
70	p	P	lower-case p
71	q	Q	lower-case q
72	r	R	lower-case r
73	s	S	lower-case s
74	t	T	lower-case t
75	u	U	lower-case u
76	v	V	lower-case v
77	w	W	lower-case w
78	x	X	lower-case x
79	y	Y	lower-case y
7A	z	Z	lower-case z
7B	ç	C	lower-case c with cedilla
7C	÷		division sign
7D	Ñ		upper-case N with tilde
7E	ñ	Ñ	lower-case n with tilde
7F	█		solid block

5. CHARACTER ATTRIBUTES

5.1 TRANSMISSION OF ATTRIBUTES

A character may be transmitted with any or all of four attributes: color, italics, underline, and flash. All of these attributes are set by control codes included in the received data. An attribute will remain in effect until changed by another control code or until the end of the row is reached. Each row begins with a control code which sets the color and underline attributes. (White non-underlined is the default if no Preamble Address Code is received before the first character on an empty row.) Attributes are not affected by transparent spaces within a row.

All Mid-Row Codes and the Flash On command are spacing attributes which appear in the display just as if a standard space (20h) had been received.

Preamble Address Codes are non-spacing and will not alter any attributes when used to position the cursor in the midst of a row of characters.

The color attribute has the highest priority and can only be changed by the Mid-Row Code of another color.

Italics has the next highest priority. If characters with both color and italics are desired, the italics Mid-Row Code must follow the color assignment. Any color Mid-Row Code will turn off italics.

If the least significant bit of a Preamble Address Code or of a color or italics Mid-Row Code is a 1 (high), underlining is turned on. If that bit is a 0 (low), underlining is off.

The flash attribute is transmitted as a Miscellaneous Control Code. The Flash On command will not alter the status of the color, italics, or underline attributes. However, any color or italics Mid-Row Code will turn off flash.

Thus, for example, if a red, italicized, underlined, flashing character is desired, the attributes must be received in the following order: a red Mid-Row or Preamble Address Code, an italics Mid-Row Code with underline bit, and the Flash On command. The character will then be preceded by three spaces (two if red was assigned via a Preamble Address Code).

5.2 DISPLAY OF ATTRIBUTES

The underline attribute will be displayed by drawing a line beneath the character in the same color as the character.

The flash attribute will be displayed by causing the character to blank from the display at least once per second.

The italic attribute will be displayed by one of the following methods:

- special italic font, or;
- the modification of the standard font by slanting, or;
- by use of inverse video (i.e., foreground and background color reversal)

The support of the color attributes is optional. If the color attributes are supported, they will be displayed in the color they have been assigned. If color attributes are not supported, the display may be in color, but all color changes will be ignored.

6. CONTROL CODES

There are three different types of control codes used to identify the format, location, attributes, and display of characters: Preamble Address Codes, Mid-Row Codes, and Miscellaneous Control Codes.

Each control code consists of a pair of bytes which are always transmitted together in a single field of line 21 and which are normally transmitted twice in succession to help insure correct reception of the control instructions. The first of the control code bytes is a non-printing character in the range 10h to 1Fh. The second byte is always a printing character in the range 20h to 7Fh. Any such control code pair received which has not been assigned a function is ignored. If the non-printing character in the pair is in the range 00h to 0Fh, that character alone will be ignored and the second character will be treated normally.

If the second byte of a control code pair does not contain odd parity (see Section 7), then the pair is ignored. The redundant transmission of the pair will be the instruction upon which the receiver acts.

If the first byte of the first transmission of a control code pair fails the parity check, then that byte is inserted into the currently active memory as a solid block character (7Fh) followed by whatever the second byte is. Again, the redundant transmission of the pair will be the controlling instruction.

If the first transmission of a control code pair passes parity, it is acted upon immediately. If the next frame contains a perfect repeat of the same pair, the redundant code is ignored. If, however, the next frame contains a different but also valid control code pair, this pair, too, will be acted upon (and the receiver will expect a repeat of this second pair in the next frame). If the first byte of the expected redundant control code pair fails the parity check and the second byte is identical to the second byte in the immediately preceding pair, then the expected redundant code is ignored. If there are printing characters in place of the redundant code, they will be processed normally.

There is provision for optional decoding of a second data channel. The second data channel is encoded with the same control codes and procedures already described. The first byte of every control code pair indicates the data channel (C1/C2) to which the command applies. Control codes which do not match the data channel selected by the user, and all subsequent data related to that control code, are ignored by the receiver.

MID-ROW CODES

DATA CHANNEL 1	DATA CHANNEL 2	ATTRIBUTE DESCRIPTION
11 20	19 20	White
11 21	19 21	White Underline
11 22	19 22	Green
11 23	19 23	Green Underline
11 24	19 24	Blue
11 25	19 25	Blue Underline
11 26	19 26	Cyan
11 27	19 27	Cyan Underline
11 28	19 28	Red
11 29	19 29	Red Underline
11 2A	19 2A	Yellow
11 2B	19 2B	Yellow Underline
11 2C	19 2C	Magenta
11 2D	19 2D	Magenta Underline
11 2E	19 2E	Italics
11 2F	19 2F	Italics Underline

MISCELLANEOUS CONTROL CODES

DATA CHANNEL 1	DATA CHANNEL 2	MNEMONIC	COMMAND DESCRIPTION
14 20	1C 20	RC	Resume Caption Loading
14 21	1C 21	BS	Backspace
14 22	1C 22	AOF	reserved (formerly Alarm Off)
14 23	1C 23	AON	reserved (formerly Alarm On)
14 24	1C 24	DER	Delete to End of Row
14 25	1C 25	RU2	Roll-Up Captions-2 Rows
14 26	1C 26	RU3	Roll-Up Captions-3 Rows
14 27	1C 27	RU4	Roll-Up Captions-4 Rows
14 28	1C 28	FON	Flash On
14 29	1C 29	RDC	Resume Direct Captioning
14 2A	1C 2A	TR	Text Restart
14 2B	1C 2B	RTD	Resume Text Display
14 2C	1C 2C	EDM	Erase Displayed Memory
14 2D	1C 2D	CR	Carriage Return
14 2E	1C 2E	ENM	Erase Non-Displayed Memory
14 2F	1C 2F	EOC	End of Caption (Flip Memories)
17 21	1F 21	TO1	Tab Offset 1 Column
17 22	1F 22	TO2	Tab Offset 2 Columns
17 23	1F 23	TO3	Tab Offset 3 Columns

PREAMBLE ADDRESS CODES

	ROW 1	ROW 2	ROW 3	ROW 4	ROW 5	ROW 6	ROW 7	ROW 8	ROW 9	ROW 10	ROW 11	ROW 12	ROW 13	ROW 14	ROW 15
First byte of code pair															
Data Channel 1	11	11	12	12	15	15	16	16	17	17	10	13	13	14	14
Data Channel 2	19	19	1A	1A	1D	1D	1E	1E	1F	1F	18	1B	1B	1C	1C
Second byte of code pair															
White	40	60	40	60	40	60	40	60	40	60	40	40	60	40	60
White Underline	41	61	41	61	41	61	41	61	41	61	41	41	61	41	61
Green	42	62	42	62	42	62	42	62	42	62	42	42	62	42	62
Green Underline	43	63	43	63	43	63	43	63	43	63	43	43	63	43	63
Blue	44	64	44	64	44	64	44	64	44	64	44	44	64	44	64
Blue Underline	45	65	45	65	45	65	45	65	45	65	45	45	65	45	65
Cyan	46	66	46	66	46	66	46	66	46	66	46	46	66	46	66
Cyan Underline	47	67	47	67	47	67	47	67	47	67	47	47	67	47	67
Red	48	68	48	68	48	68	48	68	48	68	48	48	68	48	68
Red Underline	49	69	49	69	49	69	49	69	49	69	49	49	69	49	69
Yellow	4A	6A	4A	6A	4A	6A	4A	6A	4A	6A	4A	4A	6A	4A	6A
Yellow Underline	4B	6B	4B	6B	4B	6B	4B	6B	4B	6B	4B	4B	6B	4B	6B
Magenta	4C	6C	4C	6C	4C	6C	4C	6C	4C	6C	4C	4C	6C	4C	6C
Magenta Underline	4D	6D	4D	6D	4D	6D	4D	6D	4D	6D	4D	4D	6D	4D	6D
White Italics	4E	6E	4E	6E	4E	6E	4E	6E	4E	6E	4E	4E	6E	4E	6E
White Italics Underline	4F	6F	4F	6F	4F	6F	4F	6F	4F	6F	4F	4F	6F	4F	6F
Indent 0	50	70	50	70	50	70	50	70	50	70	50	50	70	50	70
Indent 0 Underline	51	71	51	71	51	71	51	71	51	71	51	51	71	51	71
Indent 4	52	72	52	72	52	72	52	72	52	72	52	52	72	52	72
Indent 4 Underline	53	73	53	73	53	73	53	73	53	73	53	53	73	53	73
Indent 8	54	74	54	74	54	74	54	74	54	74	54	54	74	54	74
Indent 8 Underline	55	75	55	75	55	75	55	75	55	75	55	55	75	55	75
Indent 12	56	76	56	76	56	76	56	76	56	76	56	56	76	56	76
Indent 12 Underline	57	77	57	77	57	77	57	77	57	77	57	57	77	57	77
Indent 16	58	78	58	78	58	78	58	78	58	78	58	58	78	58	78
Indent 16 Underline	59	79	59	79	59	79	59	79	59	79	59	59	79	59	79
Indent 20	5A	7A	5A	7A	5A	7A	5A	7A	5A	7A	5A	5A	7A	5A	7A
Indent 20 Underline	5B	7B	5B	7B	5B	7B	5B	7B	5B	7B	5B	5B	7B	5B	7B
Indent 24	5C	7C	5C	7C	5C	7C	5C	7C	5C	7C	5C	5C	7C	5C	7C
Indent 24 Underline	5D	7D	5D	7D	5D	7D	5D	7D	5D	7D	5D	5D	7D	5D	7D
Indent 28	5E	7E	5E	7E	5E	7E	5E	7E	5E	7E	5E	5E	7E	5E	7E
Indent 28 Underline	5F	7F	5F	7F	5F	7F	5F	7F	5F	7F	5F	5F	7F	5F	7F

NOTE: All indent codes (second byte equals 50h-5Fh, 70h-7Fh) assign white as the color attribute.

7. DATA REJECTION

The receiver should provide an effective procedure to verify data.

A receiver will reject data for two reasons:

1. The data is invalid, or
2. the data is directed to the data channel or field not selected by the user.

Invalid data is any data that:

- fails to pass a check for odd parity, or
- which, having passed the parity check, is assigned no function.

If a print character fails to pass a check for parity, a solid block (7Fh) should be displayed in place of the failed character. In addition, valid data can be corrupted in many ways and may not be suitable for display. For example, repeated fields, skipped fields and altered field sequences are all possible from consumer video equipment and might present meaningless captions.

The receiver will ignore data rejected due to being directed to a deselected field or channel. However, this will not cause the display to be disabled.

8. AUTOMATIC DISPLAY ENABLE/DISABLE

The receiver shall provide an automatic enable/disable capability to prevent the display of invalid or incomplete data, when the user selects the Caption Mode. The display should automatically become enabled after the receiver verifies the data as described in the previous section.

The display will be automatically disabled when there is a sustained detection of invalid data. The display will be re-enabled when the data verification process has been satisfied once again.

GLOSSARY OF TERMS

USED TO DESCRIBE CAPTION DECODER SPECIFICATIONS

BASE ROW - The bottom row of a roll-up display. The cursor always remains on the base row. Rows of text roll upwards into the contiguous rows immediately above the base row.

BOX - The area surrounding the active character display. In Text Mode, the box is the entire screen area defined for display, whether or not displayable characters appear. In Caption Mode, the box is dynamically redefined by each caption and each element of displayable characters within a caption. The box (or boxes, in the case of a multiple-element caption) includes all the cells of the displayed characters, the non-transparent spaces between them, and one cell at the beginning and end of each row within a caption element in those decoders that use a solid space to improve legibility.

CAPTION WINDOW - The invisible rectangle which defines the top and bottom limits of a roll-up caption. The window can be 2 to 4 rows high. The lowest row of the window is called the base row.

CELL - The discrete screen area in which each displayable character or space may appear. A cell is one row high and one column wide.

COLUMN - One of 32 vertical divisions of the screen, each of equal width, extending approximately across the full width of the "Safe Title Area" as defined by SMPTE Recommended Practice #27.3 - 1989. Two additional columns, one at the left of the screen and one at the right, may be defined for the appearance of a box in those decoders which use a solid space to improve legibility, but no displayable characters may appear in those additional columns. For reference, columns may be numbered 0 to 33, with columns 1 to 32 reserved for displayable characters.

DISPLAYABLE CHARACTER - Any letter, number or symbol which is defined for on-screen display.

DISPLAY DISABLE - To turn off the display of captions or text (and accompanying background) at the receiver, rather than through codes transmitted on line 21 which unconditionally erase the display. The receiver may disable the display because the user selects an alternate mode, e.g. TV Mode, or because no valid line 21 data is present.

DISPLAY ENABLE - To allow the display of captions or text when they are transmitted on line 21 and received as valid data. For display to be enabled, the user must have selected Caption Mode or Text Mode, and valid data for the selected mode must be present on line 21.

ELEMENT - In a pop-on or paint-on style caption, each contiguous area of cells containing displayable characters and non-transparent spaces between those characters. A single caption may have multiple elements. An element is not necessarily a perfect rectangle, but may include rows of differing widths.

ERASE DISPLAY - In Caption Mode, to clear the screen of all characters (and accompanying background) in response to codes transmitted on line 21. (The caption service provider can accomplish the erasure either by sending an Erase Displayed Memory command or by sending an Erase Non-Displayed Memory command followed by and End of Caption command, effectively making a blank caption "appear".) Display can also be erased by the receiver when the caption memory erasure conditions are met, such as the user changing TV channels.

ROW - One of 15 horizontal divisions of the screen, extending across the full height of the "Safe Title Area" as defined by SMPTE Recommended Practice #27.3 - 1989.

SPECIAL CHARACTERS - Displayable characters (except for "transparent space") which require a two-byte sequence of one non-printing and one printing character. The non-printing byte varies depending on the data channel. Regular characters require unique one-byte codes which are the same in either data channel.

TEXT - When written with an upper-case "T", refers to the Text Mode. When written with a lower-case "t", refers to any combination of displayable characters.

TRANSPARENT SPACE - Transmitted as a special character, it is a one-column-wide space behind which program video is always visible (except when a transparent space immediately precedes or follows a displayable character and a solid box is needed to make that character legible).

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FEDERAL COMMUNICATIONS COMMISSION

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Before the
Federal Communications Commission
Washington, D.C. 20554

In re Applications of

ARKANSAS EDUCATIONAL TELEVISION COMMISSION	File Nos. BRET-870130KL BRET-870130KN BRET-870130KO BRET-870130KP BRET-870130KQ

For Renewal of License of
Stations KETS(TV), et al.
Little Rock, Arkansas

MEMORANDUM OPINION AND ORDER

Adopted: January 31, 1991; Released: February 4, 1991

By the Commission:

1. The Commission has before it for consideration: (a) a petition for reconsideration of our *Memorandum Opinion and Order ("Reconsideration Order")* 5 F.C.C. Rcd. 2745 (1990), filed by the Office of Communication of the United Church of Christ and the First Congregational Church of Little Rock, Arkansas (hereinafter "OC/FC"); (b) an opposition from the licensee: (c) petitioner's reply and (d) various related pleadings.[1]

2. In the *Reconsideration Order*, we affirmed our earlier decision, 3 F.C.C. Rcd. 1923 (1988), to grant renewal of license to Arkansas Educational Television Commission (hereinafter AETC"), licensee of noncommercial educational station KETS(TV), Little Rock, Arkansas, subject to EEO reporting conditions.[2] In so doing, we rejected the arguments that the National Black Media Coalition ("NBMC") had earlier raised in a petition to deny the KETS(TV) license renewal, concluding again that a Commission investigation of the licensee's EEO performance during the 1982-1987 license term was not warranted. Similarly, we were not persuaded that an evidentiary hearing was necessary regarding the licensee's admitted violation of Section 73.3527(a)(7) of the Commission's Rules, a matter raised by NBMC and by OC/FC, who had not participated earlier ~~in~~ this proceeding.[3] Based on a number of factors, we concluded that no action was warranted against KETS(TV) at that time. However, we admonished AETC that failure to prepare and maintain its issues/programs lists in a manner fully complying with our rules could result in the imposition of appropriate sanctions in the future.

3. In OC/FC's present petition for reconsideration (*"Second Petition"*), it contends that the Commission erred by: (1) dismissing OC/FC's earlier petition for reconsideration (*"First Petition"*), but accepting in part the petition for reconsideration of NBMC, even though both parties made identical allegations and filed joint pleadings in opposition to AETC; and (2) not addressing OC/FC's earlier allegations concerning misrepresentation; lack of supervision; relevancy of issues/programs lists created after the license term on actual issue-responsive programming; and ascertainment. Thus, OC/FC asks that we reinstate it as a party in this proceeding, and act upon the material and substantive allegations raised by OC/FC that the Reconsideration Order failed to address.

DISCUSSION

4. **Standing.** We have reviewed the arguments of OC/FC and believe that, under the circumstances of this case, the public interest would be better served by full consideration of the factual allegations and legal arguments singularly and jointly presented by each of the parties below. Accordingly, OC/FC will be accorded party status, notwithstanding its noncompliance with Section 1.106 of the Commission's Rules. With respect to the substantive allegations raised previously by OC/FC and NBMC, we believe that we fairly considered the record before us and properly determined that grant of the licensee's renewal applications was in the public interest. To alleviate any misunderstanding regarding our earlier action and to focus clearly the matters at issue on appeal,[4] we now take this opportunity to address specifically the substantive arguments set forth in the *Second Petition*.

5. **Misrepresentation.** Initially we note, contrary to OC/FC's assertion, that we addressed in our *Reconsideration Order* the issues raised by the petitioners regarding whether the licensee knew or should have known that the public files were out of order when it signed the renewal applications certifying otherwise. With respect to that allegation, we indicated that we had reviewed the facts in the record with regard to petitioners' belief that the licensee knowingly made false statements on its renewal applications by indicating that it had kept the issues-programs lists.[5] *Reconsideration Order*, 5 F.C.C. Rcd. at 2747, para. 17 and 2748, n. 6. On the basis of these facts, we stated that while "the licensee has not complied with the rule, and in fact, it admits that it has not complied with the rule, it appears that there was no intent on its part to either violate the rule or misrepresent to the Commission its failure to comply." *Id.* at 2747, para. 17. Indeed, we noted that "[p]rior to any Commission action on the renewal application of KETS, AETC voluntarily notified the Commission that the station had failed to maintain issues/programs lists during the license term." *Id.*

6. Contrary to OC/FC's contentions, the record evidence does not suggest that the licensee knew or should have known that the public file was out of order when it signed the renewal applications certifying otherwise. Initially, we note that the licensee experienced numerous personnel changes at the management level during the license term. Further, it appears that Oscar E. Goss, an employee at KETS(TV) who had been directed by the former Executive Director of the Arkansas Educational Television Network (AETN) to put KETS(TV)'s public file in order and to work on the issues/programs lists, prepared the AETC license renewal applications for the signature of Michael Mottler. Goss stated that he believed that the monthly PBS program topics lists and the reports of AETC's locally produced programming, which described each program and the issues which the program addressed, were sufficient to satisfy KETS(TV)'s issues/programs public file requirements. Mottler, who was AETN's Associate Director in charge, *inter alia*, of program production and funding development and who had

also temporarily assumed the responsibilities of the former Executive Director, stated that he had assumed that all record-keeping systems and procedures established earlier by AETN were still in place and that all FCC requirements were being adhered to when he signed the AETC license renewal applications. In addition, Donovan Rinker, AETC's current Executive Director, averred that it was he who, on January 21, 1988, first discovered that the issues/programs lists for the 1982-1987 license term had not been prepared and placed in KETS(TV)'s public inspection files. He also determined that the then-pending KETS(TV) renewal application needed to be amended to correct the earlier erroneous response concerning compliance with the issues/programs list public file requirement.[6] As the Commission has previously noted, disqualification of a licensee upon an allegation of misrepresentation can result where there is proof that the licensee engaged in a willful intent to deceive the Commission. *Fox River Broadcasting, Inc.*, 93 F.C.C. 2d 127 (1983). The facts noted above do not in any way raise a substantial and material question concerning such intent. We note in this regard that OC/FC does not dispute the licensee's explanation of the personnel situation existing at the station during the license period. Nor has OC/FC presented any persuasive, properly supported allegations to rebut or otherwise discredit the sworn statements from persons with first-hand knowledge of the facts. To the contrary, their case is based on speculation.

7. OC/FC argued in its *First Petition* that the station's Executive Director, Donovan Rinker, purposefully delayed reporting to the Commission the fact that the station had failed to maintain issues/programs lists during the license term. In so doing, OC/FC argued, the licensee violated Section 1.65 of the Rules, which requires an applicant to notify the Commission of decisionally significant information regarding its application as promptly as possible and in any event within 30 days, unless good cause is shown. As noted in the *Reconsideration Order*, Rinker's letter of February 19, 1988, (which was received on February 24, 1988, two days after the 30-day limit), advised the Commission of its noncompliance with the rules, which noncompliance was discovered on January 21, 1988, and not previously raised by any of the parties. *Reconsideration Order, supra*, at 2747, para. 16. Thus, it attempted to inform us prior to the expiration of the 30-day reporting period set forth in Section 1.65(a) of the Rules. While OC/FC maintains that the Commission should have been notified immediately, Rinker states that his purpose in not doing so was to be able to assure the Commission, at the time the amendment was filed, that the oversight had been corrected by the reconstruction and placement of the issues/programs lists in the KETS(TV) public inspection file. While the course of action suggested by OC/FC would have been preferable, we find Rinker's explanation creditable. OC/FC also asserts that Rinker's actions in informing the Commission were calculated to keep the Commission ignorant of KETS(TV)'s noncompliance until after action on the station's license renewal application. We find these allegations to be speculative, inconsistent with AETC's voluntary disclosures, and adequately rebutted by Rinker's sworn statements explaining his actions. We conclude that no substantial and material question of fact is raised by the short delay in reporting the public file misstatement in KETS(TV)'s renewal application.

8. **Lack of Supervision.** With respect to allegations regarding the lack of supervision at station KETS, we reviewed the various facts in the record and noted them in the *Reconsideration Order*, such as the numerous personnel changes during the license term involving employees responsible for preparing and maintaining the issues lists. *Reconsideration Order, supra*, at 2747, para. 16. We also noted that these circumstances resulted in oversight and miscommunication among successive personnel, several of whom were discharging those responsibilities on a temporary basis. *Id.* While we did not specifically so state, it was clear from the record that the level of miscommunication and oversight present at KETS did not rise to the level necessary to raise a substantial or material question for hearing, as was the basis for a hearing designation order in *Trustees of the University of Pennsylvania Radio Station WXPN(FM)*, 69 F.C.C.2d 1394 (1978)(*WXPN*). There, based upon the record in a full evidentiary hearing, which revealed a breakdown in supervision at every level of the station's operation, the Commission denied the station's application for renewal. The lack of supervision that occurred at KETS does not approach that found in *WXPN*. There is no suggestion in this case that the lapses in control or supervision reached beyond the issues/programs documentation responsibilities of the licensee or affected other critical areas of station operation, such as programming or technical compliance. Moreover, as noted in the *Reconsideration Order*, by February 18, 1988, AETC had compiled the issues/programs lists from the AETC reports, PBS's program topic listings, and the stations' program logs, and placed these issues/programs lists in the public inspection file. Further, AETC indicated, and there was no evidence to the contrary, that directives and memoranda had been distributed to station personnel setting forth the Commission's record-keeping requirements and outlining procedures to ensure that the proper issues/programs lists would be prepared and maintained in the stations' public file in the future. *Id.* at 2747, para. 16. Specifically, Goss avers that after Rinker discovered that the issues/programs lists were not in order, Rinker explained to Goss the requirements of the issues/programs lists, assigned him the responsibility of keeping the public inspection file in order and maintaining it in compliance with the FCC's rules, and gave him a memorandum from the station's communications counsel detailing the requirements regarding the file. Additionally, Rinker states that a memorandum was circulated to AETN's staff explaining the purpose and requirements of the public inspection file. Rinker also states that in February 1988, he distributed a packet of materia to AETN senior staff that listed basic regulatory record-keeping requirements and outlined the processes to be followed. Thus, it appears that, unlike the situation in *WXPN*, station management has instituted procedures to preclude a recurrence of the record-keeping errors and related problems.

9. **Issues/Programs Lists.** OC/FC states that we did no previously address the issue of whether a licensee may establish its issue-responsive programming by submission of issues/programs lists that were not created until afte the license term. At the outset, we reaffirm the clear requirement of our rules and of our broadcas deregulation orders, that issues/programs lists reflecting a station's "most significant" issue programming must be compiled and placed in the public inspection file on an ongoing and contemporaneous basis.[7] There is no dispute that KETS(TV) failed to comply with this requirement

The licensee's failure in this regard, however, is tempered by several considerations. First, the record below clearly showed, as we noted in the *Reconsideration Order*, that the licensee had kept contemporaneous program logs, reports of its locally produced programs, and monthly PBS programs topics lists, and used those very materials to later construct its issues/programs lists.[8] Moreover, it appears that at least some of this issues/programs documentation was placed in the stations' public inspection file on a regular basis during a substantial part of the license term.[9] In particular, the local program reports, which clearly identified the programs and generally described the issues to which they related, were routinely prepared by station producers and placed in the public file.

10. Second, while contemporaneous issues/programs lists were not maintained, appropriate lists for the relevant period were reconstructed by the licensee from contemporaneous programming records and made available to petitioners. Moreover, as we noted in the *Reconsideration Order*, petitioners have not contended that AETC failed to broadcast programming that was responsive to the issues facing its community of license, which is the key objective behind the rule. Nor, as we stated, has the Commission received any complaint from the stations' viewers suggesting that the stations' programming was not responsive to community issues. With these and other factors in mind,[10] in addition to our finding that the licensee had not intentionally violated the rules, we concluded that no action was warranted against KETS(TV) at that time. While we admonished AETC for its admitted failure to prepare and maintain its issues/programs lists in a manner fully complying with our rules, we have revisited this matter and now find that additional sanctions are appropriate, lest the seriousness which we attach to the licensee's omissions be misconstrued. The failure of a station to properly proffer for public scrutiny the required quarterly issues/programs lists should not be interpreted as a mere record-keeping omission. Indeed, these lists and their public availability play an important role in the proper functioning of the broadcast license renewal process. *See Office of Communication of the United Church of Christ v. FCC*, 779 F.2d 702 (D.C. Cir. 1985). To fully ensure the public's ability to evaluate KETS(TV)'s program performance on an ongoing basis during the present license term, as well as afford the Commission the opportunity to monitor the effectiveness of the measures taken by AETC to preclude recurrence of its significant oversight, albeit inadvertent and voluntarily disclosed, we shall appropriately condition the grant of the KETS(TV) license renewal application. AETC will be required, within fifteen days of our action herein, to certify that the required quarterly issues/programs lists covering the first quarter of KETS(TV)'s operation under the station's revised procedures (*i.e.*, January-March, 1988) through the latest quarter (*i.e.*, October-December, 1990) have been compiled and placed in its public inspection file in accordance with our rules. Similar certifications covering the remainder of the present license term are to be filed with the Commission within five days of the quarterly issues/programs lists inclusion in AETC's public inspection file. We also direct that a copy of the certifications required here be served upon OC/FC and the other petitioners in this proceeding.[11] Finally, the present KETS(TV) license is scheduled to expire on June 1, 1992 and its next license renewal application is required to be filed in approximately one year, *i.e.*, no later than February 1, 1992. In conjunction with that application, we shall require AETC to submit to the Commission all of the quarterly issues/programs lists for the entire license term so that we may assess whether it has adequately discharged its duties and responsibilities as a Commission licensee. We believe that the proximity of KETS(TV)'s scheduled renewal filing warrants the Commission's not seeking to make this evaluation at an earlier date. As in situations where a licensee has received only a short-term renewal, however, we will reserve to the full Commission the authority to act on KETS(TV)'s next license renewal application.

11. **Ascertainment.** The petitioners also alleged that for the first two years of the license term, prior to deregulation,[12] the licensee did not perform proper formal ascertainment of community needs as then required by our rules. In support thereof, OC/FC points out that the KETS(TV) official who was responsible for coordinating AETN's formal ascertainment efforts, left the station on October 31, 1983 and that her successor was not given that duty until an unspecified date in 1984. Moreover, the latter individual, Lillian Petrucelli, was a volunteer at that time and was not employed by AETN until June 2, 1985. In petitioners' view, Ms. Petrucelli did not qualify to be the station's ascertainment director as a volunteer.[13] OC/FC also posits that had the required community leader interviews been conducted during this period, the survey contact forms that licensees were, at that time, required to prepare and maintain would have been relied upon in reconstructing the AETC issues/programs lists. Accordingly, OC/FC argued that AETC's failure to perform formal community ascertainment at KETS(TV) and its four other stations warranted exploration in a hearing. In response, AETC does not contest the suggestion that it did not comply with the requirements of the Commission's formal ascertainment policies and regulations.

12. We disagree with the position advanced by petitioners. A hearing is not necessarily required even if we assume, as appears to be the case, that AETC did not conduct community leadership surveys for KETS(TV) and its four other stations in strict conformance with the then-existing ascertainment requirements during the initial period of the 1982-1987 license term. In *Public Broadcasting*, 98 F.C.C. 2d 746 (1985), we found that our formal ascertainment rules "unnecessarily place the emphasis on the methodology used to determine community needs rather than on the key issue of the station's responsiveness to these needs." *Id.* at 752 (citing *Radio Deregulation*, 84 F.C.C. 2d 968, 993 (1981), wherein we stated that ". . . [A]scertainment was never meant to be an end in and of itself. Rather, it is merely a tool to be used as an aid in the provision of programming.") *Public Broadcasting, supra* at n. 16. While we expect and will hold all licensees accountable for adherence to the Commission's policies and regulations when in effect, we do not believe non-renewal would be appropriate even if it were established after a hearing that AETC did not conduct ascertainment in the manner then required by the Commission. Most importantly, it appears that the station did make substantial efforts for at least the majority of the five-year term to be aware of the needs in the communities of license. For example, the record indicates that personnel at the station did ascertain community needs prior to producing programming. John Cheek, the Director of the Educative Services Department, avers that during each year of the 1982-1987 license term, each public school in Arkansas was surveyed to determine the effec-

tiveness of instructional television programs aired during the preceding school year. He also states that during the license term, committees were established, which were comprised of specialists throughout the state in particular subject areas, to recommend courses to AETN's Department of Educative Services. Cheek states that AETN also asked each Educational Cooperative Teacher Center Advisory Committee member to rank a number of educational issues in order of importance. In addition to Cheek's statements. Lillian Petrucelli, who between June 2, 1985 and April 1987 was the Acting Development Director and Special Projects Director, stated that in 1984 she was assigned the responsibility of coordinating AETN's formal ascertainment efforts. which previously had been the responsibility of Dana Gibson from 1976 to 1983. Petrucelli states that her efforts included compiling lists of community leaders in different communities in Arkansas, whose names were placed on survey lists and distributed to members of AETN's senior staff for completion of interviews. She also states that she explained to them that ascertainment was an on-going process and gave them a deadline to complete the forms. Finally, Raymond Ho, AETC's former Executive Director, and Mottler indicated that they and others at the station spoke frequently to organizations around the state and solicited their responses about perceived needs and interests, monitored the local media closely, and subscribed to numerous organizational newsletters in order to ascertain the needs of the community. Thus, while the licensee apparently did not comply with the specific requirements of our formal ascertainment rules, it did make substantial informal ascertainment efforts.

13. Moreover, as noted above, the purpose behind the ascertainment rule was to ensure issue-responsive programming. Thus, despite the fact that neither NBMC nor OC/FC has raised a *prima facie* case with regard to the licensee's issue-responsive programming, we have nonetheless thoroughly reviewed the programming documentation submitted by the licensee and find that it has met its issue-reponsive programming obligations. Specifically, as noted in Ho's affidavit and the issues/programs lists submitted with AETC's Opposition to the initial petitions for reconsideration, AETN responded to a variety of community needs with substantial locally produced and nationally produced programming, including instructional and general educational programming and documentaries. These programs included, among many others, "William Grant Still," a biography of an Arkansas native who was the dean of American black composers; "Home Seasoning," a series of programs addressing Arkansas' energy problems; "The Land of Arkansas," addressing environmental issues of particular importance to Arkansas such as soil erosion and the water table; "Beyond 1986," a locally produced series examining pressing issues affecting Arkansas' future such as the economy and the environment; a "job-a-thon" simulcast with KATV, Little Rock, to match job-seekers with available jobs, over the course of many months. "The Job Market," a daily segment for the same purpose; and "Project Second Chance," programs to assist high school dropouts in attaining their diplomas. Based on this, and the other information regarding the licensee's programming, which is set forth in the attachments to AETC's Opposition, we believe that a failure to strictly comply with our former, formal ascertainment requirements for the initial period of the 1982-1987 license term, is not a sufficient basis to impose sanctions upon the licensee or to require a hearing. Here, the licensee has made substantial efforts, both before and after deregulation, to be aware of community issues and has, in our view, provided issue-responsive programming in the public interest throughout the entire license term. While we do not condone the licensee's apparent failure to comply strictly with our formal ascertainment requirements prior to deregulation, due in some measure to the turnover at the station, we do not believe, based upon the information before us, that this alleged failure, even if true, raises a material and substantial question as to the licensee's basic qualifications or requires reversing our earlier action granting the KETS(TV) license renewal application.

14. Having carefully and fully considered the matters set forth in OC/FC's petition for reconsideration, we find that petitioner has failed to demonstrate manifest error or omissions so material as to necessitate a substantial change of our earlier decision in this case. While additional conditions will now be placed upon the grant of the KETS(TV) license renewal application, we affirm our earlier conclusion that renewal is warranted and would serve the public interest.

15. Accordingly, IT IS ORDERED, That the petition for reconsideration filed by the Office of Communication of the United Church of Christ and the First Congregational Church of Little Rock, Arkansas IS GRANTED to the extent indicated herein and otherwise IS DENIED.

16. IT IS FURTHER ORDERED, That the license renewal application for Station KETS(TV) IS GRANTED subject to the EEO conditions specified in FCC 88-77, released April 4, 1988, and to the conditions specified herein:

> (1) Arkansas Educational Television Commission shall, within fifteen days of the release of this action, file with the Commission and serve upon each of the petitioners a statement, certifying that the quarterly issues/programs listings covering the period from January, 1988 through December, 1990 have been compiled and placed in its public inspection file in accordance with Section 73.3527(a)(7) of the Commission's rules;
>
> (2) Arkansas Educational Television Commission shall, within five days of the scheduled inclusion of each quarterly issues/programs listings in its public inspection file, file with the Commission and serve upon each of the petitioners a statement, certifying that the quarterly listings for the period January, 1991 through June, 1992 were compiled and are available in its public inspection file as required by our rules; and
>
> (3) Arkansas Educational Television Commission shall, in conjunction with the filing of KETS(TV)'s next license renewal application, submit to the Commission a copy of the quarterly issues/programs lists covering the preceding license term.

17. IT IS FURTHER ORDERED, That the Mass Media Bureau send by Certified Mail - - Return Receipt Requested a copy of this Memorandum Opinion and Order to the Office of Communication of the United Church of Christ, the First Congregational Church of Little Rock, Arkansas, and the other parties to this proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

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[1] AETC filed a motion to accept supplemental pleading and supplement to opposition to petition for reconsideration. Because it raises relevant points, we will grant their motion and consider this pleading and OC/FC's pleading in opposition to it.

[2] Station KETS(TV), Little Rock, is one of five public television stations licensed to the AETC. The other four stations are: KEMV(TV), Mountain View; KAFT, Fayetteville; KTEJ, Jonesboro; and KETG, Arkadelphia.

[3] Among other things, the rule requires a noncommercial educational broadcast licensee to place in its station's public inspection file, on a quarterly basis, a listing of the programs that have provided the station's most significant treatment of community issues during the preceding three-month period.

[4] On May 29, 1990, a joint notice of appeal was filed with the United States Court of Appeals for the District of Columbia Circuit by OC/FC, NBMC, the Arkansas State Conference of Branches of the NAACP, and the Little Rock Branch of the NAACP. *Office of Communication of the United Church of Christ v. FCC*, Case No. 90-1272. By Order (*per curiam*) issued November 1, 1990, the court held this appeal in abeyance to afford the Commission an opportunity to act upon the *Second Petition*.

[5] These included allegations that had been set forth in the joint reply and the petition to institute a license revocation proceeding.

[6] OC/FC faults AETC for not simultaneously amending the license renewal applications of the other four AETC stations that Goss had also prepared and Mottler had signed. However, those applications were not pending at the time of Rinker's discovery of the error, for each had been granted on May 15, 1987. In addition, AETC, through sworn statements of Goss and Mottler, did subsequently apprise the Commission that those applications had similarly contained the erroneous response concerning compliance with the public file requirement. In view therof, we do not believe that this matter warrants further Commission consideration.

[7] *See* n.3, *supra*.

[8] We also note that, like program logs, issues/programs lists are designed to be prepared after programming has been produced. Thus, a failure to prepare issues/programs lists does not demonstrate a failure to ascertain community needs in advance of producing programming, as previously suggested by petitioners. *See supra*, n. 11.

[9] To the extent this documentation was maintained but not placed in the public inspection file, we note that a licensee may buttress its programming showing by demonstrating programming not described in the issues/programs lists but described in reasonably contemporaneous alternative programming records. *Philadelphia Renewals*, 5 F.C.C. Rcd. 3847, 3851 at n. 13 (1990), citing *Deregulation of Radio*, 84 F.C.C. 2d 968, 999 (1981).

[10] In our earlier action, we stated our mistaken belief that the AETC program reports, the monthly PBS program topic listings and the station's programs logs had been placed in the KETS(TV) public file during the license term. However, it appears that Goss had only placed the AETC program reports in that file. The monthly PBS program topic listings and the daily KETS(TV) program logs, while kept on file at the station, were maintained separately in the offices of the program coordinator and traffic manager, respectively.

[11] The other petitioners in this proceeding are NBMC, the Arkansas State Conference of Branches of the NAACP, and the Little Rock Branch of the NAACP.

[12] Effective September 1984, regulations requiring formal ascertainment and program logging, which had been in effect during the first two years of AETC's 1982-1987 license term, were repealed. *See Final Report and Order Public Broadcasting*, 98 F.C.C. 2d 746 (1984). *See also Commercial TV Stations*, 98 F.C.C. 2d 1076, 1098 (1984).

[13] We find OC/FC's objection to the activities of Ms. Petrucelli as AETC's volunteer ascertainment coordinator to be without merit. The Commission's previous formal ascertainment guidelines and regulations only limited volunteers from interviewing more than 50% of the community leaders contacted by a noncommercial educational television station. *See Ascertainment of Community Problems*, 58 F.C.C. 2d 526, 539 (1976). They did not prohibit the coordination of a station's community leadership ascertainment process by volunteers.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-630

In re Applications of

TOPP BROADCASTING LIMITED PARTNERSHIP (hereafter "Topp")	File No. BPH-880615MB
FOG COMMUNICATIONS (hereafter "Fog")	File No. BPH-880615MH
ROOT RIVER RADIO, INC. (hereafter "Root")	File No. BPH-880616NB
ROCHESTER FM, INC. (hereafter "RFI")	File No. BPH-880616ND
GARY L. LUSK (hereafter "Lusk")	File No. BPH-880616NE
OBED S. BORGEN (hereafter "Borgen")	File No. BPH-880616NT

For Construction Permit
for a New FM Station on Channel
287C2 in Stewartville, Minnesota

HEARING DESIGNATION ORDER

Adopted: December 19, 1990; Released: January 28, 1991

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.

2. *Background*. The Commission originally allotted Channel 235A to Stewartville, Minnesota, in MM Docket No. 84-231. *See First Report and Order*, 49 Fed. Reg. 3514 (1984). Root, RFI and four other applicants filed applications for Channel 235A at Stewartville during the window filing period for that channel, which closed on June 16, 1988.

3. On October 4, 1988, the Commission released its *Report and Order* in MM Docket No. 87-306, 3 FCC Rcd 5894, to amend the FM Table of Allotments. This *Report and Order*, which became effective November 21, 1988, changed the allocation for Stewartville, Minnesota from Channel 235A to Channel 287C2. The *Report and Order* referenced the Commission's *Public Notice* (Report No. W-40, dated May 12, 1988), which stated that applicants in this proceeding would, in the event the upgrade was adopted, be required to amend to specify the new channel and class.[1] Consequently, the applicants in this proceeding are required to amend their proposals to specify the new channel. To date, no such amendments have been received from Root, Lusk or Borgen and RFI has petitioned to dismiss these applications for listing a channel "that does not exist." However, since the *Public Notice* did not stipulate a final date for such amendments, each of the applicants will be required to submit to the presiding Administrative Law Judge a post-designation amendment specifying the new allocation. Therefore, RFI's petition will be denied.

4. *Fog*. On December 12, 1988, Fog submitted its amendment to specify Channel 287C2 per the *Report and Order* in Docket 87-306. However, a review of the amendment reveals that a coordinate discrepancy exists. Section V-B of Form 301 specifies the coordinates as 43^{0} *39' 29"* NL, 92^{0} *42' 20"* WL. The transmitter site map and the FAA Form 7460-1 show the coordinates as 43^{0} *40' 22"* NL, 92^{0} *41' 28"* WL.

5. The geographic coordinates, to the nearest second, of the proposed transmitter site are critical to processing the application. Thus, in the present case these inconsistent data makes it impossible to determine the veracity of the site availability certification, the environmental impact statement, or the information supplied for FAA approval. In other cases, the absence of these data makes it impossible to determine the distance from the proposed site to other proposed or existing broadcast facilities and to the community of license. In the commercial FM service, spacing determines acceptability of an application where mutual exclusivity exists with respect to a given allocation (*see* 47 C.F.R. § 73.207), and determines when mutual exclusivity exists between applicants for, or permittees of, different allocations. The geographic location also determines whether protection must be afforded to monitoring facilities and to radio quiet zones (*see* 47 C.F.R. § 73.1030), marks the center of the "blanketing" area (*see* 47 C.F.R. § 73.315), and is fundamental to analysis of a proposal's environmental and electromagnetic effects on other, nearby communications facilities. Consequently, Fog's amendment is unacceptable for filing and will be returned.[2]

6. *RFI*. By amendment dated December 23, 1988, RFI states that it has moved its transmitter site to a new location 14.838 miles southwest of its originally tendered site. RFI's amendment, however, is devoid of the required site availability certification. Accordingly, an appropriate issue will be specified.

7. *Borgen*. Borgen is President, Director and 100% stockholder of KFIL, Inc., licensee of FM Station KFIL (Preston, Minnesota). Since the grant of Borgen's application may result in a violation of the Commission's multiple ownership rules, Borgen has indicated his intent to terminate his relationship with this station in the event of grant of the referenced application. Accordingly, in the event of grant of Borgen's application, Borgen will be required to sever all connections with KFIL (FM) prior to the commencement of program test authority.

8. *Other Matters*. The applicants below have petitioned for leave to amend their application on the dates show. The accompanying amendments were filed after September 29, 1988, the last date for filing amendments as of right. Under Section 1.65 of the Commission's Rules, the

amendments are accepted for filing. However, an applicant may not improve its comparative position after the time for amendments as of right has passed. Therefore, any comparative advantage resulting from the amendments will be disallowed.

APPLICANTS	AMENDMENTS FILED
Topp	October 30, 1990
Fog	June 8 and July 18, 1990
RFI	December 23, 1988

9. Data submitted by the applicants indicate there would be significant difference in the size of the areas and populations which would receive service from the proposals. Consequently, the areas and populations which would receive FM service of 1 mV/m or greater intensity, together with the availability of other primary aural services in such areas, will be considered under the standard comparative issue for the purpose of determining whether a comparative preference should accrue to any of the applicants.

10. No determination has been received as to whether the antenna proposed by Topp, Fog, and RFI would constitute a hazard to air navigation. Further, our attempts to obtain FAA clearance through the Commission's Antenna Survey Branch and Borgen have been unsuccessful. an issue with respect thereto will be included and the FAA made a party to the proceeding.

11. Topp, Fog and RFI's proposed transmitter sites are short-spaced to the facilities of first-adjacent channel (288A) FM Station KWNG (Red Wing, Minnesota). However, the Commission modified the Table of Allotments by changing KWNG's channel and class from 288A to 290C2. *Report and Order* in MM Docket 87-310, 3 FCC Rcd 5553 (1988), *recon. denied* 4 FCC Rcd 6323 (1989). In its action, the Commission required KWNG to submit a minor change application for a construction permit specifying the new facility. That application (File No. BMPH-891031KE) is currently pending action by the Bureau. Therefore, in the event of grant of any of the three noted applications, program tests may not commence until KWNG commences on-air operations on Channel 290C2.

12. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

13. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine whether RFI has reasonable assurance that the transmitter site specified will be available to the applicant.
2. To determine whether there is a reasonable possibility that the tower heights and locations proposed by Topp, Fog, RFI and Borgen would constitute a hazard to air navigation.
3. To determine which of the proposals would, on a comparative basis, best serve the public interest.
4. To determine, in light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

14. IT IS FURTHER ORDERED, That within 30 days of the release of this Order, Root, Lusk, and Borgen shall submit the required amendment in accordance with paragraph 3 herein to the presiding Administrative Law Judge.

15. IT IS FURTHER ORDERED, That the petitions filed by RFI ARE DENIED.

16. IT IS FURTHER ORDERED, That Fog's December 12, 1988 amendment IS RETURNED for the reasons noted in paragraph 5 hereinabove, that the listed petitions for leave to amend filed by Topp, Fog, and RFI ARE GRANTED, and the corresponding amendments ACCEPTED to the extent indicated herein.

17. IT IS FURTHER ORDERED, That, in the event of grant of Borgen's application, Borgen will be ordered to divest himself of all interest in and sever all connection with FM Station KFIL (Preston, Minnesota) prior to the commencement of program test authority.

18. IT IS FURTHER ORDERED, That the Federal Aviation Administration IS MADE A PARTY to this proceeding with respect to the air hazard issue only.

19. IT IS FURTHER ORDERED, That, in the event of grant of Topp, Fog or RFI's applications, program test authority may not commence on Channel 287C2 until FM Station KWNG commences program tests on Channel 290C2.

20. IT IS FURTHER ORDERED, That a copy of each document filed in this proceeding subsequent to the date of adoption of this Order shall be served on the counsel of record in the Hearing Branch appearing on behalf of the Chief, Mass Media Bureau. Parties may inquire as to the identity of the counsel of record by calling the Hearing Branch at (202) 632-6402. Such service shall be addressed to the named counsel of record, Hearing Branch, Enforcement Division, Mass Media Bureau, Federal Communications Commission, 2025 M Street, N.W., Suite 7212, Washington, D.C. 20554. Additionally, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall also be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Federal Communications Commission, Room 350, 1919 M Street, N.W., Washington, D.C. 20554.

21. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

22. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

FOOTNOTES

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[1] Since these amendments were required pursuant to the Commission's action in the Rule Making proceeding, they are not subject to the late-filed provisions of 47 C.F.R. §§ 1.65 and 73.3522.

[2] We believe that the return of Fog's amendment is consistent with the recent opinion by the Court of Appeals for the District of Columbia Circuit in *Alegria I, Inc. v. FCC*, Case No. 89-1096, decided June 15, 1990. In that case, the Court remanded to the Commission the grant of an AM construction permit to Heritage Communications because the agency had failed to articulate the rationale for its tolerance of a succession of "major" amendments which normally would have required dismissal of Heritage's application under 47 C.F.R. § 73.3571(j). The Court held that "nowhere in the order under review did the Commission explicitly invoke [the *Golden Shores*] policy, explain why the circumstances of this case justified its invocation or expansion, or spell out the public interest considerations that justified tolerance of a succession of major amendments." *Id.* at 7. *Golden Shores*, wrote the Court, appears to be "based on the rationale that because the withdrawal of an inadvertently submitted major amendment would not result in the procedural disruptions the rule was designed to avoid, an applicant should be given the opportunity to repair its mistake and return to the *status quo ante.* " *Id.* at 9. Here, we are expressly invoking the *Golden Shores* doctrine, noting that the return of Fog's amendment "neither results in processing delays nor abridges any cognizable rights of other applicants. *Id.* at 7. Finally, Fog's application was returned to the *status quo ante* with the return of its September 12, 1988 amendment.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

WJG MARITEL CORPORATION — File No. I-T-D-91-003

Application for authority
to close VHF-FM Public
Local Service Coast Station
KIL928, Oregon, Ohio.

ORDER AND AUTHORIZATION

Adopted: January 15, 1991; Released: January 28, 1991

By the Chief, International Facilities Division:

1. The captioned application, filed on October 16, 1990 by WJG Maritel Corporation (WJG), requests authority pursuant to Section 214 of the Communications Act of 1934, as amended, to discontinue service from VHF-FM Public Local Service Coast Station KIL928 located in Oregon, Ohio. The station serves the lakeshore area of Lake Erie within a 30-mile radius of the site. The application was placed on public notice on October 31, 1990. No comments were received.

2. The basic statutory test to be applied by this Commission in considering applications for discontinuance of common carrier services to a community is found in Section 214(a) of the Act. Under this Section, the Commission may permit discontinuance of service upon a finding that "neither the present nor future public convenience and necessity will be adversely affected" by the proposed action. Application of this standard presents the Commission with a task of balancing the financial burden that would be imposed on the carrier by continued operation of its facilities with the needs and interests of the user community.[1]

3. In support of its application, WJG states that no messages were made through the subject station from April 1990 through September 1990, resulting in a loss of $2,300. According to WJG, users of the station have available to them SSB, satellite, and cellular communications service as well as the VHF coast station in Detroit, Michigan. Distress calls are handled by the U.S. Coast Guard.

4. Upon consideration of the application and in view of the foregoing, IT IS HEREBY CERTIFIED that neither the present nor future public convenience and necessity will be adversely affected by the discontinuance of service via Station KIL928.

5. Accordingly, IT IS ORDERED that application File No. I-T-D-91-003 IS GRANTED, and WJG is authorized to discontinue service via its Public Local Service Coast Station KIL928 at Oregon, Ohio.

6. This order is issued under Section 0.291 of the Commission's rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's rules may be filed within 30 days of the date of public notice of this order (*See* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

FOOTNOTE

[1] *Public Coast Radiotelegraph Stations*, 67 FCC 2d 790 at 795 (1978).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-635

In re Applications of

MORNING STAR ACADEMY File No. BPED-880406MO
(hereafter "Star")
Channel No. 219A
New Durham, New Hampshire

CAPITOL CITY EDUCATIONAL FOUNDATION File No. BPED-880808MN
(hereafter "Capitol")
Channel No. 218A
Concord, New Hampshire

NOTRE DAME COLLEGE File No. BPED-891018ML
(hereafter "NDC")
Channel No. 219A
Manchester, New Hampshire

KNOWLEDGE FOR LIFE File No. BPED-891128MF
(hereafter "KFL")
Channel No. 216A
Concord, New Hampshire

KNOWLEDGE FOR LIFE File No. BPED-890516MJ (PREVIOUSLY DISMISSED)
(hereafter "KFL")
Channel No. 219A
Manchester, New Hampshire

For Construction Permit for a
New Noncommercial Educational FM Station

HEARING DESIGNATION ORDER

Adopted: December 18, 1990; Released: January 30, 1991

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new noncommercial, educational FM station.

2. *Preliminary Matter*. The KFL application for a new noncommercial FM in Manchester, NH (BPED-890516MJ) was returned by staff letter, dated November 22, 1990, for prohibited contour overlap (in violation of 47 C.F.R § 73.509) with second-adjacent channel station WMDK-FM, Peterboro, NH and with cochannel station WNEC-FM, Henniker, NH. On December 22, 1990, KFL filed a petition for reconsideration. The petition argues that WMDK-FM is a commercial station operating on Channel 221A, hence the spacing rules of 47 C.F.R § 73.207(a) should have been utilized instead of the contour overlap rules in 47 CFR § 73.509. Upon review, we find that the return on this count was indeed erroneous. Further, the KFL proposal exceeds the 27.0 km spacing requirement to WMDK by 0.5 km. Consequently, this portion of the KFL petition for reconsideration will be granted.

3. The staff's November 22, 1990 letter also indicated that under the provisions of 47 C.F.R. § 73.215 prohibited contour overlap of 1.7 km in magnitude existed with cochannel station WNEC-FM, Henniker, NH. The staff calculated the distance to the 40 dBu interfering contour at 318.8 degrees to be 24.6 km, while the 60 dBu protected contour of WNEC-FM was found to be located 5.9 km from that station. Consequently, 1.7 km of prohibited overlap was found to exist, since the two stations are separated by only 28.8 km. However, KFL's petition asserts that based on the antenna height above average terrain (HAAT) at 315^0 (WNEC-FM lies only 3.8^0 off this radial), the actual proposed 40 dBu contour distance is 22.52 km, which would not result in contour overlap with WNEC-FM.

4. Upon review, we first note that the proposed station will employ a directional antenna. The distance to the 60 dBu protected and 40 dBu interfering contours along a particular radial must be computed using the actual ERP in that direction. The engineering statement in KFL's petition for reconsideration indicates that an effective radiated power of -24.5 dBk (0.0035 kW) was used to determine the 22.52 km distance to the 40 dBu contour for the proposed facility. However, examination of the directional antenna pattern and tabulation (Table V) indicates that this power is not accurate for this radial. Using linear interpolation between the tabulated relative field values at 315^0 and 320^0, the effective radiated power at 318.8^0 is found to be 0.0038 kW. This value agrees with the plotted directional antenna pattern. Consequently, KFL's use of -24.5 dBk (0.0035 kW) for the effective radiated power understates the distances to the contours along this radial. Using the actual ERP of 0.0038 kW along the 318.8^0 radial, prohibited contour overlap will indeed exist.[1] Consequently, the KFL application remains in violation of 47 C.F.R § 73.509, and this portion of the KFL petition for reconsideration will be denied. Thus, the staff's return of the KFL application for Manchester is affirmed.

5. Accordingly, the KFL petition for reconsideration IS HEREBY GRANTED IN PART regarding the return of the application for contour overlap with commercial FM station WMDK-FM, and IS HEREBY DENIED in all other respects.

6. *Eligibility*. Section 73.503(a) of the Commission's Rules mandates that a noncommercial educational FM broadcast station will be licensed only to a nonprofit educational organization upon a showing that the station will be used in the advancement of an educational program. KFL states "Living Faith Ministries, Inc., and its to-be-formed affiliate, Knowledge For Life, have as the education purpose the dissemination of religious and nonreligious educational information to members of the corporations and nonmembers alike" (Exhibit 1), and that "The proposed station will disseminate educational pro-

grams and use educational resources available to the applicant and its affiliate." (Exhibit 2). We find the submitted material insufficient to make a determination that KFL is a qualified educational organization proposing an acceptable educational format in compliance with 47 C.F.R. §73.503. Accordingly, an appropriate issue will be specified.[2]

7. *TV Channel 6 Protection*. In response to Item 24, Section V-B, FCC Form 301, NDC has provided a map and an engineering statement to demonstrate that the population within the predicted interference area is less than 3000. *See* 47 C.F.R. §73.525. However, an engineering review indicates that the TV Channel 6 interference area is approximately 50 per cent greater than the area depicted by NDC. Accordingly, an appropriate issue will be specified.

8. *Share-time Agreement*. The applicants have not indicated whether an agreement has been reached regarding their pending negotiations of a possible share-time arrangement. Therefore, an issue will be specified to determine whether a share-time arrangement between the applicants would be the most effective use of the frequency and thus better serve the public interest. *Granfalloon Denver Educational Broadcasting, Inc.*, 43 Fed. Reg. 49560 (1978). In the event that this issue is resolved in the affirmative, an issue will also be specified to determine the nature of such an arrangement. It should be noted that our action specifying a share-time issue is not intended to preclude the applicants, either before the commencement of the hearing or at any time during the course of the hearing, from participating in negotiations with a view toward establishing a share-time agreement among themselves.

9. The respective proposals are for different communities. Consequently, it will be necessary to determine pursuant to Section 307(b) of the Communications Act of 1934, as amended, which of the proposals would best provide a fair, efficient and equitable distribution of radio services.

10. Inasmuch as it appears that there would be a significant difference in the size of the populations which would receive service from the proposals, and since this proceeding involves competing applicants for noncommercial educational facilities, the standard areas and populations issue will be modified in accordance with the Commission's prior action in *New York University*, FCC 67-673, released June 8, 1967, 10 RR 2d 215 (1967). Thus, the evidence adduced under this issue will be limited to available noncommercial educational FM signals within the respective service areas.

11. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

12. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

> 1. To determine whether NDC is in compliance with the provisions of 47 C.F.R. § 73.525.
>
> 2. To determine whether KFL is a qualified educational organization proposing an acceptable educational format in compliance with 47 C.F.R. § 503(a) of the Commission's Rules.
>
> 3. To determine: (a) the number of other reserved channel noncommercial educational FM services available in the proposed service area of each applicant, and the area and population served thereby; (b) whether a share-time arrangement between the applicants would result in the most effective use of the channel and thus better serve the public interest and, if so, the terms and conditions thereof; and (c) in light of Section 307(b) of the Communications Act of 1934, as amended, which of the proposals would best provide a fair, efficient and equitable distribution of radio service.
>
> 4. To determine, in light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

13. IT IS FURTHER ORDERED, That the KFL petition for reconsideration IS GRANTED IN PART regarding the return of the application for contour overlap with a commercial FM station, and IS HEREBY DENIED in all other respects.

14. IT IS FURTHER ORDERED, That the Capitol "petition to dismiss or deny" IS HEREBY GRANTED to the extent indicated.

15. IT IS FURTHER ORDERED, That a copy of each document filed in this proceeding subsequent to the date of adoption of this Order shall be served on the counsel of record in the Hearing Branch appearing on behalf of the Chief, Mass Media Bureau. Parties may inquire as to the identity of the counsel of record by calling the Hearing Branch at (202) 632-6402. Such service shall be addressed to the named counsel of record, Hearing Branch, Enforcement Division, Mass Media Bureau, Federal Communications Commission, 2025 M Street, N.W., Suite 7212, Washington, D.C. 20554. Additionally, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall also be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Federal Communications Commission, Room 350, 1919 M Street, N.W., Washington, D.C. 20554.

16. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

17. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

FOOTNOTES

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[1] A computer-generated contour overlap study run by the staff demonstrates that the amount of prohibited contour overlap with WNEC-FM is significantly greater in directions off the line between the two stations. This study shows that up to 3.2 km of overlap between the 60 dBu protected contour of WNEC-FM and the 40 dBu interfering contour of KFL's proposal will exist in violation of 47 C.F.R. § 73.509. This is not addressed either in the original application or the petition for reconsideration.

[2] On February 14, 1990, Capitol Broadcasting Corp., Inc. ("Capitol"), licensee of radio station WKXL-FM, Concord, New Hampshire, filed a "petition to dismiss or deny" the KFL application, raising the same eligibility issue. Accordingly, the Capitol petition will be granted to the extent indicated.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-632

In re Applications of

SUSAN BEAUCHAMP (hereafter "Beauchamp")	File No. BPH-880217MS
WASHINGTON COUNTY COMMUNICATIONS, INC. (hereafter "WCC")	File No. BPH-880217MW
RADIO WAKEFIELD, INC. (hereafter "RWI")	File No. BPH-880217NA
AMERZINE BROADCASTING, L.P. (hereafter "Amerzine")	File No. BPH-880217NB
WAKE PARTNERSHIP (hereafter "Wake")	File No. BPH-880217NG
BLOUNT COMMUNICATIONS, INC. (hereafter "Blount")	File No. BPH-880217NJ
WAKEFIELD BROADCASTING LIMITED PARTNERSHIP (hereafter "WBLP")	File No. BPH-880217MQ (Dismissed Herein)
HOLLY P. WOOD, STEFANIE S. PABIS and KRYSTYNE M. PABIS (hereafter "Wood")	File No. BPH-880217MO (Previously Dismissed)

For Construction Permit
for a New FM Station on
Channel 259A (99.7 MHz)
in Wakefield-Peacedale, Rhode Island.

HEARING DESIGNATION ORDER

Adopted: December 19, 1990; Released: January 28, 1991

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.[1]

2. *Preliminary Matters. Wood.* On June 10, 1988, Wood filed a petition for reconsideration of the May 20, 1988 action by the Chief, FM Branch, returning its application as unacceptable for tender for failure to include the legal boundaries of the city of Wakefield-Peacedale, and its failure to submit a 7.5 minute USGS topographic site map that complies with the *Public Notice* entitled "FCC Clarifies Transmitter Site Map Requirements", Mimeo 3693, released April 5, 1985.[2] WCCI and RWI filed oppositions to the petition for reconsideration.

3. Wood argues that its application meets the Commission's processing policy adopted in the *Report and Order* in Docket 84-750, 50 Fed. Reg. 19936 (1985). Wood states that Exhibits 2 and 3 of the original application provided the Commission with a basis whereupon it could accurately and reliably determine the proposed transmitter site location and the 60 dBu and 70 dBu contours. The Commission could determine that the community of Wakefield, of which Peacedale is an adjoining community, is completely encompassed by the 3.16 mV/m signal contour. Furthermore, Wood recognized its inability to obtain a 7.5 minute map, but provided the Commission with a 15 minute USGS topographic map which contained sufficient information upon which the Commission could determine the location of the proposed transmitter site.

4. Under the "hard look" doctrine instituted by the Commission in its *Report and Order*, a petition for reconsideration of a finding of untenderability will lie only when the petitioner can demonstrate that the application met all of the tenderability requirements at the close of the window filing period. If any one of the tenderability elements described in Appendix D to the *Report and Order* is missing from an application following the close of the applicable window, that application must be returned as not sufficient for tender. Furthermore, resubmission of such application with a curative amendment will not be considered for *nunc pro tunc* reacceptance.

5. The *Report and Order* requires an applicant to submit a map satisfying the requirements of Section V-B, Item 16, and which *clearly* and *legibly* shows the 70 dBu contour as well as the legal boundaries of the community to be served. Such information is essential to the processing of the application so as to determine the applicant's compliance with Section 73.315(a) of the Commission's Rules. In the instant case, the legal boundaries of the city of Wakefield-Peacedale are clearly not indicated. The name "Wakefield" can be seen on the submitted map, but the specific area to which it references cannot be determined.

6. In addition, the *Report and Order* requires that an applicant submit a transmitter site map as described in FCC Form 301, Section V-B, Item 15 and in the Commission's April 5, 1985 *Public Notice*. The *Public Notice* clarifies the requirement that applicants submit a 7.5 minute series USGS topographical quadrangle map, where available, which identifies the transmitter site. Such a

map allows the staff to verify the coordinates of the proposed site, the presence of other, nearby communications facilities, of obstructing terrain features and the ground elevation of the transmitter site. The Wood petition discusses the unavailability of the required 7.5 minute map and the substitution of a 15 minute topographic map. Wood re-emphasizes that this fact had been brought to the Commission's attention in its original application when it stated that "the 7.5 minute topographic map which encompasses the proposed site is not at this time available from the USGS, nor has it been available for many months." Where the 7.5 minute map is either not printed or is not available from stock, a 15 minute map that complies in all other respects with the April 5th *Public Notice* is an acceptable substitute. As Wood's 15 minute map submission is sufficient in this regard, the petition for reconsideration will be granted to this extent.

7. A petition for reconsideration must be based upon newly discovered evidence or upon errors of fact or law in the action for which reconsideration is sought. *See* 47 C.F.R. § 1.106(d)(2). In the absence of such showing, reconsideration will not be granted for the purpose of reviewing matters which the Commission has already considered and resolved. Furthermore, in accordance with the *Report* and *Order*, the only basis for reversing an earlier finding of untenderability is demonstration that the Commission erred in its earlier determination. We have examined the instant petition and have determined, with regard to the city boundary tenderability requirement, that the Commission did not error in returning Wood's application as unacceptable for tender. Accordingly, Wood's petition will be denied.

8. *WBLP*. Pursuant to the *Report and Order* in MM Docket No. 84-750, 50 Fed. Reg. 19936 (May 13, 1985), the Commission established criteria by which an application's substantial completeness could be determined. In order to be deemed sufficient for tender, commercial FM Broadcast applications must include a transmitter site map as described in FCC Form 301, Section V-B, Item 13 and in the Commission's *Public Notice*, Mimeo 3693, released April 5, 1985. *See* 50 Fed. Reg. 19945 at para. 4(b). The *Public Notice* clarifies the requirements found in FCC Form 301 that each applicant submit a 7.5 minute series USGS topographical quadrangle map which identifies the transmitter site. *See also*, *FM Transmitter Site Map Submission Required by FCC Form 301 and 340*, 1 FCC Rcd 381 (1986). The *Public Notice* also specifies certain technical requirements that the site map must satisfy in order to be considered tenderable. Specifically, the applicant must provide a site map that shows along the printed margins of both axes at least two coordinate markings specifically labeled by USGS, one on either side of the marked site. While WBLP provided the original minute and seconds markings, 27' 30" and 25' 00", its 41^0 markings appears to be handwritten.

9. Under the "window" processing system for commercial FM construction permit applications adopted in the *Report and Order*, *supra*, any error in or ommission from key portions of an application as of the close of the pertinent filing window requires the return of that application as not substantially complete or insufficient for tender. *Id.* at para. 23. Accordingly, as WBLP's deficient 7.5 minute map renders the application untenderable, WBLP's application will be dismissed herein as inadvertently accepted for tender. [3]

10. *Beauchamp*. On June 24, 1988 Beauchamp filed a timely amendment to her application changing the antenna height and specifying a new transmitter site. As her attorney noted in the cover letter, he was submitting the facsimile signature of Beauchamp; pages bearing the original signature of the applicant would be submitted upon receipt by counsel. The supplemental amendment containing Beauchamp's original signature was not received until July 28, 1988.

11. Beauchamp's June 24, 1988 amendment is procedurally defective since it did not contain her original signature pursuant to 47 C.F.R. § 73.3513(a)(1). Moreover, neither the June 24, 1988 nor July 28, 1988 amendments were accompanied by any justification as to why Beauchamp could not satisfy the Commission's procedural requirements in this matter. Therefore, the June 24, 1988 amendment is unacceptable for filing and will be returned.[4] Additionally, Beauchamp's July 28, 1988 amendment cannot be accepted for filing. In its *Report and Order* in Docket 84-750, *supra*, the Commission adopted strict rules governing the acceptance of amendments to applications for FM facilities. These rules provide that amendments which address the acceptability or grantability of an application may be filed as a matter of right prior to expiration of the 30-day period triggered by release of the Public Notice announcing that the subject application has been accepted for tender. *See*, 47 C.F.R. § 73.3522(a)(6). Once this period expires, predesignation amendments will be considered only upon a showing of good cause for late filing or pursuant to Sections 1.65 or 73.3514 of our rules. Unauthorized or untimely amendments are subject to return without consideration.

12. Pursuant to *Public Notice*, Report No. 14181, May 25, 1988, Beauchamp's 30 day period for filing amendments as of right began May 27, 1988 and ended June 27, 1988. The amendment containing Beauchamp's original signature was filed after this period. Furthermore, no showing of good cause accompanied the amendment pursuant to 47 C.F.R.§ 73.3522(a)(2). Therefore, the July 28, 1988 amendment is untimely and will be returned. Beauchamp's altered antenna height and proposed new transmitter site cannot be studied. The Commission must revert to the engineering parameters contained in the original application and Beauchamp's application will be processed as originally filed on February 17, 1988.

13. *Blount*. In Section V-B, Item 7(a)(1) of Blount's application, as originally filed, the site elevation is listed as 91 meters. However, the transmitter site map (Exhibit 2b) shows the site elevation as 76 meters.[5] Since neither value results in a violation of the maximum ERP/HAAT combination specified in 47 C.F.R. § 73.211 for Class A facilities, the defect is neither a tenderability defect nor an acceptability defect and may, therefore, be resolved with an amendment. We note that Blount filed such a corrective amendment on July 21, 1988 rectifying the site elevation discrepancy. Accordingly, for administrative purposes, Blount's late-filed amendment will be accepted for filing.

14. We also note that on May 1, 1989, Blount filed a petition for leave to amend to specify a new transmitter site.[6] In support of its request for acceptance of the late-filed amendment, Blount states that it was informed by the Federal Aviation Administration ("FAA") on February 22, 1988, that its originally proposed site violated Part 77 Obstruction Standards. The Commission has traditionally considered FAA disapproval to be "good cause"

for a site relocation amendment. *See e.g. Orlando FM Group Limited Partnership*, 2 FCC Rcd 4696 (1987). Blount has made the requisite good cause showing, pursuant to 47 C.F.R. § 73.3522(a)(2), for acceptance of its late-filed amendment. However, in keeping with the Commission policy, Blount will not be allowed to gain comparative advantage from its amended site. Therefore, Blount's petition for leave to amend will be granted and the accompanying amendment will be accepted to the extent indicated herein.

15. *RWI*. RWI amended its application on June 6, 1989 and December 19, 1989 to report that its principal, Carol M. Carson, became Account Executive at station WWAZ(AM), Providence, Rhode Island and Sales Manager of WWLI(FM), Providence, Rhode Island. The amendments include a pledge that Ms. Carson will resign both positions at WWAZ(AM) and WWLI(FM) upon grant of the RWI application. Because Ms. Carson's continued employment at WWAZ(AM) and WWLI(FM) may potentially violate the Commission's cross-interest policy, an appropriate divesture condition will be specified. *See Re-examination of the Commission's Cross-Interest Policy*, 4 FCC 2d 2208 (1989).

16. The Commission requires that if there will be five or more fulltime station employees, the applicant must complete and file Section VI of Form 301 and supply a statement detailing hiring and promotion policies for women and each minority group whose representation in the available labor force is five percent or greater in the proposed service area. Although Wake has filed such statement, it is deficient. Wake has not listed specific sources of recruitment specializing in women candidates. Accordingly, Wake will be required to file an amended EEO program with the presiding Administrative Law Judge, or an appropriate issue will be specified by the Judge.

17. Section II, Item 4 (old form) of FCC Form 301 (October 1986) requires that an applicant specify its address (number, street, city, state) as well as the home address of each of its principals. Wake has not completed Item 4 correctly. The Wake application gives a post office box number as the residence address for Marcus Rand and Eleanor Rand. Accordingly, Wake must submit an amendment which gives all the information required by Section II, Item 4 to the presiding Administrative Law Judge after this Order is released.

18. The applicants below have petitioned for leave to amend their application on the dates shown. The accompanying amendments were filed after the last date for filing amendments as of right. Under Section 1.65 of the Commission's Rules, the amendments are accepted for filing. However, an applicant may not improve its comparative position after the time for amendments as of right has passed. Therefore, any comparative advantage resulting from the amendments will be disallowed.

APPLICANTS	AMENDMENTS FILED
Beauchamp	June 14, 1990
Blount	July 21, 1988 (engineering) March 28, 1990
RWI	June 6, 1989; December 19, 1989 August 1, 1990
Wake	May 24, 1989

19. Attempts to obtain FAA clearance through the Commission's Antenna Survey Branch and the applicants have been unsuccessful. Accordingly, since no determination has been received as to whether the antennas proposed by Beauchamp, Blount and WCCI would constitute a hazard to air navigation, an issue with respect thereto will be included and the FAA made a party to the proceeding.

20. Data submitted by the applicants indicate there would be significant difference in the size of the areas and populations which would receive service from the proposals. Consequently, the areas and populations which would receive FM service of 1 mV/m or greater intensity, together with the availability of other primary aural services in such areas, will be considered under the standard comparative issue for the purpose of determining whether a comparative preference should accrue to any of the applicants.

21. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

22. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine whether there is a reasonable possibility that& the tower heights and locations proposed by Beauchamp, Blount and WCCI would constitute a hazard to air navigation.
2. To determine which of the proposals would, on a comparative basis, best serve the public interest.
3. To determine, in light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

23. IT IS FURTHER ORDERED, That the petition for reconsideration filed by Wood on June 10, 1988 IS HEREBY DENIED. RWI's May 16, 1988 petition to dismiss Wood's application IS DISMISSED AS MOOT.

24. IT IS FURTHER ORDERED, That, for the reasons set forth in paragraphs 8 and 9 hereinabove, WBLP's application IS HEREBY DISMISSED as inadvertently accepted for tender.

25. IT IS FURTHER ORDERED, That, for the reasons set forth in paragraph 8 and 9 hereinabove, RWI's May 16, 1988 petition to dismiss WBLP's application IS GRANTED to the extent indicated herein, and IS DENIED in all other respects. WBLP's June 17, 1988 supplement and RWI's July 11, 1988 motion to strike ARE HEREBY DIMISSED pursuant to 47 C.F.R. § 1.45(c).

26. IT IS FURTHER ORDERED, That the amendments of June 24, 1988, July 28, 1988 and November 6, 1990, filed by Beauchamp ARE HEREBY RETURNED.

27. IT IS FURTHER ORDERED, That RWI's petition to dismiss Blount's application IS HEREBY DENIED, for the reasons set forth in paragraph 13 hereinabove.

28. IT IS FURTHER ORDERED, That, for the reasons set forth in paragraph 14 hereinabove, RWI's June 22, 1989 opposition to Blount's May 1, 1989 petition for leave to amend, IS HEREBY DENIED.

29. IT IS FURTHER ORDERED, That in the event of grant of RWI's application, the construction permit shall be conditioned as follows:

> Prior to the commencement of operation of the station authorized herein pursuant to program test authority, the permittee shall certify to the Commission that Carol M. Carson has terminated all employment at stations WWAZ(AM) and WWLI(FM), Providence, Rhode Island.

30. IT IS FURTHER ORDERED, That within 30 days of the release of this Order, Wake shall submit Section VI information in accordance with the requirement of Section 73.2080(c) of the Commission's Rules to the presiding Administrative Law Judge.

31. IT IS FURTHER ORDERED, That Wake shall submit an amendment which contains the information required by Section II, Item 4 (old form) of FCC Form 301, to the presiding Administrative Law Judge within 30 days after the release of this Order.

32. IT IS FURTHER ORDERED, That the petitions for leave to amend filed by Beauchamp, Blount, RWI and Wake ARE GRANTED, and the corresponding amendments ARE ACCEPTED to the extent indicated herein.

33. IT IS FURTHER ORDERED, That the Federal Aviation Administration IS MADE A PARTY to this proceeding with respect to the air hazard issue only.

34. IT IS FURTHER ORDERED, That a copy of each document filed in this proceeding subsequent to the date of adoption of this Order shall be served on the counsel of record in the Hearing Branch appearing on hehalf of the Chief, Mass Media Bureau. Parties May inquire as to the Identity of the Counsel of recored by calling the Hearing Branch at (202) 632-6402. Such service shall be addressed to the named counsel of record, Hearing Branch, Enforcement Division, Mass Media Bureau, Federal Communications Commission, 2025 M Street, N.W., Suite 7212, Washington, D.C. 20554. Additionally, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall also be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureu, Federal Communications Commission, Room 350, 1919 M Street, N.W., Washington, D.C. 20554.

35. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Sedction 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issue specified in this Order.

36. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

FOOTNOTES

[1] RWI had filed a petition to dismiss the application of Southern Rhode Island Broadcasting, Inc. (SRIB), (BPH-880217NC), on May 16, 1988. However, on June 22, 1988, SRIB, by its attorney, requested dismissal of its application. The request was in accordance with our requirements governing such matters. Accordingly, the application, as well as all accompanying pleadings, were dismissed by Commission letter dated September 14, 1990.

[2] RWI had filed a petition to dismiss Wood's application on May 16, 1988 raising identical issues to those cited in the FM Branch's return letter. In light of the ultimate return of Wood's application, RWI's petition will be dismissed as moot.

[3] On May 16, 1988, RWI filed a petition to dismiss WBLP's application alleging, *inter alia*, that the 41-S markings shown on WBLP's transmitter site map are not those specifically labeled by USGS. WBLP filed an opposition and RWI a reply. In light of the action taken herein, RWI's petition will be granted for the reasons noted in paragraphs 8 and 9 hereinabove, and denied in all other respects. Further, the WBLP supplement and the RWI motion to strike are being dismissed as unauthorized pleadings pursuant to 47 C.F.R. § 1.45(c).

[4] On November 6, 1990 Beauchamp filed a supplemental amendment to its June 24, 1988 amendment. In light of the above action, its November 6, 1990 amendment will also be returned.

[5] On July 8, 1988 RWI filed a petition to dismiss Blount's originally filed application. Blount filed an opposition and RWI filed a reply. For the reasons set forth in paragraph 13, hereinabove, RWI's petition will be denied.

[6] On June 22, 1989 RWI filed an opposition to petition for leave to amend alleging, *inter alia*, that Blount's petition to specify a new transmitter site is in violation of § 73.3522(a)(6) of the Commission's Rules. For the reasons set forth in paragraph 14, hereinabove, RWI's opposition will be denied herein.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-625

In re Applications of

Evan Doss, Jr., Corporation (hereafter "Doss")	File No. BPH-890420MH
Edward Carter, Sr., d/b/a Tri-County Broadcasting, L.P. (hereafter "Carter")	File No. BPH-890420MP

For Construction Permit
for a New FM Station on
Channel 263A (100.5 MHz)
in Port Gibson, Mississippi

HEARING DESIGNATION ORDER

Adopted: December 3, 1990; Released: January 28, 1991

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.

2. Data submitted by the applicants indicate there would be significant difference in the size of the areas and populations which would receive service from the proposals. Consequently, the areas and populations which would receive FM service of 1 mV/m or greater intensity, together with the availability of other primary aural services in such areas, will be considered under the standard comparative issue for the purpose of determining whether a comparative preference should accrue to any of the applicants.

3. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

4. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

> 1. To determine which of the proposals would, on a comparative basis, best serve the public interest.
>
> 2. To determine, in light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

5. IT IS FURTHER ORDERED, That a copy of each document filed in this proceeding subsequent to the date of adoption of this Order shall be served on the counsel of record in the Hearing Branch appearing on behalf of the Chief, Mass Media Bureau. Parties may inquire as to the identity of the counsel of record by calling the Hearing Branch at (202) 632-6402. Such service shall be addressed to the named counsel of record, Hearing Branch, Enforcement Division, Mass Media Bureau, Federal Communications Commission, 2025 M Street, N.W., Suite 7212, Washington, D.C. 20554. Additionally, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall also be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Federal Communications Commission, Room 350, 1919 M Street, N.W., Washington, D.C. 20554.

6. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

7. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-618

In re Applications of

HEART OF THE LAKES BROADCASTING (hereafter "Heart")	File No. BPH-881221MO
BRUCE HARRISON LINDER (hereafter "Linder")	File No. BPH-881221MP
INGSTAD BROADCASTING, INC. (hereafter "Ingstad")	File No. BPH-881221MQ

For Construction Permit
for a New FM Station
on Channel 281C2 (104.1 MHz)
in Pelican Rapids, Minnesota

HEARING DESIGNATION ORDER

Adopted: December 3, 1990; Released: January 28, 1991

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.

2. *Ingstad*. Section II, Item 6(b) asks:

> Does any member of the immediate family (i.e., husband, wife, father, mother, sister or brother) of any party to this application have any interest in or connection with any other broadcast station, pending broadcast application, newspaper in the same area (see Section 73.3555(c) or, in the case of a television station applicant only, a cable television system in the same area (see Section 76.501(a))?

Ingstad answered in the negative. In its accompanying exhibit however, the applicant indicated that:

> Certain relatives of Jack W. Ingstad, President, Director and 50% stockholder and James Ingstad, Vice President and 50% stockholder of the subject application have broadcast interests, but a listing of those relatives and their broadcast interests does not appear to be required by Form 301.[1]

This response is not adequate, as Ingstad has failed to indicate why these broadcast interests are to be excluded. Ingstad will therefore be required to submit the appropriate amendment to the presiding Administrative Law Judge.

3. Linder petitioned for leave to amend his application on August 17, 1989 and October 27, 1989. The accompanying amendments were filed after the last date for filing minor amendments as of right. Under Section 1.65 of the Commission's Rules, the amendments are accepted for filing. However, an applicant may not improve its comparative position after the time for filing amendments as of right has passed. Therefore, any comparative advantage resulting from the amendments will be disallowed.

4. Section II, Item 4 (old form) of FCC Form 301 (October 1986) requires that an applicant specify its address (number, street, city, state) as well as the home address of each of its principals. Heart has not completed Item 4 correctly. Heart's application gives a post office box number as the residence address for Michael Steele. Accordingly, Heart must submit an amendment which gives all the information required by Section II, Item 4 to the presiding Administrative Law Judge after this Order is released.

5. The FAA has determined that the towers proposed by Heart, Linder, and Ingstad would constitute a hazard to air navigation and the applicants have failed to file amendments to remedy the situation. Accordingly, an issue with respect thereto will be included and the FAA made a party to the proceeding.

6. Data submitted by the applicants indicate there would be significant difference in the size of the areas and populations which would receive service from the proposals. Consequently, the areas and populations which would receive FM service of 1 mV/m or greater intensity, together with the availability of other primary aural services in such areas, will be considered under the standard comparative issue for the purpose of determining whether a comparative preference should accrue to any of the applicants.

7. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

8. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

> 1. To determine whether there is a reasonable possibility that the tower height and location proposed by Heart, Linder and Ingstad would constitute a hazard to air navigation.
>
> 2. To determine which of the proposals would, on a comparative basis, best serve the public interest.
>
> 3. To determine, in light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

9. IT IS FURTHER ORDERED, That Ingstad must clarify its response governing the broadcast interest held by relatives of Jack W. Ingstad and James Ingstad, as detailed in paragraph 2 hereinabove, by submitting the appropriate amendment to the presiding Administrative Law Judge within 30 days of the release of this Order.

10. IT IS FURTHER ORDERED, That the petitions for leave to amend filed by Linder ARE GRANTED, and the corresponding amendments ARE ACCEPTED to the extent indicated herein.

11. IT IS FURTHER ORDERED, That Heart shall submit an amendment which contains the information required by Section II, Item 4 (old form) of FCC Form 301, to the presiding Administrative Law Judge within 30 days after the release of this Order.

12. IT IS FURTHER ORDERED. That the Federal Aviation Administration IS MADE A PARTY to this proceeding with respect to the air hazard issue only.

13. IT IS FURTHER ORDERED, That a copy of each document filed in this proceeding subsequent to the date of adoption of this Order shall be served on the counsel of record in the Hearing Branch appearing on behalf of the Chief, Mass Media Bureau. Parties may inquire as to the identity of the counsel of record by calling the Hearing Branch at (202) 632-6402. Such service shall be addressed to the named counsel of record, Hearing Branch, Enforcement Division, Mass Media Bureau, Federal Communications Commission, 2025 M Street, N.W., Suite 7212, Washington, D.C. 20554. Additionally, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall also be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Federal Communications Commission, Room 350, 1919 M Street, N.W., Washington, D.C. 20554.

14. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

15. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

FOOTNOTE

[1] Our ownership records reveal, for example, that Robert E. Ingstad owns 100% of Radio Ingstad Minnesota, Licensee of stations KDHL(AM) and KQCL(FM) in Faribault, Minnesota and 80% of Radio Ingstad Nebraska, Licensee of KKPR(AM & FM) in Kearney, Nebraska.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-621

In re Applications of

JOHN STRELITZ (hereafter "Strelitz)	File No. BPH-890313MT
VINCENTE SILVA (hereafter "Silva")	File No. BPH-890313MU
SKR, INC. (hereafter "SKR")	File No. BPH-890313MV
JEMEZ MOUNTAIN BROADCASTERS (hereafter "Jemez")	File No. BPH-880310MI (PREVIOUSLY DISMISSED)
T.C. MONTE, INC. (hereafter "Monte")	File No. BPH-890313MS (DISMISSED HEREIN)

For Construction Permit
for a New FM Station on
Channel 234C (94.7 MHz)
in Santa Fe, New Mexico

HEARING DESIGNATION ORDER

Adopted: December 3, 1990; Released: January 28, 1991

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.

2. *Preliminary Matters.* On February 1, 1988, the Commission announced a filing window for applications to serve Santa Fe, New Mexico on Channel 234C. This window commenced on February 1 and closed on March 10, 1988. *Public Notice*, Report No. W-33 (released February 1, 1988). Since all of the applications filed in this window were subsequently found unacceptable for filing, the Commission announced that applications proposing to serve Santa Fe on this channel could be filed as of March 13, 1989. *Public Notice*, Report No. FCFS-13 (released March 6, 1989). Four applications were filed on March 13th; therefore, pursuant to 47 C.F.R. § 73.3564(d)(4), they must be treated as "simultaneously filed" and are therefore mutually exclusive with each other.

3. Jemez's application was filed during the initial filing window. However, it was returned as unacceptable for filing on February 6, 1989. *Letter to Mr. Jeffery R. Kline from Dennis Williams, Chief, FM Branch*. In its letter, the FM Branch denied Jemez's request for waiver of the Commission's spacing requirements (47 C.F.R. § 73.207). In its waiver request, Jemez claimed that "all of the suitable [fully-spaced] sites are located on U.S. Forest land" and are therefore not available to any applicant for Channel 234C. The Branch's letter rejected this argument, stating that Jemez "provided no evidence to support [its] contention that no non-short-spaced or lesser short-spaced sites exist."

4. On March 28, 1989, Jemez petitioned for reconsideration of the Branch's action. In its petition, Jemez argues that its waiver request did not receive the "hard look" required by *WAIT Radio v. FCC*, 418 F.2d 1153 (D.C. Cir.,1969). *Reconsideration*, at page 2. Specifically, Jemez contends that the lack of evidence in its request for waiver "is no basis for summary denial of the waiver" and that "the waiver movants showing is to be viewed with some indulgence." *Id.* Jemez complains that "[t]here was a time when the staff would have requested orally or in writing for a supplement to the waiver showing," and argues that the Branch could have alternatively specified "an appropriate hearing issue to meet a burden of evidentiary proof." *Reconsideration*, at page 3.

5. Jemez has clearly misread *WAIT Radio*. In that decision, the Court clearly stated the agency's responsibility to provide a "hard look" at any allegation "made by petitioners, stated with clarity *and accompanied by supporting data.* " *WAIT*, at 1157 (emphasis added). As it footnoted at this juncture in its decision, the Court referenced the comment in *Pikes Peak Broadcasting Co. v. FCC*, 422 F. 2d 671 n.8 (D.C. Cir., 1969), that applicants for waiver "must articulate a specific pleading, and adduce concrete support, preferably documentary." Clearly, the request prepared for Jemez in Exhibit 13 of its application failed to provide any evidence supporting its allegation.[1] Jemez's petition, given its basis on procedural grounds, must accordingly be denied.

6. According to our analysis and Monte's own calculation, its proposed transmitting antenna site is short-spaced by 7.8 kilometers to the licensed facilities of FM Station KZRR (Albuquerque, New Mexico). Monte has requested waiver of the rules (47 C.F.R. § 73.207) to permit this short-spacing, stating that "a reasonable site which was not short-spaced could not be located so one was chosen which had less than 8 kilometers short-spacing so the applicant could amend the application using a directional antenna after the effective date of [MM] Docket 87-121." *Engineering Statement*, dated March 11, 1989.

7. Since Monte never amended its application after the June 26, 1989 effective date of MM Docket 87-121, its proposal must be judged in light of the fully-spaced proposals for Channel 234C. Specifically, Monte's application must raise a substantial question of fact regarding all fully-spaced proposals in order to warrant inclusion in the proceeding and specification of a short-spacing issue. *See, e.g., Clearlake Broadcasting Company*, 47 Fed. Reg. 47931 (1982). A careful review of both the application and amendments reveals no such evidence. Therefore, Monte's request for waiver of the spacing rules must be denied and its application returned as unacceptable for filing.

8. *SKR.* On July 14, 1989, SKR amended its application to specify a new transmitting antenna site, approximately "290 meters to the north of that originally specified." However, SKR's amendment failed to include a certification of reasonable assurance of the availability of this amended site on Picuris Peak. Therefore, the appropriate issue will be specified.

9. SKR indicated that it notified the Federal Aviation Administration on June 12, 1989 of its proposed construction on Picuris Peak. However, our Antenna Survey

Branch indicates that the tower heights specified in SKR's application (64 meters AGL/3356 meters AMSL) exceed those on file with the FAA (49 meters AGL/3341 meters AMSL). Accordingly, an air hazard issue must be specified. To remedy this discrepancy, SKR must amend either the data in its application or that on file with the FAA.

10. *Other matters*. The engineering data submitted by Strelitz, Silva and SKR does not clearly demonstrate that each provides a 3.16 mV/m signal to the entire proposed city of license, as required by Section 73.315(a) of the Commission's Rules. The FM Branch does not require waiver of this requirement unless the proposed 3.16 mV/m coverage falls below 80% of the area of the principal community. *See John R. Hughes*, 50 Fed. Reg. 5679 (February 11, 1985). *See* also *Southwest Communications, Inc*., released July 16, 1986 (Letter from the Chief, FM Branch, reference 8920-HVT). The applicants, whose coverages range between 20 to 56% of Santa Fe's residential area, have each requested waiver of the Commission's Rules. As Silva noted in support of his request, the difficulty facing applicants in this proceeding was to propose a site that would "provide good coverage of the Santa Fe area" while simultaneously avoiding short-spacing and line-of-sight problems. "The area which meets these two conflicting criteria." Silva indicated, "is limited due to wilderness area and governmental restrictions." A coverage issue must therefore be specified in this matter.

11. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

12. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

> 1. To determine whether SKR has reasonable assurance of the availability of its site.
>
> 2. To determine whether there is a reasonable possibility that the tower height and location proposed by SKR would constitute a hazard to air navigation.
>
> 3. To determine whether the proposals of Strelitz, Silva and SKR would provide coverage of the city sought to be served, as required by Section 73.315(a) of the Commission's Rules, and, if not, whether circumstances exist which warrant waiver of that Section.
>
> 4. To determine which of the proposals would, on a comparative basis, best serve the public interest.
>
> 5. To determine, in light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

13. IT IS FURTHER ORDERED, That Jemez's petition for reconsideration IS DENIED.

14. IT IS FURTHER ORDERED, That Monte's application IS RETURNED as unacceptable for filing.

15. IT IS FURTHER ORDERED, That the Federal Aviation Administration IS MADE A PARTY to this proceeding with respect to the air hazard issue only.

16. IT IS FURTHER ORDERED, That a copy of each document filed in this proceeding subsequent to the date of adoption of this Order shall be served on the counsel of record in the Hearing Branch appearing on behalf of the Chief, Mass Media Bureau. Parties may inquire as to the identity of the counsel of record by calling the Hearing Branch at (202) 632-6402. Such service shall be addressed to the named counsel of record, Hearing Branch, Enforcement Division, Mass Media Bureau, Federal Communications Commission, 2025 M Street, N.W., Suite 7212, Washington, D.C. 20554. Additionally, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall also be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Federal Communications Commission, Room 350, 1919 M Street, N.W., Washington, D.C. 20554.

17. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

18. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

FOOTNOTE

[1] In its entirety, that exhibit stated:

> The applicant seeks a waiver of Section 73.207 of the Commission's rules to permit short-spacing to commercial FM broadcast station KZRR, Albuquerque, New Mexico. As is clear from Exhibit SFA-1-FM, the proposed site is 8 kilometers closer to KZRR than is permitted by the rules.
>
> The location of Santa Fe, the requirement for height above average terrain for a Class C facility such as that for which the applicant is applying, and the fact that all of the suitable sites are located on U.S. Forest Service land, makes location of a suitable nonshort-spaced site not possible. The Forest Service limits the locations on land which it controls at which communications facilities can be located. The only other suitable site suggested by the Forest Service was one at which the short-spacing would be more severe than at the present site.

In light of the foregoing, grant of a waiver to permit operation at the present site is appropriate, and would serve the public interest.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-622

In re Applications of

BLACK HILLS CHRISTIAN COMMUNICATIONS, INC. (hereafter "Black Hills")	File No. BPH-890123MO
UPPER COLUMBIA BROADCASTING, INC. (hereafter "UCB")	File No. BPH-890123MV
EARLIMART EDUCATIONAL FOUNDATION, INC. (hereafter "Earlimart")	File No. BPED-890123MA (DISMISSED HEREIN)

For Construction Permit
for a New FM Station on Channel 284-A
in Spokane, Washington

HEARING DESIGNATION ORDER

Adopted: December 3, 1990; Released: January 28, 1991

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.

2. *Preliminary matters.* On April 13, 1990 and April 17, 1990, respectively, Black Hills and UCB filed Petitions To Deny against Earlimart stating, *inter alia*, that Earlimart is short spaced to station KMJY-FM, Newport, Washington and to the allotment of Channel 284-A in Cranbrook, British Columbia, Canada. On July 19, 1990, Earlimart filed an Opposition To Petition To Deny,[1] stating that it had filed a request for waiver of the Commission's spacing rules, and that the question of short spacing can and should be addressed at the hearing.

3. An engineering review of Earlimart's application reveals that the proposal is short-spaced by 2.0 kilometers to a previously filed and granted construction permit application (BPH-880823IA, granted November 28, 1988) which modified the licensed facilities of station KSMP-FM (now KMJY-FM), Newport, Washington.[2] A license to cover that permit has since been granted by the Commission (BLH-891130KC, granted September 12, 1990). Therefore, Earlimart's application was inadvertently accepted for filing and will be returned below. [3] Additionally, Black Hills' and UCB's petitions will be dismissed as moot.

4. On April 13, 1990, Black Hills filed a Petition To Deny against the application of UCB, stating that UCB failed to certify that sufficient net liquid assets were on hand or that sufficient resources were available from committed sources to construct and operate its requested facilities for three months without revenue. UCB failed to file an amendment in order to make this certification within the amendment as of right period. Black Hills contends that this demonstrates contempt for the financial requirement on the part of UCB, and that it should serve as an admission that UCB is not financially qualified to be a Commission licensee. For these reasons, Black Hills seeks the dismissal of UCB's application.

5. On April 25, 1990, UCB filed an Opposition to Petition To Deny, stating that the Commission issued its *Report and Order*, in the *Revision of Construction Permit Application*, 4 FCC Rcd 3835 (1989) adopting, *inter alia*, stricter requirements regarding financial qualifications. UCB states that the Commission has made it clear that the new financial certification rules do not apply to its application, since it was filed before June 26, 1989, the date upon which the new rules became effective. We agree. Under the old processing guidelines where the financial certification box was checked "no", an issue was designated against the mutually exclusive applicant for resolution at hearing. Accordingly, such an issue will be designated against UCB below, and Black Hills' petition will be granted to that extent and denied in all other respects. *See e.g., Goodhartt Broadcasting, Inc.*, DA 90-1055, MM Docket No. 90-367, released August 23, 1990.

6. The engineering data submitted by Black Hills does not clearly demonstrate that it provides a 3.16 mV/m signal to the entire proposed city of license, as required by Section 73.315(a) of the Commission's Rules. The FM Branch does not require waiver of this requirement unless the proposed 3.16 mV/m coverage falls below 80% of the area of the principal community. *See John R. Hughes*, 50 Fed. Reg. 5679 (February 11, 1985). *See* also *Southwest Communications, Inc.*, released July 16, 1986 (Letter from the Chief, FM Branch, reference 8920-HVT). Engineering study reveals that Black Hills' 3.16 mV/m contour would cover approximately 95.8% of the area of the community of license, and 98.6% of its population. Accordingly, no waiver is required.

7. Section II, Item 4 (old form) of FCC Form 301 (October 1986) requires that an applicant specify its address (number, street, city, state) as well as the home address of each of its principals. Black Hills and UCB have not completed Item 4 correctly. Black Hills' application gives a post office box number as the residence address for Mark Pluimer, Lavern Willson, and Pat Alley. UCB's application gives a post office box number as the residence address for J.D. Toms. Accordingly, Black Hills and UCB must submit amendments providing all the information required by Section II, Item 4 to the presiding Administrative Law Judge after this Order is released.

8. The applicant below has petitioned for leave to amend their application on the dates shown. The accompanying amendment was filed after the last date for filing amendments as of right. Under Section 1.65 of the Commission's Rules, the amendment is accepted for filing. However, an applicant may not improve its comparative

position after the time for amendments as of right has passed. Therefore, any comparative advantage resulting from the amendments will be disallowed.

APPLICANTS	AMENDMENTS FILED
UCB	July 14, 1989

9. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

10. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine with respect to UCB, whether the applicant is financially qualified.
2. To determine which of the proposals would, on a comparative basis, best serve the public interest.
3. To determine, in light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

11. IT IS FURTHER ORDERED, That pursuant to the discussion in paragraph 3, *supra*, Earlimart's October 2, 1989 amendment IS HEREBY RETURNED, and its application IS HEREBY RETURNED as inadvertently accepted for filing.

12. IT IS FURTHER ORDERED, That the Petitions To Deny filed by Black Hills and UCB against Earlimart ARE HEREBY DISMISSED AS MOOT.

13. IT IS FURTHER ORDERED, That the Petition to Deny filed by Black Hills against UCB IS GRANTED to the extent indicated herein and IS DENIED in all other respects.

14. IT IS FURTHER ORDERED, That Black Hills and UCB shall submit amendments which contain the information required by Section II, Item 4 (old form) of FCC Form 301, to the presiding Administrative Law Judge within 30 days after the release of this Order.

15. IT IS FURTHER ORDERED, That the petition for leave to amend filed by UCB IS GRANTED, and the corresponding amendment IS ACCEPTED to the extent indicated herein.

16. IT IS FURTHER ORDERED, That a copy of each document filed in this proceeding subsequent to the date of adoption of this Order shall be served on the counsel of record in the Hearing Branch appearing on behalf of the Chief, Mass Media Bureau. Parties may inquire as to the identity of the counsel of record by calling the Hearing Branch at (202) 632-6402. Such service shall be addressed to the named counsel of record, Hearing Branch, Enforcement Division, Mass Media Bureau, Federal Communications Commission, 2025 M Street, N.W., Suite 7212, Washington, D.C. 20554. Additionally, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall also be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Federal Communications Commission, Room 350, 1919 M Street, N.W., Washington, D.C. 20554.

17. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

18. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

FOOTNOTES

[1] Earlimart only filed an Opposition against the Black Hills Petition To Deny. However, since Black Hills' petition espouses, *inter alia*, the same issues as the UCB Petition To Deny, we will consider the Opposition as an answer to both. This Opposition was not timely filed and therefore is an unauthorized pleading under 47 C.F.R. §1.45. However, in order to dispose of the issue raised in the petitions using as complete a record as possible, we will consider the opposition in our motion.

[2] This engineering review also indicates that Earlimart's proposal is not short-spaced to the Cranbrook allotment.

[3] On October 2, 1989, Earlimart filed a request for waiver of the Commission's short spacing rules. However, the Commission has instituted a "hard look" processing policy whereby applicants may submit amendments curative of tenderability or acceptablity defects only within the period for amendment as of right. *Report and Order* in Docket 84-750, 50 Fed. Reg. 19,936 (May 13, 1985). *See also* 47 C.F.R. § 73.3522(a)(6). In this case, the amendment as of right period expired on July 10, 1989. Earlimart's waiver request, therefore, was untimely and will be returned below. We note that Earlimart's amendment/waiver request for a short-spacing of this magnitude would not have made its proposal acceptable even if it had been timely, since other applicants had submitted proposals which contained fully spaced sites. *See Donovan Burke*, 60 RR 2d 110 (1986).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Liability of
Evergreen Media
Corporation of
Chicago AM

Licensee of Radio Station
WLUP(AM), Chicago, IL

for a Forfeiture

MEMORANDUM OPINION AND ORDER

Adopted: January 18, 1991; Released: January 28, 1991

By the Chief, Mass Media Bureau:

1. The Commission, by the Chief of the Mass Media Bureau acting pursuant to authority delegated by Section 0.283 of the Commission's Rules, has under consideration (1) a $6,000 Notice of Apparent Liability (NAL) issued November 30, 1989, to Evergreen Media Corporation of Chicago AM (Evergreen Media), licensee of Station WLUP(AM), Chicago, Illinois; and (2) Evergreen Media's response to the NAL dated January 29, 1990.

2. The NAL was issued for apparent violation of 18 U.S.C. § 1464, prohibiting the broadcast of indecent material.[1] Pursuant to Sections 312(a)(6) and 503(b)(1)(D) of the Communications Act of 1934, as amended, the Commission has statutory authority to take appropriate administrative action when licensees broadcast material in violation of 18 U.S.C. § 1464. The Commission has defined indecency as language or material that, in context, depicts or describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities or organs. In *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978) ("*Pacifica* "), the Supreme Court upheld the Commission's authority to regulate indecent broadcasts under this definition, and the United States Court of Appeals for the District of Columbia Circuit has upheld the Commission's authority to restrict the broadcast of indecent material when there is a reasonable risk that children may be in the audience. *Action for Children's Television v. FCC*, 852 F.2d 1332 (D.C. Cir. 1988) ("*ACT* ").

3. The complaint underlying the NAL alleged that on August 19, 1987, between 2:30 and 4:30 p.m., and on March 30, 1989, at 5:10 p.m., WLUP(AM) aired indecent material on the "Steve and Garry Show." On August 24, 1989, the Complaints and Investigations Branch, Enforcement Division, Mass Media Bureau, requested the licensee's comments regarding these allegations, and Evergreen Media responded by letter dated October 10, 1989. After reviewing all the information before it, the Mass Media Bureau determined that the three broadcasts transcribed in Attachment 1 apparently violated 18 U.S.C. § 1464 and on November 30, 1989, issued a notice of apparent liability regarding that material.

4. In its January 29, 1990, response, Evergreen Media argues that Section 503(b)(6) of the Communications Act[2] bars the Commission from issuing a forfeiture as to the two broadcasts on August 19, 1987, which occurred in WLUP(AM)'s previous license term and more than one year prior to the issuance of the November 30, 1989, NAL. According to Evergreen Media, this section of the Communications Act should be interpreted to mean that a forfeiture order cannot issue for a violation occurring more than a year ago and in a previous license term, even if a notice of apparent liability for a monetary forfeiture regarding the violation issued in a timely manner within that previous license term. Applying this interpretation of the statute to the case before us, the licensee suggests that because its current term began December 1, 1989, a forfeiture order cannot be issued today regarding conduct that occurred on August 19, 1987, or on March 30, 1989, notwithstanding that the November 30, 1989, NAL was issued to WLUP(AM) before the current term began.

5. Before turning to Evergreen Media's other arguments, we address the issue of whether a forfeiture order concerning the subject broadcasts may be issued after the commencement of WLUP(AM)'s current term, which began on December 1, 1989. As the licensee argues, an NAL and a forfeiture order are not equivalent, and an NAL does not itself impose a forfeiture. Section 503(b)(6), in fact, emphasizes the distinction between a forfeiture order and an NAL. It creates a prerequisite for issuance of a forfeiture penalty, and that prerequisite is in the form of notice, or notice of apparent liability. Moreover, the statute requires that a forfeiture be preceded by notice or NAL within one of two time frames in relation to the violations. The notice, or NAL, if issued more than three years past the date of the violation, cannot result in the imposition of a forfeiture penalty. Similarly, a notice, or NAL, if issued more than one year after the violation occurred, cannot result in imposition of a forfeiture penalty if a new license term began prior to said notice or NAL. In other words, if the conduct sought to be sanctioned occurred in one license term and the NAL occurred in the succeeding license term, the NAL must be issued within one year of the conduct; if the conduct sought to be sanctioned occurred in the same license term as the NAL, the NAL must be issued within three years of the conduct. In this case, because the NAL of November 30, 1989, was issued in the same license term as the conduct, the Commission is authorized to impose a forfeiture penalty for alleged violations occurring within three years preceding the NAL. [3]

6. Raising another argument based on passage of time, Evergreen Media urges that the Commission exercise its discretion not to impose a forfeiture because "contemporary community standards for the broadcast medium" may have changed since August 1987, and, consequently, the trier of fact may be unable to make a determination based on standards that were contemporary at the time of the broadcast. We do not believe, however, that there has been any change in the relevant broadcast standards between August 1987 and today's date that should lead to a different result with respect to the broadcasts transcribed in Attachment 1.

7. In addition, Evergreen Media repeats and incorporates all the arguments made in response to the Commission's letter of inquiry, asserting that the subject material was not indecent. It argues that the March 30, 1989, broadcast was a "straightforward description" of a picture of Vanessa Williams in *Penthouse* magazine, and advises that the discussion occurred in the context of a conversation about pornography which led to a spoof of Ms. Williams' appearance on NBC Television's Bob Costas Show. The licensee states that the broadcast comments were political and social commentary and gave a "simple, accurate description of a picture of oral-genital contact," in language that was explicit but not erotic or suggestive; that they included innuendo which was not capable of only one, sexual, meaning; that they were not readily understandable by children; and that they were in each case no more than "a fleeting, isolated reference." As to the August 19, 1987, broadcasts, Evergreen Media argues that neither contained explicit language. Rather, they claim that the "Kiddie Porn" song, sung by a call-in participant, contained only mild innuendo, and the called-in joke alluding to homosexual activity contained one double entendre which was not surrounded by explicit sexual references. The licensee asserts that children would not have readily understood a sexual meaning in either broadcast. Moreover, it asserts that the "Kiddie Porn" song was perhaps offensive, not in language, but in subject, contending that "[t]he complainant likely objected to this song because he/she believed that it was improper to address the troubling issue of child pornography in a humorous tune." Evergreen Media maintains that the subjects of all these broadcasts -- homosexual activity, child pornography, and oral-genital contact -- are not taboo and that the language and context of raising these subjects in the cited broadcasts do not warrant an indecency determination.

8. Further, Evergreen Media describes the context of the show as an extemporaneous, frank, live and spontaneous, open forum, often humorous but never pandering or titillating, often discussing important public issues, and incorporating listener comments in over half of its dialogue (subject to WLUP's reasonable seven-second screenings). It urges that the merits of the "Steve and Garry Show" talkshow format, as conducted by WLUP, should weigh heavily against a Commission determination that the material was indecent or any Commission sanction against the station that would have a chilling effect. It maintains that the program is aimed at adults and would not be interesting to any but "the maturest" of minors; further, it contends that there is no showing that unsupervised children listen to the program, or that any harm would result if they did. According to the licensee, the degree of audience participation and the show's high ratings reflect the contemporary community standards in the Chicago area and establish that, in context, the broadcasts were not patently offensive by contemporary community standards, locally for Chicago (as further illustrated by its submission of supportive listener letters) or for broadcasting generally.

9. Evergreen Media also challenges the Commission's right to formulate an indecency standard based on anything other than a factual finding of local standards. In response to the NAL, it claims that proffered evidence of contemporary community standards for the Chicago area and evidence of merit should have been considered but were not. Moreover, it argues that the Commission's guidance in the area of indecency has been inadequate, that the Commission's precedent does not support a finding of indecency with respect to the broadcasts here at issue, and that the NAL fails to demonstrate that the material in the three broadcasts was indecent as broadcast.

10. Finally, Evergreen Media urges that since its decisions regarding the cited broadcasts were reasonable, good faith determinations under the circumstances, no fine should be imposed. It also urges that no sanction be imposed because these enforcement actions constitute a change in the Commission's regulatory course.

11. In *FCC v. Pacifica Foundation*, *supra*, the Supreme Court upheld the Commission's authority to regulate indecent broadcasts and rejected the argument that the Commission's definition, essentially unchanged from the one used today, was unconstitutionally vague. Furthermore, in *ACT*, *supra*, the United States Court of Appeals upheld the Commission's authority to restrict, using the same definition of indecency, the broadcast of indecent material when there is a reasonable risk that children may be in the audience. In both these cases, our definition of indecency included a "contemporary community standards for the broadcast medium" component based on the Commission's asserted expertise in ascertaining such standards for the broadcast medium. This standard is not a local one, but rather, is the standard of an average broadcast viewer or listener. *See Infinity Broadcasting Corp. of Pa.*, 3 FCC Rcd 930, 933 (1987); *Sagittarius Broadcasting Corp.*, 5 FCC Rcd 7291 (MMB 1990). Further, the popularity of allegedly indecent broadcasts in any given community cannot vitiate an apparent violation of federal law, nor can it vindicate the Commission's legitimate and recognized interest in protecting children who may be in the listening audience. Moreover, the Commission is not required to make a specific factual determination that children were in the WLUP listening audience during the daytime broadcasts of the Steve and Garry Show. Rather, the courts have presumed that during the hours at issue here (2:30 p.m. to 5:10 p.m.), there is a reasonable risk that children may be in the general radio audience. Absent specific probative evidence in rebuttal -- evidence which Evergreen Media has not supplied -- this presumption remains valid. The broadcasts cited in this case are, therefore, legally actionable. *See ACT*, 852 F.2d at 1341 (recognizing the Commission's authority, pursuant to *Pacifica*, *supra*, to proceed against the daytime broadcast of indecent material using a "bright-line" test). Finally, it is well established that protecting children from exposure to indecent material is a compelling governmental interest and courts have not questioned or expected proof on the issue of harm. *See Sable Communications of California v. FCC*, 109 S.Ct. 2829, 2836 (1989); *Pacifica*, 438 U.S. at 749-50.

12. We find that all the broadcasts transcribed in Attachment 1 fit squarely within our definition of indecency stated above. Each of the passages describes sexual or excretory activities or organs -- specifically, oral-genital contact, sexual activity with a child, and anal intercourse. Contrary to Evergreen Media's contention, we do not rest our indecency determination on subject matter alone. Rather, we also find that each passage was presented in a manner or in terms that were patently offensive, as measured by contemporary community standards for the broadcast medium. The "Kiddie Porn" song was pandering in its descriptions of soliciting a young boy to pose nude and seducing him into homosexual activity. The

"gay bar" joke, within its brief sexual context, was explicit and vulgar in its depiction of anal intercourse. The March 30, 1989, broadcast, involving an allegedly "straightforward" description of sexual activities depicted in a magazine, was delivered by the talkshow host in explicit, graphic and vulgar language and was pandering and titillating in nature. While the broadcast's asserted character as political and social commentary would, if true, be a relevant contextual consideration in an indecency determination, it would not in itself be dispositive. As we stated, analogously, in *Infinity Broadcasting Corp. of Pa.*, 3 FCC Rcd 930, 932 (1987), "the merit of a work . . . is simply one of many variables" that make up a work's context; "we reject an approach that would hold that if a work has merit, it is *per se* not indecent" (footnote omitted). Even conceding, therefore, that the passage broadcast on March 30, 1989, possessed some redeeming value as social or political commentary, in the particular context of that broadcast, we find the explicit nature of the material and its manner of presentation to be patently offensive.

13. We also believe that the innuendo of the March 30, 1989, broadcast, as well as the innuendo and double entendre present in the August 19, 1987, broadcast of the "Kiddie Porn" song and the joke alluding to homosexual activity, was understandable and clearly capable of a specific sexual meaning, the import of which was inescapable. *See Infinity Broadcasting Corp. of Pa.*, 2 FCC Rcd 2705 (1987), *recon.*, *Infinity Broadcasting Corp.*, 3 FCC Rcd 930 (1987), *aff'd in part and remanded in part sub nom. ACT, supra.* Contrary to the argument of Evergreen Media, double entendre need not by its context be rendered capable of only one meaning -- a specific sexual one -- for broadcasts to fit within the Commission's definition of indecency; it is sufficient that the sexual (or excretory) meaning be clear and that it be presented in a patently offensive manner that exhibits all the elements spelled out in our definition of indecency. Furthermore, while indecency of a merely fleeting and isolated nature may in some instances be undeserving of a sanction, we are not persuaded that the material before us here, including the broadcasts involving listener participation, occurred in circumstances that can sustain such a claim. *Cf. Pacifica Foundation*, 2 FCC Rcd 2698 (1987) (dismissing complaint regarding "Shocktime, U.S.A." live broadcast).

14. A licensee's good faith conduct is no defense to a statutory violation for purposes of Commission enforcement action but may affect the sanction imposed. *Infinity Broadcasting Corp.*, 3 FCC Rcd 930, 933 (1987), *aff'd in part and remanded in part sub nom. ACT, supra.* The Commission made it clear by its enforcement actions in 1987 that the kind of material before us here is actionable, and that licensees will be held responsible for erroneous good faith judgments which stray this far afield in their indecency determinations. We understand that the talkshow format may present unique problems and responsibilities for broadcasters, but we do not foresee its demise by the exercise of care to avoid, or screen out, indecent language.

15. Accordingly, pursuant to Section 503(b) of the Communications Act of 1934, as amended, IT IS ORDERED, that Evergreen Media Corporation of Chicago AM, licensee of Radio Station WLUP(AM), Chicago, Illinois, FORFEIT to the United States the sum of six thousand dollars ($6,000) for its violation of Section 1464 of Title 18 of the United States Code. Payment of the forfeiture may be made by mailing to the Commission a check or similar instrument payable to the Federal Communications Commission. In regard to this forfeiture proceeding, the licensee may take any of the actions set forth in Section 1.80 of the Commission's Rules, as summarized in the attachment to this Memorandum Opinion and Order.

FEDERAL COMMUNICATIONS COMMISSION

Roy J. Stewart
Chief, Mass Media Bureau

ATTACHMENT 1

Transcripts, WLUP (AM), Chicago, IL

March 30, 1989, 5:10 p.m.
SD: Steve Dahl
GM: Garry Meier
BW: Bruce Wolfe

BW: He's (Bob Costas) trying to defend this Vanessa Williams. I mean she's a, the most embarassing pictures that you ever saw in your life in *Penthouse*. I don't know and he's talking about how she actually had more talent than your typical Miss America. I'll say.

SD: She was licking that other woman's vagina. I want to tell you pal.

GM: Isn't this great. We can all break into Jack Brickhouse at any moment.

BW: They chorus. But I mean, he's just offending her (unintelligible).

SD: Went down on that other woman and oh God, you had your tongue in her vagina. It was fabulous. A lot of your Miss Americas can. I don't picture Phyliss George being able to do it like that.

GM: More on later with Vanessa Williams. (Laughter)

BW: Show all these pictures of her right? They're getting increasingly suggestive. They show in that break.

SD: He had to put his leg up on the ottoman because he had a stiff-oh. God, I'm as hard as a rock right now Vanessa. You're so honest Bob.

GM: On the big chair.

BW: Oh, he's always dropping these references.

SD: He looks like he could (unintelligible). That chair's way too big.

August 19, 1987, 2:30 to 4:30 p.m.

C: Caller
SD: Steve Dahl
GM: Garry Meier

C: I want you guys to listen to my Cliff song and see if I'm on the right track, a little bit because I'm stumbling along with some of the lyrics, or, I have a.

SD: Why don't you pick what you think is your best.

C: OK, let's do this then because I want, I want to know if I'm on the right way. OK? You got to imagine Cliff singing this 'cause it's not that funny otherwise but, this parody to September Morn and we're going to call it Kiddie Porn. Here we go. (music)

> Welcome to my camp, you're a grown up little man, let me rub out that cramp, my, you've got a lovely hand, look at who you are and where you want to go. drop your drawers and strike a pose, my tripod's all aglow, it's Kiddie Porn. Do you remember when we filmed that hot summer day, you were nude and you discovered I was gay. Yes, I know but let's go roll out in the hay. (laughter in the background during song)

SD: That's pretty good.

GM: I think you should sing that. I think Cliff commissioned.

C: I was there.

SD: Pretty funny with you singing it.

* * * * * * *

C: I have a joke for you guys and think you can say it on the air. It's not real bad but do you know what the number one line in a gay bar is?

SD: What?

C: May I push your stool in for you?

SD: (laughs) Don't you think those guys have enough to deal with? We got AIDS and all that and then we're all naming gerbil jokes and stuff. I don't know.

FOOTNOTES

[1] "Whoever utters any obscene, indecent, or profane language by means of radio communication shall be fined not more than $10,000 or imprisoned not more than two years, or both." 18 U.S.C. § 1464.

[2] Section 503(b)(6) provides in pertinent part:

> No forfeiture penalty shall be determined or imposed against any person under this subsection if-- (A) such person holds a broadcast station license issued under title III of this Act and if the violation charged occurred--
>
> (i) more than 1 year prior to the date of issuance of the required notice or notice of apparent liability; or
>
> (ii) prior to the date of commencement of the current term of such license, whichever is earlier so long as such violation occurred within 3 years prior to the date of issuance of such required notice . . . .

47 U.S.C. § 503(b)(6).

[3] The licensee cites a footnote in *Dena Pictures, Inc.*, 90 FCC 2d 27, 42 n.23 [51 RR 2d 839, 850] (1982), to support its interpretation of Section 503(b)(6). That note, however, is clearly *dicta*, and its language is not a precise restatement of the limitations statute, particularly in its omission of any mention of a notice or NAL as a prerequisite to a forfeiture penalty in a prior license term. Among the numerous other cases that do not omit the notice or NAL prerequisite in discussing the limitations statute are *Deer Lodge Broadcasting*, 86 FCC 2d 1066, 1068 n.5 [49 RR 2d 1317, 1319] (1982); *Vinita Broadcasting Co.*, 30 FCC 2d 458, 461 n.8 [22 RR 2d 195, 210] (1971); and *Belk Broadcasting Co. of Florida*, 29 FCC 2d 150 [21 RR 2d 989] (1971).

Before the
Federal Communications Commission
Washington, D.C. 20554

PR Docket No. 90-27

In the Matter of

Amendment of the Maritime Services Rules to permit both commercial and noncommercial communications on VHF channels 67 and 72 in the Puget Sound area	RM-6769

REPORT AND ORDER

Adopted: January 14, 1991; Released: January 29, 1991

By the Commission:

I. INTRODUCTION

1. In a *Notice of Proposed Rule Making* (*Notice*), released February 1, 1990, 5 FCC Rcd 609, the Commission proposed to amend Section 80.373(f) of the Rules, 47 C.F.R. § 80.373(f), to permit both commercial and noncommercial communications on very high frequency (VHF) channels 67 and 72 in the Puget Sound and Straits of Juan de Fuca. This Report and Order adopts the rule amendments as proposed.

II. BACKGROUND

2. The use of radio for communication between maritime vessels of all types has become increasingly important to promote safety as the number of vessels has increased. We estimate there are 20,000 noncommercial and commercial vessels operating in Puget Sound and the Straits of Juan de Fuca. There are currently six channels alloted for use by noncommercial vessels in these waters, one of which is for intership use only. In Puget Sound and the Straits of Juan de Fuca only one channel is available for both commercial and noncommercial use. The small number of channels available for noncommercial use and the increasing number of recreational and other maritime vessels has resulted in congestion on the marine VHF noncommercial channels. In a *Report and Order* in PR Docket No. 83-431, FCC 85-441, 50 FR 33942, (1985), we assigned channel 70 (156.525 MHz), which had previously been available for noncommercial use, for digital selective calling in accordance with international usage (RR No. 4681A). This action, while necessary, nevertheless exacerbated the shortage of noncommercial channels.

3. To provide some relief to noncommercial users we proposed in a *Notice of Proposed Rule Making* in PR Docket No. 88-350, 3 FCC Rcd 4288 (1988), to make VHF channels 79 and 80 available for noncommercial as well as commercial use on a nationwide basis. In light of the comments, however, we determined that nationwide sharing on these two channels was not in the public interest because local conditions vary. Accordingly, we authorized sharing in that proceeding on VHF channels 79 and 80 in the Great Lakes area only, the original area requested by the petitioner. We indicated, however, that we would consider sharing in other areas on a case-by-case basis.[1]

4. The North Pacific Marine Radio Council (NPMRC) filed a petition for rule making (RM-6769) on April 27, 1989, Public Notice Report No. 1781 dated June 2, 1989. In its petition, NPMRC asked the Commission to amend Section 80.373(f) of the Rules to permit both commercial and noncommercial communications on VHF channels 67 and 72 in the Puget Sound and the Strait of Juan de Fuca. We agreed with NPMRC and proposed amending the Rules as requested. NPMRC filed comments in response to the *Notice* supporting the proposed rule amendments and suggested they be extended to include the waters offshore of Alaska. No other comments were filed. No reply comments were filed.

III. DISCUSSION

5. In support of its request, NPMRC notes the growing number of vessels in the area. NPMRC argues that as the number grows the ability to communicate between ships (both commercial and non-commercial) becomes even more important.[2] Under the current rules, however, there is only one VHF channel (channel 9) that can be used by both commercial and noncommercial vessels in the Puget Sound area. NPMRC states that this frequency is heavily used by commercial vessels. NPMRC proposed to allow both commercial and noncommercial communications on channel 67, currently restricted to commercial intership communications, and channel 72, currently restricted to noncommercial intership communications. This, it argues, would provide three channels for both commercial and noncommercial intership communications to be used by vessels operating in Northwest Washington waters. NPMRC points out that such channel usage is consistent with channel usage in adjacent Canadian waters that vessels in the area routinely navigate. NPMRC states that it has discussed its proposal with marine radio users and government officials in the Puget Sound area and in Canada and they are supportive of the idea.

6. As indicated in PR Docket 88-350, we support regional sharing of commercial/noncommercial VHF marine channels to reduce congestion on maritime frequencies where feasible. In this case, allowing both commercial and noncommercial vessels to use these two channels should reduce congestion and thus increase boating safety in the area. Further, such sharing is supported by the marine radio users in the area and the channel usage is consistent with channel usage in adjacent Canadian waters. For these reasons, we are adopting a rule to permit shared use of channels 67 and 72 in the Puget Sound and the Strait of Juan de Fuca.

7. In its comments, NPMRC suggests that the Commission extend the scope of these amendments regarding commercial and noncommercial communications on VHF channels 67 and 72 to the waters offshore of Alaska.[3] While there may well be merit in NPMRC's request concerning Alaskan waters, there is no indication in its comments that this matter has been extensively coordinated in Alaska or in Canada. Further, no reply comments were received addressing the question. As a result, we regard the question of shared use of channels 67 and

72 in Alaskan waters to be beyond the scope of this proceeding. We would be willing, however, to revisit the Alaskan question in a future proceeding.

IV. PAPERWORK REDUCTION ACT STATEMENT

8. The action herein has been analyzed with respect to the Paperwork Reduction Act of 1980 and found to contain no new or modified form, information collection or recordkeeping, labeling, disclosure, or record retention requirements, and will not increase or decrease burden hours imposed on the public.

V. ORDERING CLAUSES

9. Accordingly, IT IS ORDERED that under the authority contained in Sections 4(i) and 303(r) of the Communication Act of 1934, as amended, Part 80 of the Commission's Rules, 47 C.F.R. Part 80, IS AMENDED, as set forth in the Appendix below.

10. IT IS FURTHER ORDERED, that these rule amendments shall become effective on **March 11, 1991.**

11. IT IS FURTHER ORDERED that a copy of the *Report and Order* be sent to the Chief Counsel for advocacy of the Small Business Administration.

12. IT IS FURTHER ORDERED, that this proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX

Part 80 of Chapter 1 of Title 47 of the Code of Federal Regulations is amended as follows:

Part 80 - Stations in the Maritime Services

1. The authority citation for Part 80 continues to read as follows:

AUTHORITY: Secs. 4, 303 48 Stat. 1066, as amended, 47 U.S.C. 154, 303, unless otherwise noted. Interpret or apply 48 Stat. 1064-1068, 1081-1105, as amended; 47 U.S.C. 151-155, 301-609; UST 3450, 3 UST 4726, 12 UST 2377, unless otherwise noted.

2. In § 80.373, paragraph (f) is amended by adding a new frequency to the commercial and noncommercial tables and adding a new footnote to read as follows:

§ 80.373 Private communications frequencies

* * * * *

(f) * * *

* * * * *

Commercial

* * * * *

72[14]. . . 156.625 . . . . Intership only

* * * * *

Noncommercial

67[14]. . . 156.375 . . . . . . .Intership only

* * * * *

[14] Available only in the Puget Sound and the Strait of Juan de Fuca.

* * * * *

FOOTNOTES

[1] Report and Order, PR Docket No. 88-350, 4 FCC Rcd 1637 (1989).

[2] For example, sailboats must frequently talk to commercial vessels during races. Vessels also routinely exchange information on weather and sea conditions.

[3] *See* NPMRC Comments at 1.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-634

In re Applications of

Oasis Radio Affiliates, Inc. (hereafter "Oasis")	File No. BPH-881215MH
AB Partners, Ltd. (hereafter "AB")	File No. BPH-881215MI
Kathleen D. Walker (hereafter "Walker")	File No. BPH-881215ML
BEBE-F Broadcasting Corp. (hereafter "BEBE")	File No. BPH-881215NE
Baker Communications Partnership (hereafter "BCP")	File No. BPH-881215NN
Bear Broadcasting of Louisiana, Inc. (hereafter "Bear")	File No. BPH-881215NP
Rupert of East Baton Rouge Broadcasting L.P. (hereafter "Rupert")	File No. BPH-881215NQ
RDH Communications. Limited Partnership (hereafter "RDH")	File No. BPH-881215NG (HEREIN DISMISSED)

For Construction Permit
for a New FM Station on
Channel 297A (107.3 MHz)
in Baker, Louisiana

HEARING DESIGNATION ORDER

Adopted: December 18, 1990; Released: January 28, 1991

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.

2. *RDH*. RDH's application (Form 301) lacked Sections III (financial) and IV (programming). Although RDH attached an exhibit describing its planned programming service as called for in Section IV, an examination of its application fails to reveal the certification of sufficent net liquid assets called for in Section III. Since that certification is absent, RDH's application is untenderable and was inadvertently accepted. Accordingly, it must be dismissed. *See Report and Order* in MM Docket No. 84-750, 50 Fed. Reg. 19936, (May 13, 1985).

3. *Oasis*. Alan H. Potamkin, a principal of Oasis, has an ownership interest in the following non-communications entities, against which have pending complaints alleging equal employment opportunity (EEO) violations: (i) *Thomas Gilmore v. Potamkin Chevrolet* (Philadelphia)-EEOC-Charge No. 170890020, October 12, 1988; (ii) *Eva Sieberling v. Potamkin Auto Mall* (Philadelphia) Philadelphia Commission on Human Rights - Charge No. 17G890035, October 19, 1988; (iii) *Gale L. Schuber v. Potamkin Ford* (Atlanta) - EEOC August 17, 1987 - U. S. District Court for the Northern District of Georgia (Atlanta Division) - Case No. 1:88-CV-952-LV, April 29, 1988; and, (iv) *Raymond Angulo v. Potamkin Toyota* (Miami) - Metro Dade Co. Fair Housing and Equal Opportunity Appeals Board - EEOC - Charge No. 150890127, October 24, 1988. An appropriate condition will therefore be specified below.

4. *AB*. The Commission requires that if there will be five or more fulltime station employees, the applicant must complete and file Section VI of Form 301 and supply a statement detailing hiring and promotion policies for women and each minority group whose representation in the available labor force is five percent or greater in the proposed service area. Although AB has filed such a statement, it is deficient. AB has not listed employment services which refer job candidates without regard to race, color, religion, national origin, or sex. Accordingly, AB will be required to file an amended EEO program with the presiding Administrative Law Judge, or an appropriate issue will be specified by the Judge.

5. *BCP*. BCP asserts that the Federal Aviation Administration determined that, although its proposed tower does not otherwise constitute a hazard to air navigation, that agency ruled that the proposed facilities would cause harmful electromagnetic interference (EMI) to aircraft receivers. BCP argues that the FAA's conclusion constitutes a disruptive "intrusion" into the FCC's domain. Although it is willing to amend to specify an alternate site, BCP asserts that another site is less desirable. Thus, it requests a declaratory ruling from the Commission that a site change on the basis of EMI alone is not required.

6. The question of air hazard determinations based on FAA objections regarding potential EMI are the subject of current, ongoing negotiations between the FCC and FAA. *See Letter from former Commission Chairman Dennis R. Patrick to Secretary of Transportation Samuel K. Skinner*, March 13, 1989. Until such time as there is an agreement between the agencies concerning the harmful effects of EMI to aircraft navigation equipment, the policy of the FCC is to specify an air hazard issue absent clearance of a proposed site by the FAA. Thus, an air hazard issue will be specified as to BCP.

7. *Rupert*. Rupert indicated in an amendment filed on September 28, 1990, that its limited partner and 37.5% owner, Hubert Payne, has been indicted for alleged viola-

tions of 18 U.S.C. § 371 (conspiracy to launder money) and 18 U.S.C. § 1956 (money laundering). *See U.S. v. Frank Coyle, et al.*, No. 1:90 CR-0187 (N.D. Ohio, filed July 24, 1990). An appropriate condition will therefore be specified below.

8. The following applicants petitioned for leave to amend their applications on the dates shown. The accompanying amendments were filed after the last date for filing minor amendments as of right. Under Section 1.65 of the Commission's Rules, the amendments are accepted for filing. However, an applicant may not improve its comparative position after the time for filing amendments as of right has passed. Therefore, any comparative advantage resulting from the amendments will be disallowed.

APPLICANT	AMENDMENTS FILED
Oasis	July 3, 1989
BCP	April 26, 1989
Rupert	September 28, 1990

9. Bear petitioned for leave to amend its application on November 13, 1989, after the last day for filing amendments as of right. The subject amendment was accompanied by the good cause showing required by 47 C.F.R. § 73.3522(a)(2); consequently, the amendment is accepted for filing. However, an applicant may not improve its comparative advantage after the time for filing amendments as of right has passed. Therefore, any comparative advantage resulting from the amendments will be disallowed.

10. Data submitted by the applicants indicate there would be significant difference in the size of the areas and populations which would receive service from the proposals. Consequently, the areas and populations which would receive FM service of 1 mV/m or greater intensity, together with the availability of other primary aural services in such areas, will be considered under the standard comparative issue for the purpose of determining whether a comparative preference should accrue to any of the applicants.

11. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

12. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine whether there is a reasonable possibility that the tower height and location proposed by BCP would constitute a hazard to air navigation.
2. To determine which of the proposals would, on a comparative basis, best serve the public interest.
3. To determine, in light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

13. IT IS FURTHER ORDERED, That RDH's application IS DISMISSED as inadvertently accepted for tender.

14. IT IS FURTHER ORDERED, That, in the event a construction permit is awarded to Oasis as a result of this proceeding, its grant will be without prejudice to whatever action, if any, the Commission deems appropriate in light of the outcome of the complaint proceedings outlined in paragraph 3 above.

15. IT IS FURTHER ORDERED, That within 30 days of the release of this Order, AB shall submit Section VI information in accordance with the requirement of Section 73.2080(c) of the Commission's Rules to the presiding Administrative Law Judge.

16. IT IS FURTHER ORDERED, That, in the event a construction permit is awarded to Rupert as a result of this proceeding, its grant whall be without prejudice to whatever action, if any, the Commission may deem appropriate in light of the outcome of *U.S. v. Frank Coyle, et al.*, No. 1:90 CR-0187 (N.D. Ohio, filed July 24, 1990).

17. IT IS FURTHER ORDERED, That the petitions for leave to amend filed by Oasis, BCP, Bear, and Rupert ARE GRANTED, and the corresponding amendments ARE ACCEPTED to the extent indicated herein.

18. IT IS FURTHER ORDERED, That the Request for Declaratory Ruling submitted by Baker Communications Partnership IS GRANTED to the extent indicated herein and IS DENIED in all other respects.

19. IT IS FURTHER ORDERED, That the Federal Aviation Administration IS MADE A PARTY to this proceeding with respect to the air hazard issue only.

20. IT IS FURTHER ORDERED, That a copy of each document filed in this proceeding subsequent to the date of adoption of this Order shall be served on the counsel of record in the Hearing Branch appearing on behalf of the Chief, Mass Media Bureau. Parties may inquire as to the identity of the counsel of record by calling the Hearing Branch at (202) 632-6402. Such service shall be addressed to the named counsel of record, Hearing Branch, Enforcement Division, Mass Media Bureau, Federal Communications Commission, 2025 M Street, N.W., Suite 7212, Washington, D.C. 20554. Additionally, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall also be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Federal Communications Commission, Room 350, 1919 M Street, N.W., Washington, D.C. 20554.

21. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

22. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-636

In re Applications of

THE MIRKWOOD GROUP (hereafter "Mirkwood")	File No. BPH-890412MH
BRUCE M. LYONS (hereafter "Lyons")	File No. BPH-890413MD
CAROLE L. PICKETT (hereafter "Pickett")	File No. BPH-890413MO
LEWIS CREEK BROADCASTERS, LTD. (hereafter "Lewis Creek")	File No. BPH-890413NA
BACH 'N ROLL RADIO OF BRANDON, INC. ("Bach 'n Roll")	File No. BPH-890413NG
JAMES G. KIRKPATRICK (hereafter "Kirkpatrick")	File No. BPH-890413NI
GREEN MOUNTAIN BOYS BROADCASTING (hereafter "Green Mountain")	File No. BPH-890413NM (DISMISSED HEREIN)

For Construction Permit
for a New FM Station on Channel 270A
in Brandon, Vermont

HEARING DESIGNATION ORDER

Adopted: December 18, 1990; Released: January 28, 1991

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.

2. *Preliminary Matters.* A preliminary examination of these applications revealed that the entire allocation for Channel 270A at Brandon, Vermont is short-spaced to the pending Rule Making in MM Docket No. 89-487, RM-6855. In the *Notice of Proposed Rule Making* in MM Docket No. 89-487, the Commission, at the request of Stokes Communications Corporation, proposed the substitution of Channel 271C3 for Channel 272A at Randolph, Vermont. The *NPRM* also proposes to substitute Channel 268A for the current Channel 270A at Brandon. Therefore, while the applicants will be allowed to proceed to comparative hearing, it shall be ordered that any construction permit awarded as a result of this proceeding shall be made contingent on the outcome of MM Docket 89-487.

3. Data submitted by the applicants indicate there would be significant difference in the size of the areas and populations which would receive service from the proposals. Consequently, the areas and populations which would receive FM service of 1 mV/m or greater intensity, together with the availability of other primary aural services in such areas, will be considered under the standard comparative issue for the purpose of determining whether a comparative preference should accrue to any of the applicants.

4. *Air hazard.* Attempts to obtain Federal Aviation Administration (FAA) clearance through the Commission's Antenna Survey Branch and applicants Mirkwood and Lyons have been unsuccessful. Accordingly, since no determination has been received as to whether or not the antennas proposed by the applicants would constitute a hazard to air navigation, an issue with respect thereto will be included and the FAA made a party to the proceeding.

5. *Financial Qualifications.* The material submitted by Kirkpatrick does not demonstrate its financial qualifications. Accordingly, an issue will be specified concerning the following deficiency: an answer of "no" to Items 1 and 2, Section III, FCC Form 301 (April 1985), certifying that it does not possess the financial resources to construct and operate the station.

6. *Return of Late-filed Amendment.* Lewis Creek filed, on August 25, 1989, an engineering amendment after the last date to file an amendment as of right. Lewis Creek fails to submit any good cause for the lateness of its filing. Therefore, the amendment filed shall be returned. *See* 47 C.F.R. § 73.3577(a)(6).

7. *Late-filed Amendment.* Lyons petitioned for leave to amend its application on November 16, 1989. Bach 'n Roll petitioned for leave to amend its application on July 23, 1989 and September 9, 1990. The accompanying amendments were filed after the last date for filing minor amendments as of right. Under Section 1.65 of the Commission's Rules, the amendments are accepted for filing. However, an applicant may not improve its comparative position after the time for filing amendments as of right has passed. Therefore, any comparative advantage resulting from the amendments will be disallowed.

8. *Lyons.* On June 20, 1990, Susan E. Marcotte ("Marcotte") filed an informal objection to Lyons' application. Since the matters raised in the objection have previously been filed in a pending transfer proceeding involving stations WSHQ(FM) (File No. BTCH-891122HE), Cobleskill, New York and WYNJ(FM) (File No. BTCH-891122HF), Rotterdam, New York, in the event of grant of the instant application, it shall be without prejudice to whatever action may be appropriate in light of the ultimate resolution of the issues sought in the Rotterdam, New York and Cobleskill, New York proceeding that are not specified herein.

9. In addition, in MM Docket 90-73, Lyons was the subject of a "real party-in-interest" issue added by the presiding Administrative Law Judge concerning the ap-

plication of Maxine W. Snow (BPH-880125NX). The merits of the issue were never addressed, but was framed as follows:

> To determine whether Bruce Lyons is an undisclosed party-in-interest in Maxine Snow's Lebanon, New Hampshire FM application (BPH-880126NX), in comparative proceeding MM Docket 90-73, and if so, what effect that has on Snow's qualifications to be a Commission licensee.

10. Maxine Snow subsequently dismissed her application as part of a settlement reached in that proceeding. This unresolved issue calls into question Lyons' qualifications to be a Commission licensee. Therefore, since the issue was unanswered, it was specified and will be tried in the hearing involving Walpole, Massachusetts. *See Hearing Designation Order* in MM Docket No. 90-421, DA 90-1217, released October 3, 1990. Therefore, this issue will not be specified in this proceeding. However, any grant of Lyons' application will be conditioned to the outcome of the Rotterdam/Cobleskill and Walpole proceedings. Additionally, should Lyons dismiss his Walpole application, the issues raised in the *Hearing Designation Order* in MM Docket 90-421 which raised substantial and material questions of fact regarding Lyons's qualifications to be a Commission licensee, would remain unresolved. Therefore, a *contingent* issue will be specified against Lyons.

11. *73.207.* Green Mountain indicates that it is short-spaced to FM broadcast stations WENU(FM), Hudson Falls, New York and WJIV(FM), Cherry Valley, New York by 9.09 km and 2.15 km, respectively. However, while it requests a waiver of Section 73.207 of the Commission's Rules, the applicant provides no rationale whatever to support this request. Further, its proposal must be judged in light of the five other fully-spaced proposals for this Brandon allotment.

12. When an applicant seeks waiver of the rules, it must plead with particularity the facts and circumstances which warrant such action. *Rio Grande Family Radio Fellowship, Inc. v. FCC*, 406 F.2d 644 (D.C. Cir. 1968). Green Mountain provided no basis whatever for its waiver request, and the request can and will be denied on that basis alone. However, we should also point out that Commission policy at the time these applications were filed did not permit waiver of the mileage separation requirements of the magnitude requested here unless no fully spaced or lesser short-spaced site exists. *See Donovan Burke*, 104 FCC 2d 843 (1986). Here, any argument that no such site is available is negated by the fact that five other aplicants propose fully-spaced sites.[1]

13. *Pledge to divest.* Carole Pickett has indicated that she has attributable interests in WHWB-AM and WHWB-FM, Rutland, Vermont. These stations are close enough in proximity to Brandon that Pickett's ownership interest in these stations would violate the Commission's cross-interest policy (with respect to WHWB-AM) and duopoly (with respect to WHWB-FM) rules. Consequently, she has indicated that in the event of grant of the instant construction permit application, she would divest herself of her interest in the stations noted above. Accordingly, in the event of Pickett's application, Pickett will be required to sever all connections with and divest herself of all interest in the noted stations prior to the commencement of program test authority.

14. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

15. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

> 1. To determine whether there is a reasonable possibility that the tower height and location proposed by Mirkwood and Lyons would constitute a hazard to air navigation.
>
> 2. To determine with respect to Kirkpatrick whether the applicant is financially qualified.
>
> 3. If Lyons dismisses his application for Walpole, Massachusetts, (BPH-881216NT) prior to resolution of Issues 1 and 2 in MM Docket 90-421, whether Lyons was an undisclosed real party-interest in Maxine Snow's application (BPH-880126NX) in the Lebanon, New Hampshire proceeding, MM Docket 90-73, and, if so, the effects thereof on Lyons' qualifications to be a licensee of the facilities sought herein.
>
> 4. To determine which of the proposals would, on a comparative basis, best serve the public interest.
>
> 5. To determine, in light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

16. IT IS FURTHER ORDERED, That grant of any application in this proceeding shall be contingent on the outcome of MM Docket 89-487.

17. IT IS FURTHER ORDERED, That the Federal Aviation Administration IS MADE A PARTY to this proceeding with respect to the air hazard issue only.

18. IT IS FURTHER ORDERED, That Green Mountain's request for waiver of 47 C.F.R. § 73.207 IS DENIED, and its application IS DISMISSED as inadvertently accepted for filing.

19. IT IS FURTHER ORDERED, That Lewis Creek's August 25, 1989 amendment IS RETURNED.

20. IT IS FURTHER ORDERED, That the petitions for leave to amend filed by Lyons and Bach 'n Roll ARE GRANTED, and the corresponding amendments ARE ACCEPTED to the extent indicated herein.

21. IT IS FURTHER ORDERED, That the informal objection filed by Marcotte on June 20, 1990, is hereby GRANTED to the extent indicated herein and DENIED in all other respects.

22. IT IS FURTHER ORDERED, That in the event of grant of Lyons' application, the grant shall be without prejudice to whatever action, if any, the Commission deems appropriate in light of the matters specified in paragraph 8.

23. IT IS FURTHER ORDERED, That in the event of the grant of Pickett's application, Pickett will be required to sever all connections with and divest herself of all

interest in radio stations WHWB-AM and WHWB-FM, Rutland, Vermont, prior to commencement of program test authority.

24. IT IS FURTHER ORDERED, That a copy of each document filed in this proceeding subsequent to the date of adoption of this Order shall be served on the counsel of record in the Hearing Branch appearing on behalf of the Chief, Mass Media Bureau. Parties may inquire as to the identity of the counsel of record by calling the Hearing Branch at (202) 632-6402. Such service shall be addressed to the named counsel of record, Hearing Branch, Enforcement Division, Mass Media Bureau, Federal Communications Commission, 2025 M Street, N.W., Washington, D.C. 20554. Additionally, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall also be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Federal Communications Commission, Room 350, 1919 M Street, N.W., Washington, D.C. 20554.

25. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

26. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner presecribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

FOOTNOTE

[1] Green Mountain has not raised any question regarding the suitability of the fully spaced sites proposed by any other applicant here. *See, e.g.*, 47 Fed. Reg. 47,931 (1982).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-631

In re Applications of

WASHINGTON INTERSTATE BROADCASTING COMPANY, INC. (hereafter: WIBC)	File No. BPH-881215ME
CLARE E. MAROHN (hereafter: Marohn)	File No. BPH-890112MD
ARMAK, INC. (hereafter: Armak)	File No. BPH-890112MQ
CLARK R. HARMON (hereafter: Harmon)	File No. BPH-890112MX

For Construction Permit
for a New FM Station on Channel 233A
in Kelso, Washington

HEARING DESIGNATION ORDER

Adopted: December 18, 1990; Released: January 28, 1991

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.

2. *Preliminary Matter.* On August 6, 1990, Marohn filed a "petition to deny" ("petition") the application of WIBC. Marohn's petition is essentially a petition to specify issues. Since the Commission's *Report and Order* in re *Revised Procedures for the Processing of Contested Broadcasting Applications; Amendments of Part I of the Commission's Rules*, 72 FCC 2d 202, 45 RR 2d 1220 (1979), directed the deletion of all issue pleadings in pending cases, the matters sought to be raised in this petition have not been considered. Accordingly, an opportunity to raise any allegations contained therein will be afforded the parties post-designation pursuant to Section 1.229.

3. *Harmon.* Harmon has submitted a site availability certification which states that he has obtained, through a consultant, reasonable assurance of an available site by contacting the Columbus County (Washington) School District No. 13-5. However, Exhibit VII to Harmon's application states that the subject land is up for sale and that the applicant is "gathering additional information to obtain absolute assurance as to its availability." The Commission has held that although an applicant need not have a binding agreement or absolute assurance of the availability of its proposed site, an applicant must show that it has obtained reasonable assurance that the proposed site is available. "The Commission's requirements will be satisfied when an applicant has contacted the property owner or owner's agent and has obtained reasonable assurance in good faith that the proposed site will be available for the intended purpose." *Report and Order* in MM Docket No. 84-750, 50 Fed.Reg. 19936, 19939-40 (1985). Given the confusion as to the availability of the site in question, a site availability issue will be specified against Harmon.

4. Harmon failed to respond to Item 17, Section V-B of FCC Form 301 (October 1986), which requests data relative to areas and populations. Accordingly, Harmon will be required, within 30 days of release of this Order, to submit this information to the presiding Administrative Law Judge.

5. *Other Matters.* Data submitted by the applicants indicate there would be a significant difference in the size of the areas which would receive service from the proposals. Consequently, the areas and populations which would receive FM service of 1 mV/m or greater intensity, together with the availability of other primary aural services in such areas, will be considered under the standard comparative issue for the purpose of determining whether a comparative preference should accrue to any of the applicants.

6. Attempts to obtain FAA clearance through the Commission's Antenna Survey Branch and Armak have been unsuccessful. Accordingly, since no determination has been received as to whether the antenna proposed by Armak would constitute a hazard to air navigation, an issue with respect thereto will be included and the FAA made a party to the proceeding.

7. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

8. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

> 1. To determine whether Harmon has reasonable assurance that the transmitter site specified will be available to the applicant.
>
> 2. To determine whether there is a reasonable possibility that the tower height and location proposed by Armak would constitute a hazard to air navigation.
>
> 3. To determine which of the proposals would, on a comparative basis, best serve the public interest.
>
> 4. To determine, in light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

9. IT IS FURTHER ORDERED, That Marohn's petition to deny WIBC's application IS DISMISSED.

10. IT IS FURTHER ORDERED, That Harmon shall submit an amendment which contains the information required by Section V-B, Item 17, Form 301 (October

1986), in accordance with paragraph 4 herein, to the presiding Administrative Law Judge within 30 days after the release of this Order.

11. IT IS FURTHER ORDERED, That the Federal Aviation Administration IS MADE A PARTY to this proceeding with respect to the air hazard issue only.

12. IT IS FURTHER ORDERED, That a copy of each document filed in this proceeding subsequent to the date of adoption of this Order shall be served on the counsel of record in the Hearing Branch appearing on behalf of the Chief, Mass Media Bureau. Parties may inquire as to the identity of the counsel of record by calling the Hearing Branch at (202) 632-6402. Such service shall be addressed to the named counsel of record, Hearing Branch, Enforcement Division, Mass Media Bureau, Federal Communications Commission, 2025 M Street, N.W., Suite 7212, Washington, D.C. 20554. Additionally, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall also be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Federal Communications Commission, Room 350, 1919 M Street, N.W., Washington, D.C. 20554.

13. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

14. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-607

In re Applications of

COLUMBIA BIBLE COLLEGE BROADCASTING CO. (hereafter CBCB) Monroe, North Carolina	File No. BPED-850618ME
WINGATE COLLEGE (hereafter Wingate) Wingate, North Carolina	File No. BPED-851108MA
INSPIRATIONAL DELIVERANCE CENTER, INC. (hereafter IDC) Monroe, North Carolina	File No. BPED-851108MB

For Construction Permit For a New
Noncommercial Educational FM Station
on Channel 204A

HEARING DESIGNATION ORDER

Adopted: November 20, 1990; Released: January 30, 1991

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new noncommercial educational FM ("NCE-FM") station.

PRELIMINARY MATTERS

2. *Petition to Deny*. On August 29, 1986, CBCB filed a "Petition to Deny and Dismiss" IDC's application because IDC has failed to show that it "contemplates or is capable of providing an educational broadcast service," as required by Section 73.503(a)(2) of the Commission's rules. Further, CBCB says that IDC is not accredited by an appropriate agency nor has it sought such accredidation. Finally, CBCB says that IDC is not financially qualified to construct and operate a station. This is because, while IDC claims to be financially dependent upon a grant from the National Telecommunication Information Administration (NTIA), petitioner states that NTIA, pursuant to the Public Telecommunications facilities Program, is precluded from funding IDC because applicant, to be elegible, cannot be "primarily religious." *See* 15 C.F.R. § 2301.5(a)(5).

3. On September 16, 1986, IDC filed a "Motion to Strike or Dismiss" the petition, stating that CBCB's allegations were procedurally defective and constituted an unauthorized pleading. It went on to say that CBCB's allegation concerning IDC's financial qualification and elegibility to be a non-commercial licensee were, in effect, pre-designation petitions to specify issues against IDC. "Such pleadings no longer are authorized under Commision procedures for processing applications." *Revised Procedure for the Processing of Contested Broadcast Applications*, 72 FCC 2d 202 (1979); *Seven Locks Broadcasting Company*, 94 FCC 2d 899, 900 (1983). Lastly, IDC says that CBCB is not a party in interest because its application has been returned. The thrust of the motion to strike is procedural in that IDC does not respond on point to any of the points which CBCB makes in its petition.

4. On October 9, 1986, CBCB filed an "Opposition to Motion to Strike or Dismiss." CBCB says that it clearly is a party in interest and, at the very least, its pleading should be considered as an informal objection. The balance of the opposition mirrors allegations stated in the petition to deny.

5. *Standing*. IDC claims that CBCB has no standing to file a petition because, since its application had been returned, "CBCB simply is not a mutually exclusive applicant . . . Although it concurrently resubmitted its application and requested *nunc pro tunc* reinstatement, CBCB cannot be considered an applicant mutually exclusive with IDC unless and until its request. . . is granted." On January 22, 1988, CBCB's petition for reconsideration and acceptance *nunc pro tunc* was granted. *See* Letter from the Chief, FM Branch, reference 8920-DEB. Therefore, we find that CBCB is a "party-in-interest" to the instant proceeding, and we will treat the August 24, 1986 pleading as a formal petition to deny under 47 U.S.C. § 309(d) and C.F.R. § 73.3584. Additionally, we believe that the petition raises a potentially disqualifying issue, namely, whether or not IDC qualifies under the Commission's Rules to be the licensee of a noncommercial educational broadcasting station. If the issue is resolved against IDC, its application will be dismissed. Therefore, we will decide the issue prior to hearing.

6. The Court of Appeals for the District of Columbia Circuit, in a recent line of cases here controlling, clarified and reaffirmed the Commission's statutorily prescribed two-step process for judging the sufficiency of a petition to deny.[1] Consequently, it is well established that in order to obtain an evidentiary hearing, the proponent of a petition to deny must first set forth specific allegations of fact sufficient to show that "a grant of the application would be *prima facie* inconsistent with the public interest, convenience and necessity." 47 U.S.C. § 309(d)(1). Second, if the petition meets these requirements, then and only then, the Commission must determine whether "on the basis of the application, the pleadings filed, or other matters which the Commission may officially notice, a substantial and material question of fact is presented." 47 U.S.C. § 302(d)(2). If not, no evidentiary hearing need be held. *Citizens for Jazz on WRVR, Inc. v. FCC*, 775 F.2d 392, 294 (D.C. Cir. 1985).

7. The *prima facie* sufficiency determination is to be made on the assumption that the specific facts set forth by the complaining party are true, and without reference to contrary evidence. *Id.* at 397. In other words, the Commission must perform this threshold inquiry on the basis of the petitioner's allegations alone; the Commission is limited to consideration of the petition and its supporting affidavits during this initial inquiry. *Astroline Communica-*

tions Company v. FCC, 857 F.2d 1556 (D.C. Cir. 1988). CBCB's allegations establish an apparent violation of the Commission's licensing requirements for noncommercial educational FM broadcast stations Rule, found at 47 C.F.R. § 73.503.

8. After consideration of the petitioner's allegations, as required under 47 U.S.C. § 309(d)(1), we are persuaded that the assumed rule violation, standing alone, is sufficient to establish that grant of the subject application would be *prima facie* inconsistent with the public interest, convenience and necessity. *See, e.g., Banks Broadcasting Company*, FCC 85-122, Slip op. (rel. April 4, 1985, adopted March 14, 1985); *Kist Corporation*, 99 FCC 2d 173, 57 RR 2d 49 (1984); *Julie P. Minor (KDXU)* 51 FCC 2d 1163, 33 RR 2d 159 (Rev. Bd. 1975). *See also Catoctin Broadcasting Corporation of New York*, 2 FCC Rcd 2126, 2178; 62 RR 2d 1132, 1149 (Rev. Bd. 1987). In this regard, we note that the petitioner's allegations indicate that an organization which has a purpose that is not predominantly *educational* is seeking to operate on a channel reserved for noncommercial educational stations.

9. Having found that the petition comports with the requirements set forth in 47 U.S.C. § 309(d)(1), *i.e.*, to plead specific facts, which, if assumed true, show that grant of the subject application would be *prima facie* inconsistent with the public interest, convenience and necessity, we now reach the question of the substantiality or materiality of the facts presented. 47 C.F.R. § 503 states that a noncommercial educational FM broadcast station will be licensed only to a nonprofit educational organization upon a showing that the station will be used in the advancement of an educational program. In applying this rule section, FCC Form 340 asks for, and the Commission looks to see, whether: (i) there is an overall educational program proposed for the station; and (ii) the proposed programs evidence a commitment to advance the educational goal. *See Seattle Public Schools*, 103 FCC 2d 862 (1986), and *Way of the Cross, Inc.*, 101 FCC 2d 1368 (1985). In *Way of the Cross*, the Commission overruled *Bible Moravian Church, Inc.*, 28 FCC 2d 1 (1971) and made clear that noncommercial educational organizations, even though religiously-oriented, can qualify upon an appropriate showing for licenses on reserved channels. The Commission stated:

> It is this point we wish to make clear. [The] Bureau stated on reconsideration of the Way/Utah proceeding, "over the years, the Commission has articulated the principle that organizations which are primarily religious in nature, even though they have some educational aspects, will not be allowed to operate on channels reserved for educational use." This statement was clearly in error. We therefore agree fully. . . that "applicants for reserved channels may not be dismissed *simply* because they propose religious instructions." (Emphasis supplied). Religiously oriented applicants for reserved. . . channels can meet the requisite eligibility standards. 10 FCC 2d at 1374, note 8.

10. In addressing the arguments raised by CBCB, we examined several elements: IDC's Articles of Incorporation and by-laws to determine whether or not the applicant proposes an overall educational program; and (ii) its proposed programming statement to determine if it furthers these educational objectives. We believe that IDC has demonstrated its qualifications to be a noncommercial educational FM license under Section 503 of the rules. Article V of IDC's articles of incorporation states that the corporation is organized "to operate exclusively for religions, charitable, educational and distinct ecclesiastical purposes . . . ." Amoung these purposes are "spread[ing] the word of God through seminars, radio, television, establishment of church literature and other forms of Mass Media" and "[e]stablishing a Bible Training School of Theology . . . for the preparation of ministers." Articles of Incorporation, Article V, (b)(vi) and (viii). These sentiments are echoed in the corporation by-laws at p. 3, and in Exhibit 4, the statement of purposes and objectives. Similarly, Exhibit 5, IDC's proposed program schedule, evidence a commitment to advancing these purposes. While admittedly these purposes and programs are geared to religious instruction (see Exhibit 6 of the application, "Proposed Facilities and Resources"), the Commission has stated that it will not disqualify any program simply because the subject matter of the teaching or instruction religious in nature. It is recognized that, while not all religious programs are educational in nature, programs which involve the teaching of matters relating to religion would qualify. Accordingly, IDC has satisfied requirements of Section 503(c) and CBCB's petition will be denied.

11. *Wingate Petition for Reconsideration*. On August 28, 1986, the day before the deadline for filing amendments as of right in the instant proceeding,[2] Wingate filed an amendment to its application changing the proposed transmitter location, power, and antenna height. This amendent caused mutual exclusivity between Wingate's application and those of South Carolina Radio Fellowship (SCRF) (File No. ARN-860808MB) for a new noncommercial educational FM station in Florence, South Carolina, and Fayetteville State University (WFSS) (File No. BPED-860811MF) for a modification of the facilities of its station WFSS(FM), Fayetteville, North Carolina. Neither the SCRF nor WFSS application was filed prior to the November 8, 1985 filing deadline for applicants mutually exclusive with the Wingate application, [3] and on June 26, 1987, the SCRF application was returned. SCRF filed a petition for reconsideration on July 24, 1987.

12. By letter of October 14, 1988, the Chief, Audio Services Division, granted SCRF's petition and reinstated its application, and returned Wingate's August 28, 1986 amendment. This was done because: (i) the *Kittyhawk* doctrine[4] which was the basis for the return of SCRF's application involved a "daisy chain" created by the filing of a mutually exclusive *application*, not the (albeit timely) filing of a technical *amendment*; (ii) SCRF and WFSS protected all Monroe/Wingate applicants when they filed, thus anticipating the very possibility which the Ellettsville applicant in *Kittyhawk* did not; and (iii) while the *Kittyhawk* policy is necessary to insure finality in "daisy chain" proceedings, we were "both hesitant to extend it to situations where the mutual exclusivity was caused by later amendment and unaware of any case in which we have so held." Additionally, we noted that the Commission has, to the extent possible, extended the AM processing rules and policies to noncommercial educational FM applicants, since both services are licensed as a "demand" rather than a channel-allocation basis. (Hence, the Commission applied *Kittyhawk*, an AM case, in the present case). 47 C.F.R. § 73.3571(j)(i) indicates that an engineer-

ing amendment to an AM application will require a new file number "unless such amendment would not involve new or increased interference problems with . . . other applications pending at the time the amendment is filed." Therefore, since that principle serves to insure "finality," as does the *Kittyhawk* doctrine, it applied to the present case and the Wingate amendment was returned. On December 19, 1988, Wingate filed a petition for reconsideration.[5]

13. In its petition for reconsideration, Wingate states that: (i) allowing a later-filed application to take precedence over an earlier applicant whose right to amend is protected is impermissible under current NCE-FM rules; (ii) when the NCE-FM rules are clear and unambiguous as is 47 C.F.R. § 73.3522(a)(2), it is improper to apply a rule from the AM commercial broadcast services merely to achieve a desired result; (iii) even if it is appropriate to apply the AM rule, it is inappropriate to apply such rule retroactively to Wingate and in so doing the commission violated the Administrative Procedure Act; (iv) Wingate had no notice of how to file a fault-free amendment, since it was unforseeable that the Commission would abandon its current processing rules or amendments to "reach a convenient result"; (iv) on the other hand, it was forseeable by SCRF and WFSS that a mutually exclusive applicant might file a minor technical amendment before the "B" cut-off date; and (vi) the Division's action disserves the public interest because it both deprive Wingate residents of increased service and denies applicant Wingate comparative rights under *Ashbacker Radio Corp. v. FCC*, 326 US 732 (1945), which mandates consideration of Wingate's amended application. Each of these arguments will be considered in turn.

14. We believe that the return of the Wingate amendment was appropriate. Here, acceptance of the Wingate amendment would lead to two possible results, each of which would contravene an established policy. First, acceptance of Wingate's amendment could lead to the Post "A" date addition of SCRF and WFSS to the Monroe/Wingate mutually exclusive proceeding. As stated in the Commission's October 14 letter, "[w]e do not believe that the 'amendment as of right' privilege accorded by our processing rules should allow a cut-off mutually exclusive group of applicants to be enlarged after the 'A' cut-off date. Such a cause of action would thus undercut 'finality,' the very essence of the cut-off processing system." The second possible consequence of accepting Wingate's August 28 amendment is the return or dismissal of the SCRF and WFSS applications.[6] This result is unacceptable because, as stated in the October 14 letter,

> In *Kittyhawk*, the intervening "daisy chain" was caused by the filing of a mutually exclusive *application* which the Commission held the returned applicant should have foreseen. Here, the mutual exclusivity between Wingate and both SCRF and WFSS was caused by Wingate's (albeit timely) technical *amendment*. Both SCRF and WFSS clearly protected all Monroe/Wingate applicants as originally filed and cut-off; thus, these two applicants anticipated the very possibility which the Ellettsville applicant in *Kittyhawk* did not. When no intervening application was filed, SCRF and WFSS later filed their respective applications (footnote omitted).

15. Thus, to accept Wingate's argument would require the Commission to extend *Kittyhawk* retroactively (to the fatal detriment of SCRF and WFSS) to a situation which was previously permissible. While the *Kittyhawk* doctrine is necessary to insure finality in "daisy chain" proceedings, as we stated in our October 14 letter, we will not extend it to situations where the mutual exclusivity was caused by later amendment.

16. Wingate claims that the rejection of its amendments violated Section 4 of the Administrative Procedure Act ("APA") because Wingate "had no notice before being stripped of its rights to a comparative hearing, which enured because of the cut-off rules grant of perfecting rights." Petition, at 12. Thus, Wingate claims, the return of the amendment was not a procedural matter governing the time and order in which applications will receive consideration, but a substantive matter governing the eligibility for filing applications and amendments[7] and thus required a formal rule-making. Wingate also claims that it had no notice of how to file a fault-free amendment, as it had no indication that the Commission would abandon its current processing rules. Thus, it asserts, the Commission's failure to follow its own rules[8] voids the return of Wingate's amendment.

17. Essentially, Wingate claims here that: (i) the application of Commission procedural rules which led to the return of its amendment had a substantive effect on its hearing rights and thus needed a full notice and comment Rule Making when the APA; and (ii) the deviation from 73.3522, which give Wingate the right to file its August 28 amendment, voided that return. We disagree with each of these contentions.

18. The APA requires that the Commission allow an opportunity for notice and comment before promulgating rules other than those "of agency organization, procedure, or practice." *See* 5 U.S.C. § 553(b).[9] The APA further requires that "substantive" rules should be made public at least 30 days before their effective date. 5 U.S.C. § 553(d). While courts have not had an easy time in determining whether particular agency rulings were "procedural" or "substantive", the following discussion is useful:

> "'Procedure' and its opposite, 'substance,' are not talismanic labels or given premises. Rather, they are legal conclusions which depend upon their settings for definition." *Brown Express, Inc. v. United States*, 607 F.2d 695, 701 (5th Cir. 1979). "A useful articulation of the exemption's critical feature is that it covers agency action that do not themselves alter the rights or interests of parties, although it may alter the manner in which the parties present themselves or their viewpoints to the agency." [*Batterton v. Marshall*, 648 F.2d 694, 707 (D.C. Cir. 1980)]. *See also National Association of Home Health Agencies v. Schweiker*, 690 F.2d 932, 949 (D.C. Cir. 1982), *cert. denied*, 459 U.S. 1205, 103 S.Ct. 1193, 75 L.Ed.2d 483 (1983) (APA exemption from the notice and comment requirement does not apply to agency action which has a substantial impact on substantive rights and interests). It still remains, however, to identify the "substantive rights and interests" that may not be altered without prior opportunity for notice and comment. Certainly not every interest so qualifies, since every change in rules will have some effect on those regulated. *See Batterton*, 648 F.2d at 707. In determining whether a rule is substantive,

> we must look at its effect on those interests ultimately at stake in the agency proceeding. *See, e.g., Pickus v. United States Board of Parole*, 507 F.2d 1107 (D.C. Cir. 1974) (parole board guidelines were substantive because they "were the kind calculated to have a substantial effect on the *ultimate* parole decisions") (emphasis supplied).

Neighborhood TV Co., Inc. v. FCC, 742 F.2d 629, 637 (D.C. Cir. 1984). *See also Ranger v. FCC*, 294 F.2d 240 (D.C. Cir. 1961)(Procudural requirements may and occasionlly do affect substantive rights, but such possibility does not make a procedural requirement substantive).

19. We believe that, while our October 14 ruling does affect Wingate's right to better its comparative position, it does not affect the interest ultimately at stake in the Monroe/Wingate proceeding. However, extension of the Kittyhawk policy to SCRF and WFSS *extinguishes* their ultimate interest, namely, the provision of broadcast service to their respective communities.

20. With respect to the Commission's alleged deviation from the NCE-FM processing rules, we must point out that a strict adherence to the rule would require either an extension of *Kittyhawk* beyond that currently contemplated or undercutting altogether the finality concept which generated *Kittyhawk*. As the Court of Appeals for the District of Columbia Circuit has written:

> There is a "general principle that '[i]t is always within the discretion of a court or an administrative agency to relax or modify its procedural rules adopted for the orderly transaction of business when in a given case the ends of justice require it." *American Farm Lines v. Black Ball Freith Service*, 397 U.S. 532, 90 S.Ct. 1288, 25 L.Ed.2d 547 (1970) (quoting *National Labor Relations Board v. Monsanto Chemical Co.*, 205 F.2d 763, 764 (3th Cir. 1953)); *see also Health Systems Agency v. Norman*, 589 F.2d 486 (10th Cir. 1978) (court found HEW abused its discetion by refusing to waive a filing deadline where application was 55 minutes late for justifiable reasons). *Lyman v. United States*, 500 F.2d 1394, 1396 (Temp. Emer. Ct. of App. 1974) (excusing Price Commission failure to get comments from a local agency as required by its rules). "Whether or not [a Commission's] discretion has been soundly exercised will, of course, *depend on the circumstances of the case* as reviewed by the Commission." *Municipal Electric Utility Association v. Federal Power Commission*, 485 F.2d 967 (D.C. Cir. 1973) (emphasis supplied).

Neighborhood TV Co. Inc., 742 F.2d 629, 636 (D.C. Cir. 1984). We believe that "the order of justice" here clearly requires that the Wingate amendment be returned in order that the SCRF and WFSS applications can be processed. Any deviation from the processing rules is amply supported by the October 14 letter.

21. Wingate also claims that the Commission's action disserves the public interest because it deprives Wingate residents of increased service and denies applicant Wingate's comparative rights under *Ashbacker, supra*. We disagree. This comparative proceeding involves two applicants for Monroe, North Carolina, and one applicant for Wingate, North Carolina, and therefore an issue must be specified under 47 U.S.C. § 307(b) regarding which proposal best promotes a fair, efficient and equitable distribution of radio service. Thus, there is no guarantee that: (a) the town of Wingate will prevail in the 307(b) consideration; or (b) applicant Wingate will ultimately prevail at hearing. The Commission's return of Wingate's amendment can hardly be said to "deprive the residents of Wingate of service [from] Wingate's 40 kW operation." see petition, at 16.[10] Additionally, Wingate's reliance on *Ashbacker* is misplaced. The Supreme Court of the United States held there simply that "where two *bona fide* applications are mutually exclusive, the grant of one without a hearing to both deprives the loser of the opportunity which Congress chose to give him [in 47 U.S.C. § 309(a)]." *Ashbacker, supra*, 326 U.S. at 333. Nowhere does *Ashbacker* mandate consideration of Wingate's amendment, and in fact the Court does not discuss amendments at all. Rather, *Ashbacker* simply requires that the Monroe/Wingate applicants be designated for comparative hearing before any of them is granted. That is happening by this *Order*.

22. Based on the foregoing, we find Wingate's petition for reconsideration to be meritless, and it will be denied below. The SCRF and WFSS applications will be processed in due course.[11]

OTHER MATTERS

23. Pursuant to the *First Report and Order* in MM Docket 88-375, 54 Fed. Reg. 16,363, applicants for or permittees of Class C2 frequencies must achieve at least minimum Class C2 facilities by June 1, 1991, or they will be reclassified to Class C3 facilities on that date. Neither CBCB nor Wingate currently specify minimum Class C2 facilities. Accordingly, an appropriate condition will be specified below.

24. The applicants below have petitioned for leave to amend their applications on the dates shown. The accompanying amendments were filed after the last date for filing minor amendments as of right. Under Section 1.65 of the Commission's Rules, the amendments are acccepted for filing. However, an applicant may not improve its comparative position after the time for filing amendments as of right has passed. Therefore, any comparative advantage resulting from the amendments will be disallowed.

APPLICANTS	AMENDMENTS FILED
CBCB	January 13, 1989, May 13, 1989
IDC	October 22, 1986

25. Since no determination has been received from the Federal Aviation Administration as to whether the antenna proposed by IDC would constitute a hazard to air navigation, an issue with respect thereto will be included and the F.A.A. made a party to the proceeding.

26. *Share-time Arrangement*. The applicants have not indicated whether or not an attempt has been made to negotiate a share-time arrangement. Therefore, an issue will be specified to determine whether a share-time arrangement between the applicants would be the most effective use of the frequency and thus better serve the public interest. *Granfalloon Denver Educational Broadcasting, Inc.*, 43 Fed. Reg. 49,560 (October 24, 1978). It should be noted that our action specifying a share-time issue is not intended to preclude the applicants, either

before the commencement of the hearing or at any time during the course of the hearing, from participating in negotiation with a view toward establishing a share-time agreement between themselves.

27. *307 (b)*. The respective proposals, although for different communities, would serve substantial areas in common. Consequently, in addition to determining pursuant to 47 U.S.C. § 307(b) which of the proposals would better provide a fair, efficient and equitable distribution of radio service, a contingent comparative issue will also be specified.

28. *Areas and Populations*. Inasmuch as it appears that there would be a significant difference in the size of the areas and populations which would receive service from the proposals, and since this proceeding involves competing applications for noncommercial educational facilities, the standard areas and populations issue will be modified in accordance with the Commission's prior action in *New York Univerisity*, FCC 67-673, released June 8, 1967, 10 RR 2d 215 (1967). Thus, the evidence adduced under this issue will be limited to available noncommercial FM signals within the respective service areas.

29. Attempts to obtain FAA clearance through the Commission's Antenna Survev Branch and IDC have been unsuccessful. Accordingly, since no determination has been received as to whether the antenna proposed by IDC would constitute a hazard to air navigation, an issue with respect thereto will be included and the FAA made a party to the proceeding.

30. Except as indicated above, the applicants are qualified to construct and operate as proposed. However, since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

31. Accordingly, IT IS ORDERED, That, pursuant to 47 U.S.C. § 309(e), as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

> 1. To determine whether there is a reasonable possibility that the tower height and location proposed by the IDC would constitute a hazard to air navigation.
>
> 2. To determine: (a) the number of other reserved channel noncommercial educational FM services available in the proposed service area of each applicant, and the area and population served thereby; (b) whether a share-time arrangement between the applicants would result in the most effective use of the channel and thus better serve the public interest and, if so, the terms and conditions thereof; and (c) in light of 47 U.S.C. § 307(b), which of the proposals would better provide a fair, efficient and equitable distribution of radio service.
>
> 3. To determine, in the event it is concluded that a choice between the applications should not be based solely on considerations relating to 47 U.S.C. § 307(b), the extent to which each of the proposed operations will be integrated into the overall educational operation and objectives of the respective applicants; and whether other factors in the record demonstrate that one applicant will provide a superior FM educational broadcast service.
>
> 4. To determine, in light of the evidence adduced pursuant to the foregoing issues, which of the applications should be granted, if any.

32. IT IS FURTHER ORDERED, That CBCB's Petition to Deny IS DENIED.

33. IT IS FURTHER ORDERED, That Wingate's December 19, 1988 Petition for Reconsideration IS DENIED and its resubmitted amendment IS RETURNED.

34. IT IS FURTHER ORDERED, That CBCB and Wingate must amend their proposals to specify minimum Class C2 facilities by June 1, 1991; alternatively, in the event of a grant of a construction permit to CBCB or Wingate prior to that date, the permit shall contain a condition requiring upgrade by that date or reclassification to Class C3 status will occur.

35. IT IS FURTHER ORDERED, That the petitions for leave to amend filed by the following applicants ARE GRANTED, and the corresponding amendments ARE ACCEPTED to the extent indicated herein: CBCB, IDC.

36. IT IS FURTHER ORDERED, That the Federal Aviation Administration IS MADE A PARTY to this proceeding with respect to the air hazard issue only.

37. IT IS FURTHER ORDERED, That in addition to the copy served on the Chief, Hearing Branch, a copy of each amendment filed in this proceeding subsequent to the date of the adoption of this Order shall be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau.

38. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing to present evidence on the issues specified in this Order.

39. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594(g) of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

FOOTNOTES

[1] *See, e.g., Beaumont Branch of the NAACP v. FCC*, 854 F.2d 501 (D.C. Cir. 1988); *Gencom, Inc. v. FCC*, 832 F.2d 171 (D.C. Cir. 1987).

[2] The date was established by *Report No. B-75*, released July 29, 1986.

[3] The deadline was established by Report No. A-101, released October 8, 1985.

[4] *See Kittyhawk Broadcasting Corporation*, 7 FCC 2d 153 (1967), *appeal dismissed sub nom. Cook, Inc. v. FCC,* 384 F.2d 84 (7th Cir. 1968).

[5] The petition is timely filed. Athough the letter returning the Wingate amendment and reinstating the SCRF application was dated October 14, Public Notice of the amendment's return was not released until November 17, 1989. Under the time computation rules contained in 47 C.F.R. § 1.4, the petition was filed within 30 days of the release of the Public Notice.

[6] Indeed, the SCRF application *was* returned on June 26, 1987 and was reinstated by the Commission's October 14 letter.

[7] Wingate cities *FCC v. Pottsville Broadcasting Co.,* 302 U.S. 134, 137-8 (1940); *FCC v. WJCR,* 337 U.S. 265, 281-83 (1949).

[8] The specific processing rule maintained in this section of Wingate's petition is "the time-honored 'first in time, first in right' axiom." Petition, at 13. This axiom, we take it, is derived from the protection afforded to NCE-FM applicants which have been cut-off.

[9] The notice and comment procedures of the APA do not, except when required by statute apply *inter alia*, "to interpretive rules, general statements of agency policy, or rules of agency organization, procedure, or practice." *Id.*

[10] On the other hand, returning the SCRF and WFSS applications clearly deprives Florence and Fayetteville residents of broadcast service.

[11] On December 19, 1988, Wingate filed informal objection to the SCRF and WFSS applications, based on the arguments presented in the petition for reconsideration. For the reasons stated above, those will be denied.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-633

In re Applications of

CENTRAL FLORIDA COMMUNICATIONS GROUP, INC. (hereafter "Central")	File No. BPH-880505MS
KING/HOLLY HILL, LTD. (hereafter "King")	File No. BPH-880505MW
INTERMART BROADCASTING, INC. (hereafter "Intermart")	File No. BPH-880505NI
HOLLY HILL RADIO PARTNERS (hereafter "HHRP")	File No. BPH-880505NQ
JOHN E. MORRIS and LAWRENCE R. BAKER, D/B/A MORBAK COMMUNICATIONS, A GENERAL PARTNERSHIP (hereafter "Morbak")	File No. BPH-880505NV
A. WAYNE ATCHLEY (hereafter "Atchley")	File No. BPH-880505OR
H.B. BROADCASTING, INC. (hereafter "HB")	File No. BPH-880505OU
WALO BROADCASTING LIMITED PARTNERSHIP (hereafter "Walo")	File No. BPH-880505OZ
SUN CITY RADIO GROUP, INC. (hereafter "Sun City")	File No. BPH-880505PC
SEABREEZE BROADCASTING GROUP, INC. (hereafter "Seabreeze")	File No. BPH-880505PE
JULIE E. LUBKE, D/B/A MODERN MEDIA (hereafter "Modern Media")	File No. BPH-880505PJ
MICHELLE N. TERZYNSKI (hereafter "Terzynski")	File No. BPH-880505PL
HOLLY HILL BROADCASTING CO. (hereafter "HHB")	File No. BPH-880505PG (Dismissed Herein)

For Construction Permit
for a New FM Station on
Channel 277A (103.3 MHz)
in Holly Hill, Florida.

HEARING DESIGNATION ORDER

Adopted: December 18, 1990; Released: January 30, 1991

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.

2. *HHB*. On August 15, 1988, HHB filed a petition for reconsideration of the July 25, 1988 action by the Chief, FM Branch returning its application as not sufficient for tender because FCC Form 301, Section V-B, Item 7 data conflicts with the antenna sketch data contained in Exhibit No. 1 of its application. In support of its petition, HHB argues that the Engineering Statement shows that the computed numbers on the antenna sketch are consistent and reliable; it is only the numbers in Section V-B, Item 7 which are not internally consistent. The radiation center above sea mean level (AMSL) of 103 meters, found in Section V-B, Item 7(b)(2), is identical to that shown on the antenna sketch. In addition, the values shown in Section V-B for the site elevation AMSL, the top of the supporting structure above ground level, and the top of the structure AMSL are all in agreement with their corresponding values depicted on the antenna sketch. It is only the height of the radiation center above ground as listed in Item 7(b) of the Form that is not correct. All of the numbers except the radiation center above ground are identical in both Item 7 and the antenna sketch and yield results that are arithmetically correct. The addition of 7(a)(1) to 7(b)(1) in Section V-B would produce 109 meters which is in excess of the total height of the tower (108 meters) as shown on the antenna sketch. Subtracting 7(a)(1) from 7(b)(2) would produce a radiation center AGL of 94 meters as shown on the antenna sketch. There-

fore, the only logical conclusion is that, Item 7(b)(1), being the one inconsistent number on the Form, must be erroneous.

3. We agree with this conclusion. By this method, the Commission's staff was able to resolve the discrepancy drawing on the application as a whole, and verify the correct height of the radiation center AGL as being 94 meters. Therefore, HHB's application will be reinstated for this purpose. However, pursuant to a *Public Notice* released on March 25, 1988, Mimeo No. W-37, the filing window for Holly Hill, Florida opened on March 25, 1988 and closed on May 5, 1988. As filed on May 5 1988, the original of HHB's application included only a facsimile copy of the applicant's signature. On May 6, 1988, the day after the window closed, HHB provided the original signature on the appropriate page for its application.[1] Section 73.3513(a)(3) of the Commission rules requires, when the applicant is a corporation, that the *original* application be signed by an officer and the requisite duplicates may be conformed. Such was not the case here. Furthermore, Appendix D to the *Report and Order* in MM Docket No. 84-750, 50 Fed. Reg. 19936 (1985), states that "because of the critical importance of the applicant's certification of the correctness of the data contained in the application as of the date of filing, unsigned applications will not be accepted for tender." *See also*, *Taber Broadcasting Company of New Mexico*, 4 FCC Rcd. 7892 (1989). Therefore, in view of the Commission's longstanding policy that the original application bear the original signature of the applicant, the application by HHB will be dismissed as not sufficient for tender.

4. *Sun City*. Information before the Commission indicates that Sun City was organized and is affiliated with Sonrise Management Services ("Sonrise"). Sonrise has been the subject of numerous "real party-in-interest" issues added by presiding Administrative Law Judges in a number of mutually exclusive proceedings. For example, issues concerning Sonrise have been designated in each of the following proceedings:

City/State	Docket No.
Solona, Florida	87-464
Rockledge, Florida	87-556
Silver Springs, Florida	88-119
East Ridge, Tennessee	88-122
Des Moines, Iowa	88-238
Nags Head, North Carolina	88-277
Tyler, Texas	88-280
Raleigh, North Carolina	88-306
Sedona, Arizona	88-335
Mableton, Georgia	88-400
Evansville, Indiana	88-403
Swanton, Ohio	88-432
Atlantic City, New Jersey	88-433

Identical issues were specified in each of these proceedings: whether or not Sonrise was a real party-in-interest in the subject applicant, whether or not the applicant's organizational structure was a sham, and the effect thereof on the applicant's qualifications to be a Commission licensee. In each of the proceedings listed above, the Sonrise-affiliated applicant has dismissed its application rather than resolving these issues. These unresolved issues call into question Sun City's qualifications to be a Commission licensee. Therefore, such issues will be specified and tried against Sun City in this proceeding.

5. *Mobak*. On August 31, 1990, Morbak amended the instant application to report that in a *Memorandum Opinion and Order*, FCC 90M-2315, released July 31, 1990, the presiding Administrative Law Judge added the following issues to its application (BPH-880615MG), in the Ada, Ohio proceeding (Docket No. 90-142):

> To determine whether Morbak falsely certified to its financial qualifications in this proceeding; and if so, whether Morbak is basically qualified to be a Commission licensee;
>
> In light of its other financial obligations to other FM applications, whether Morbak is financially qualified to be a Commission licensee, and if not, whether its Ada application can be granted.

Morbak further states that it amended its application on August 16, 1990 requesting dismissal of its Ada application pursuant to a Joint Request for a Settlement Agreement. A review of the Commission's records reveals that Morbak's Ada application, pursuant to *Memorandum Opinion and Order*, FCC 90M-2617, released August 22, 1990, was ismissed with prejudice. Consequently, this dismissal left unresolved issues pending against the applicant. Therefore, such issues will be specified and tried against Morbak in this proceeding.

6. *Intermart*. On July 15, 1988, Intermart amended its application to add Patricia S. Fierro as Secretary/Treasurer and deleted David L. Cobb as one of its principals. On March 21, 1989 Intermart also amended its application to include Harley P. Park as Vice President, Chief Finance and Administrative Officer. The amendments are incomplete as they failed to contain pages 4 and 5 of Section II (Items 5-10) pertaining to Patricia S. Fierro's and Harley P. Park's legal qualifications. Accordingly, Intermart will be required to submit this information in an amendment to the presiding Administrative Law Judge within 30 days of the release of this Order.

7. *Walo, Sun City, Intermart*. Section II, Item 4 of FCC Form 301 requires that an applicant specify its address (number, street, city, state) as well as the residence address of each of its principals. Walo has not completed Item 4 correctly. Walo gives a post office address for its Limited Partner, Jake Rasor, Jr. Sun City has also not completed Item 4 correctly. Sun City gives a post office address for its General Partner, Dan K. Richardson. Intermart amended its application on July 15, 1988 to include Patricia S. Fierro as its Secretary, Assistant Treasurer; on March 21, 1989, Intermart also included Harley P. Park as Vice President, Chief Financial and Administrative Officer of Intermart. However, Intermart failed to include the residence address for both parties in the instant application. Accordingly, Walo, Sun City and Intermart each will be required to submit an amendment which gives all the information required by Section II, Item 4 to the presiding Administrative Law Judge within 30 days of the release of this Order.

8. *Atchley*. Atchley has not submitted a description in narrative form of his proposed programming relating to the issues of public concern facing its service area, pursuant to Section IV of FCC Form 301.[2] Accordingly, Atchley will be required to file within 30 days of the

release of this Order a narrative programming statement with the presiding Administrative Law Judge, or an appropriate issue will be specified by the Judge.

9. In addition, on February 7, 1989, Atchley amended its application to specify a new transmitter site and on February 24, 1989, Atchley submitted a supplemental showing of good cause for the late-filed amendment. Atchley states that he changed his site after being informed by the Federal Aviation Administration (FAA) that his original site would not receive FAA clearance. The amendments were filed after the last date for filing minor amendments as of right. The requisite good cause showing under 47 C.F.R.§ 73.3522(a)(2) was subsequently filed; consequently, the amendments are accepted for filing. However, the applicant may not improve his comparative position after the last date for filing amendments as of right has passed. Therefore, any comparative advantage resulting from the amendments will be disallowed.

10. The applicants below have petitioned for leave to amend their application on the dates shown. The accompanying amendments were filed after the last date for filing amendments as of right. Under Section 1.65 of the Commission's Rules, the amendments are accepted for filing. However, an applicant may not improve its comparative position after the time for amendments as of right has passed. Therefore, any comparative advantage resulting from the amendments will be disallowed.

APPLICANTS	AMENDMENTS FILED
Central	October 26, 1989
King	March 6, 1989; May 15, 1989; July 24, 1989
Intermart	September 26, 1988; November 17, 1988; February 1, 1989; March 21 1989; December 11, 1989; January 25, 1990; November 28, 1990
Morbak	September 15, 1988; February 21 1989; June 30, 1989; October 2, 1989; March 30, 1990; July 11, 1990; August 31, 1990
Walo	March 24, 1989

11. Attempts to obtain FAA clearance through the Commission's Antenna Survey Branch and the applicants have been unsuccessful. Accordingly, since no determination has been received as to whether the antenna proposed by Intermart and HB would constitute a hazard to air navigation, an issue with respect thereto will be included and the FAA made a party to the proceeding.

12. Data submitted by the applicants indicate there would be significant difference in the size of the areas and populations which would receive service from the proposals. Consequently, the areas and populations which would receive FM service of 1 mV/m or greater intensity, together with the availability of other primary aural services in such areas, will be considered under the standard comparative issue for the purpose of determining whether a comparative preference should accrue to any of the applicants.

13. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

14. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine whether Sonrise Management Services, Inc. is an undisclosed party to the application of Sun City.

2. To determine whether Sun City's organizational structure is a sham.

3. To determine, from the evidence adduced pursuant to Issues 1 and 2 above, whether Sun City possesses the basic qualifications to be a licensee of the facilities sought herein.

4. To determine whether Morbak falsely certified to its financial qualifications in [the Ada, Ohio] proceeding; and if so, whether Morbak is basically qualified to be a Commission licensee.

5. In light of its other financial obligations to other FM applications, whether Morbak is financially qualified to be a Commission licensee, and if not, whether its Holly Hill application can be granted.

6. To determine whether there is a reasonable possibility that the tower heights and locations proposed by Intermart and HB would constitute a hazard to air navigation.

7. To determine which of the proposals would, on a comparative basis, best serve the public interest.

8. To determine, in light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

15. IT IS FURTHER ORDERED, That the petition for reconsideration filed by HHB IS GRANTED, and its application is DISMISSED for the reason set forth in paragraph 3 hereinabove.

16. IT IS FURTHER ORDERED, That the informal objection filed by HHRP, against the application of HHB, IS GRANTED for the reason set forth in paragraph 3 hereinabove.

17. IT IS FURTHER ORDERED, That Intermart shall submit an amendment to the presiding Administrative Law Judge within 30 days of the release of this Order which contains the information required by pages 4 and 5 of Section II of FCC Form 301.

18. IT IS FURTHER ORDERED, That Walo, Sun City and Intermart shall submit an amendment which contains the information required by Section II, Item 4 (old form) of FCC Form 301, to the presiding Administrative Law Judge within 30 days after the release of this Order.

19. IT IS FURTHER ORDERED, That within 30 days of the release of this Order, Atchley shall submit an amendment with the presiding Administrative Law Judge describing its planned programming service relating to the issues of public concern facing its proposed service area.

20. IT IS FURTHER ORDERED, That the petitions for leave to amend filed by Central, King, Intermart, Morbak, Atchley and Walo ARE GRANTED, and the corresponding amendments ARE ACCEPTED to the extent indicated herein.

21. IT IS FURTHER ORDERED, That the Federal Aviation Administration IS MADE A PARTY to this proceeding with respect to the air hazard issue only.

22. IT IS FURTHER ORDERED, That a copy of each document filed in this proceeding subsequent to the date of adoption of this Order shall be served on the counsel of record in the Hearing Branch appearing on behalf of the Chief, Mass Media Bureau. Parties may inquire as to the identity of the counsel of record by calling the Hearing Branch at (202) 632-6402. Such service shall be addressed to the named counsel of record, Hearing Branch, Enforcement Division, Mass Media Bureau, Federal Communications Commission, 2025 M Street, N.W., Suite 7212, Washington, D.C. 20554. Additionally, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall also be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Federal Communications Commission, Room 350, 1919 M Street, N.W., Washington, D.C. 20554.

23. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

24. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

FOOTNOTES

[1] On June 6, 1988 HHRP filed an informal objection to HHB's May 6, 1988 late-filed amendment. For the reasons set forth in paragraph 3 above, the informal objection will be granted to the extent indicated herein.

[2] Atchley indicates that its response to IV is contained in Exhibit 1 to FCC Form 301. However, it appears that Exhibit 1 was omitted from the application.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-640

In re Applications of

OUTREACH COMMUNICATIONS CORPORATION File No. BPED-860603MH
(hereafter "Outreach")
North Palm Beach, Florida
Reg: 88.3 MHz Channel 202A
1.0 kW (H&V) 45.5 meters HAAT

SOUTHWEST FLORIDA COMMUNITY RADIO, INC. File No. BPED-891212MC
(hereafter "Southwest")
West Palm Beach, Florida
Reg: 88.1 MHz Channel 201C2
50 kW (H&V) 127 meters HAAT

For Construction Permit
for a Noncommercial,
Educational FM Station

HEARING DESIGNATION ORDER

Adopted: December 27, 1990; Released: January 30, 1991

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new, noncommercial, educational FM station.

2. *Preliminary Matter.* Outreach and Southwest are proposing to construct new noncommercial, educational FM stations on adjacent channels 202 and 201 to serve, respectively, North Palm Beach and West Palm Beach, Florida. Our study, made pursuant to 47 C.F.R. § 73.509, indicates that Outreach's predicted interfering (54 dBU) contour is completely within Southwest's protected (60 dBU) contour and that Southwest's interfering contour completely envelopes Outreach's protected contour. Since Southwest's application was filed prior to the December 14, 1989 cut-off date for applications mutually exclusive with Outreach's proposal, grant of one application would effectively preclude grant of the other. Accordingly, the applications are mutually exclusive and must be consolidated for hearing. *Ashbacker Radio Corp. v. FCC*, 326 U.S. 327 (1945).

3. *Southwest.* CBS, Inc., licensee of television Channel 6 station WCIX (Miami, Florida) petitioned, on September 13, 1990, to deny grant of Southwest's application. In its petition, CBS argued that Southwest should not use the 6 dBU adjustment for television directivity specified in 47 C.F.R. § 73.525(e)(1)(iii) because this method greatly underestimated the number of persons that would receive interference from Southwest's proposal to WCIX's signal. If this 6 dBU adjustment were used, CBS conceded, no person would receive TV Channel 6 interference pursuant to § 73.525. CBS estimates that, if the 6 dBU adjustment were not applied in this case, interference over northern Miami would be caused to 116,017 people.

4. The core of CBS's argument is that § 73.525(e)(1)(iii) is not accurate in this instance because it is premised on the assumption that most television viewers use outdoor TV antennas which, when compared to inside antennas (such as rabbit ears), are more sensitive and reject interfering signals better. CBS argues that most northern Miami viewers use indoor antennas since these sufficiently receive multiple television stations that do not operate on Channel 6. Southwest claims, and CBS concedes, that its proposal does not violate the requirements of § 73.525. Further, Southwest argues that CBS failed to provide any demonstrative proof of the number of persons using indoor antennas and that, since part of the interference area claimed by CBS is at a considerable distance (approximately 54 miles) from WCIX's transmitter site, reception utilizing an indoor antenna is not likely in any event.

5. The Commission staff has examined Southwest's proposal and has found it in compliance with the requirements of § 73.525. Specifically, using the 6 dBU adjustment permitted by § 73.525(e)(1)(iii), Southwest's proposal will not cause any TV Channel 6 interference. We are not persuaded by CBS's arguments that the 6 dBU adjustment is not applicable in this instance. While we recognize the possibility that there may be a predominance of indoor antennas in the area WCIX (TV) serves, this does not justify suspension of the rules. No special treatment for indoor antennas was adopted as a result of the Commission's inquiry in the noncommercial educational FM-Channel 6 interference proceeding. *See Memorandum Opinion and Order* in Docket 20735, 58 RR 2d 629 (1985). To require such treatment now would impose an arbitrary requirement without due consideration of the impact on noncommercial FM stations. Absent a Rule Making proceeding to modify the provisions of § 73.525, the current requirements are our only measure for considering the potential for Channel 6 interference. Consequently, the petition to deny filed by CBS will be denied.

6. *Other Matters.* Outreach and Southwest propose to locate their proposed transmitting antennas on existing towers: Outreach on the existing WNJY (FM) tower and Southwest on a tower it states is used by "multiple business radio systems." Both applicants list tower heights above ground (AGL) and above mean sea level (AMSL) that differ from those in our Antenna Survey Branch records. Outreach states that its tower is 165 meters AGL and 177 meters AMSL. Our records for this structure indicate these heights as 146.3 meters AGL/153.9 meters AMSL. Southwest lists its tower height as 146 meters AGL and 154 meters AMSL. Commission records state that the correct heights are 152.4 meters AGL/160.3 meters AMSL. Since both applicants indicated that they will operate from existing towers contained in the Commission's records, these discrepancies are neither a tenderability nor an acceptability defect and may be corrected by post-designation amendments to the presiding Administrative Law Judge. Until these discrepancies are resolved, an air hazard issue will be specified for both applicants.

7. Neither of the applicants has indicated that an attempt has been made to negotiate a share-time arrangement. Therefore, an issue will be specified to determine whether a share-time arrangement between the applicants would be the most effective use of the frequency and thus better serve the public interest. *Granfalloon Denver Educational Broadcasting, Inc.*, 43 Fed. Reg. 49560 (October 24, 1978). In the event that this issue is resolved in the affirmative, an issue will also be specified to determine the nature of such an arrangement. It should be noted that our action specifying a share-time issue is not intended to preclude the applicants, either before the commencement of the hearing or at any time during the course of the hearing, from participating in negotiations with a view toward establishing a share-time agreement between themselves.

8. The respective proposals, although for different communities, would serve substantial areas in common. Consequently, in addition to determining, pursuant to Section 307(b) of the Communications Act of 1934, as amended, which of the proposals would best provide a fair, efficient and equitable distribution of radio service, a contingent comparative issue will also be specified.

9. Inasmuch as it appears that there would be a significant difference in the size of the areas and populations which would receive service from the proposals, and since this proceeding involves competing applicants for noncommercial educational facilities, the standard areas and populations issue will be modified in accordance with the Commission's prior action in *New York University*, FCC 67-673, released June 8, 1967, 10 RR 2d 215 (1967). Thus, the evidence adduced under this issue will be limited to available non-commercial educational FM signals within the respective service areas.

10. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

11. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

> 1. To determine whether there is a reasonable possibility that the tower heights and locations proposed by Outreach and Southwest would constitute a hazard to air navigation.
>
> 2. To determine: (a) the number of other reserved channel non-commercial educational FM services available in the proposed service area of which each applicant, and the area and population served thereby; (b) whether a share-time arrangement between the applicants would result in the most effective use of the channel and thus better serve the public interest and, if so, the terms and conditions thereof; and (c) in light of Section 307(b) of the Communications Act of 1934, as amended, which of the proposals would best provide a fair, efficient and equitable distribution of radio service.
>
> 3. To determine, in the event it is concluded that a choice between the applications should not be based solely on considerations relating to Section 307(b), the extent to which each of the proposed operations will be integrated into the overall cultural and educational objectives of the respective applicants; and whether other factors in the record demonstrate that one applicant will provide a superior FM educational broadcast service.
>
> 4. To determine, in light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

12. IT IS FURTHER ORDERED, That the petition to deny filed by CBS, Inc. against Southwest IS DENIED.

13. IT IS FURTHER ORDERED, That Outreach and Southwest must submit the amendment required by paragraph 6 hereinabove to the presiding Administrative Law Judge within 30 days of the release of this Order.

14. IT IS FURTHER ORDERED, That the Federal Aviation Administration IS MADE A PARTY to this proceeding with respect to the air hazard issue only.

15. IT IS FURTHER ORDERED, That a copy of each document filed in this proceeding subsequent to the date of adoption of this Order shall be served on the counsel of record in the Hearing Branch appearing on behalf of the Chief, Mass Media Bureau. Parties may inquire as to the identity of the counsel of record by calling the Hearing Branch at (202) 632-6402. Such service shall be addressed to the named counsel of record, Hearing Branch, Enforcement Division, Mass Media Bureau, Federal Communications Commission, 2025 M Street, N.W., Suite 7212, Washington, D.C. 20554. Additionally, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall also be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Federal Communications Commission, Room 350, 1919 M Street, N.W., Washington, D.C. 20554.

16. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

17. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-637

In re Applications of

EARLIMART EDUCATION FOUNDATION, INC. (hereafter "Earlimart")	File No. BPED-890123MB
PEREZ-FM EDUCATIONAL FOUNDATION, INC. (hereafter "Perez")	File No. BPED-890123MD
MELINDA BOUCHER READ (hereafter "Boucher-Read")	File No. BPH-890123MM

For Construction Permit
for a New FM Station on Channel 245A
in Spokane, Washington

HEARING DESIGNATION ORDER

Adopted: December 18, 1990; Released: January 30, 1991

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.

2. The applicants below have petitioned for leave to amend their application on the dates shown. The accompanying amendments were filed after the last date for filing amendments as of right. Under Section 1.65 of the Commission's Rules, the amendments are accepted for filing. However, an applicant may not improve its comparative position after the time for amendments as of right has passed. Therefore, any comparative advantage resulting from the amendments will be disallowed.

APPLICANTS	AMENDMENTS FILED
Earlimart	June 22, 1990
Boucher-Read	August 18, 1989

3. Earlimart filed amedments on June 25, 1990 and September 5, 1990, after the last date for filing amendments as of right. Under Section 73.3522(a)(6) of the Commission's Rules, amendments filed after that date will be considered only upon a showing of good cause for late filing or pursuant to Sections 1.65 or 73.3514 of the rules. Neither Earlimart's June 25 amendment nor its September 5 one met these requirements. Therefore, they will be returned below.

4. Section II, Item 4 of FCC Form 340 (May 1985) requires that an applicant specify its address (number, street, city, state) as well as the home address of each of its principals. Perez has not completed Item 4 correctly. Perez's application gives a post office box number as the residence address for Diane R. Perez. Accordingly, Perez must submit an amendment which gives all the information required by Section II, Item 4 to the presiding Administrative Law Judge within 30 days of the release of this Order.

5. Attempts to obtain FAA clearance through the Commission's Antenna Survey Branch and Earlimart and Perez have been unsuccessful. Accordingly, since no determination has been received as to whether the antennae proposed by Earlimart and Perez would constitute a hazard to air navigation, an issue with respect thereto will be included and the FAA made a party to the proceeding.

6. The engineering data submitted by Boucher-Read shows that her proposal would not provide a 3.16 m/Vm signal to the entire proposed city of license, as required by section 73.315(a) of the Commission's rules. Boucher-Read has indicated that her proposal would reach 96% of the area and 99% of the population of Spokane. Accordingly, Boucher-Read has submitted facts and circumstances which persuade us that a waiver of section 73.315(a) is not required since there is substantial compliance with the rule. *Letter to Southwest Communications, Inc. (KLDN-FM)*, released July 16, 1986, citing *John R. Hughes, et. al.*, 50 Fed. Reg. 5679 (1985).

7. Boucher-Read proposes to sidemount her antenna on an existing tower currently utilized by several two-way communications facilities. Boucher-Read states that the elevation of her proposed supporting structure above mean sea level is 807 meters. However, Commission records indicate that the elevation of the top of that supporting structure above mean sea level is 804.7 meters. Because Boucher-Read proposed to locate on an existing tower contained in the Commission's records, the staff can, drawing on the application as a whole, verify its actual height by taking official notice of the tower height as found in Commission records. Accordingly, Boucher-Read must file an amendment to correct this discrepancy.

8. Earlimart's and Perez's applications, filed on FCC form 340, do not demonstrate that they are eligible to be noncommercial educational (NCE) applicants. These standards of eligibility were published in appendix A to the *Notice of Inquiry* in Docket #78-164, 43 FR 30842 (1978). Although they were meant for entities applying for reserved channels, they will be applied to Earlimart and Perez here, since they have chosen to present themselves as NCE applicants.

9. An entity seeking to become an NCE applicant must demonstrate that it is committed to a suitable educational program. Earlimart states that its purpose is:

> " . . . to build and operate a station that will be used to train and educate people interested in getting into the communications field who are unable to enter broadcasting elsewhere. The applicant will make such training and education available to females, minorities, and disadvantaged people who desire to get into the communications field but who do not have the opportunity to do so."

(Earlimart Application, Exhibit A). Perez states that its purpose is :

> " . . . to train female, minorities and handicapped persons in communications and in hopes of entering broadcasting for employment."

(Perez Application, Exhibit A).[1] The fact that Earlimart and Perez propose to use their facilities for vocational broadcast training is not relevant to determining their eligibility to become NCE licensees. *See Way of the Cross of Utah, Inc.*, 58 RR 2d 455, 460 (1985). Therefore, these "educational programs" clearly do not meet the eligibility requirements. Earlimart and Perez have the burden of establishing their eligibility as NCE applicants. Both Earlimart and Perez have failed to provide the necessary information called for by our rules and procedures, making their applications defective. If Earlimart and Perez were proposing to operate on a reserved channel, their applications could be dismissed for this deficiency without hearing. *Bible Moravian Church*, 28 FCC 2d 1, (1971); *see also Way of the Cross, supra*. However, because Earlimart and Perez are proposing to operate on a commercial channel, we will merely specify educational qualifications issues against them.

10. Earlimart, in addition to the subject application, filed for a new station in Spokane, Washington on Channel 284A (File No. BPED-890123MA). The Commission's multiple ownership rules, 47 C.F.R. § 73.3555, prohibit, *inter alia*, grant of an application if so doing would create an overlap of the 3.16 mV/m contour with that of another station owned, operated or controlled by the same applicant. This prohibition however, does not apply to NCE applicants. *See* 47 CFR 73.3555(f). If Earlimart is found unqualified to be an NCE applicant, then the subject application, being the one reached for processing latest, will be dismissed. *See* 47 C.F.R. § 73.3518; and *Big Wyoming Broadcasting Corp.*, 2 FCC Rcd 3493 (1987).

11. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

12. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

> 1. To determine whether there is a reasonable possibility that the tower heights and locations proposed by Earlimart and Perez would constitute a hazard to air navigation.
>
> 2. To determine, with respect to Earlimart and Perez, whether the applicants are qualified to be noncommercial educational FM licensees.
>
> 3. To determine which of the proposals would, on a comparative basis, best serve the public interest.
>
> 4. To determine, in light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

13. IT IS FURTHER ORDERED, That the petitions for leave to amend filed by Earlimart and Boucher-Read ARE GRANTED, and the corresponding amendments ARE ACCEPTED to the extent indicated herein.

14. IT IS FURTHER ORDERED, That pursuant to the discussion in paragraph 3, *supra*, the amendments filed by Earlimart on June 25, 1990 and September 5, 1990, ARE HEREBY RETURNED.

15. IT IS FURTHER ORDERED, That Perez shall submit an amendment which contains the information required by Section II, Item 4 (old form) of FCC Form 301, to the presiding Administrative Law Judge within 30 days after the release of this Order.

16. IT IS FURTHER ORDERED, That, within 30 days of the release of this Order, Boucher-Read shall submit an amendment with the presiding Administrative Law Judge correcting the discrepancy between its application and the Commission's records regarding the elevation of the top of the supporting structure above mean sea level.

17. IT IS FURTHER ORDERED, That Earlimart shall file an amendment listing completely its other media interests with the presiding Administrative Law Judge within 30 days of the release of this Order.

18. IT IS FURTHER ORDERED, That pursuant to the discussion in paragraph 10 above, if it Earlimart is found to be unqualified to be an NCE-FM applicant, its application will be DISMISSED.

19. IT IS FURTHER ORDERED, That the Federal Aviation Administration IS MADE A PARTY to this proceeding with respect to the air hazard issues only.

20. IT IS FURTHER ORDERED, That a copy of each document filed in this proceeding subsequent to the date of adoption of this Order shall be served on the counsel of record in the Hearing Branch appearing on behalf of the Chief, Mass Media Bureau. Parties may inquire as to the identity of the counsel of record by calling the Hearing Branch at (202) 632-6402. Such service shall be addressed to the named counsel of record, Hearing Branch, Enforcement Division, Mass Media Bureau, Federal Communications Commission, 2025 M Street, N.W., Suite 7212, Washington, D.C. 20554. Additionally, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall also be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Federal Communications Commission, Room 350, 1919 M Street, N.W., Washington, D.C. 20554.

21. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

22. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

FOOTNOTE

[1] Perez also proposed to establish a local news bureau and contact local and regional community leaders. However, neither of these demonstrates either a valid educational purpose or a programming proposal to further that purpose.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-443

In the Matter of

Amendment of Section 73.202(b), RM-7239
Table of Allotments,
FM Broadcast Stations.
(Sikeston, Missouri)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: January 22, 1991; Released: January 30, 1991

By the Acting Chief, Allocations Branch:

1. The Commission has before it for consideration the *Notice of Proposed Rule Making*, 5 FCC Rcd 5940 (1990), issued in response to a petition filed by Delta Radio Corporation ("petitioner") proposing the substitution of FM Channel 250C3 for Channel 249A at Sikeston, Missouri. Petitioner also requested modification of its license for Station KSTG(FM), Channel 249A, to specify operation on Channel 250C3. Petitioner filed supporting comments in which it reaffirmed its interest in the channel. No other comments were received.

2. We believe the public interest would be served by the substitution of Channel 250C3 for Channel 249A at Sikeston, Missouri, since it could provide the community with a wide coverage area FM station. The substitution can be made in compliance with the minimum distance separation requirements of Section 73.207 of the Commission's Rules at the site specified by the petitioner.[1] In addition, we will modify the license for Station KSTG(FM), Sikeston, to specify operation on Channel 250C3 in accordance with Section 1.420(g) of the Commission's Rules.

3. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **March 18, 1991,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, to read as follows:

Community	Channel No.
Sikeston, Missouri	250C3

4. IT IS FURTHER ORDERED, pursuant to the authority contained in Section 316(a) of the Communications Act of 1934, as amended, that the license of Station KSTG(FM), Sikeston, Missouri, IS MODIFIED to specify operation on Channel 250C3, in lieu of Channel 249A, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall file with the Commission a minor change application for construction permit (Form 301), specifying the new facility.

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620.

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

5. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

6. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Andrew J. Rhodes
Acting Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

FOOTNOTE

[1] The coordinates for Channel 250C3 are 36-57-30 and 89-32-05.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-438

In the Matter of

Amendment of Section 73.202(b), Table of Allotments. FM Broadcast Stations. (Dock Junction, Georgia)	RM-7441

REPORT AND ORDER
(Proceeding Terminated)

Adopted: January 22, 1991; Released: January 30, 1991

By the Acting Chief, Allocations Branch:

1. The Commission has before it for consideration the *Notice of Proposed Rule Making*, 5 FCC Rcd 5841 (1990), issued in response to a petition for rule making filed by Lorraine M. Wiggins ("Wiggins"), permittee of Station WXMK(FM), Channel 290A, Dock Junction, Georgia, proposing the substitution of Channel 290C3 for Channel 290A at Dock Junction and modification of her construction permit for Station WXMK(FM) to specify the higher class channel. Southland Radio, Inc. ("Southland"), successor-in-interest to Wiggins, filed comments stating its intention to apply for Channel 290C3, if allotted. No other comments were received.

2. We believe the public interest would be served by the substitution of Channel 290C3 for Channel 290A at Dock Junction since it could provide a wide coverage area FM service to the community. Channel 290C3 can be allotted to Dock Junction in compliance with the Commission's minimum distance separation requirements with a site restriction of 2.5 kilometers (1.6 miles) east of the community,[1] in order to avoid a short-spacing to a proposal to substitute Channel 290C3 for Channel 290A at Lakeland, Georgia. Pursuant to the provisions of Section 1.420(g) of the Commission's Rules, we will modify the construction permit of Station WXMK(FM) to specify operation on Channel 290C3 at Dock Junction.

3. Accordingly, pursuant to the authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **March 18, 1991**, the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, as follows:

Community	Channel No.
Dock Junction, Georgia	290C3

4. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the construction permit for Station WXMK(FM), Dock Junction, Georgia, IS MODIFIED to specify operation on Channel 290C3 in lieu of Channel 290A, subject to the following conditions:

> (a) Within 90 days of the effective date of this *Order*, the permittee shall submit to the Commission a minor change application for a construction permit (Form 301), specifying the new facility;
>
> (b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620; and
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> (c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

5. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

6. For further information concerning this proceeding, contact Nancy J. Walls, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Andrew J. Rhodes
Acting Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

FOOTNOTE

[1] The coordinates for Channel 290C3 at Dock Junction are North Latitude 31-11-30 and West Longitude 81-28-50.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-596

In the Matter of

Amendment of Section 73.202(b), RM-7144
Table of Allotments,
FM Broadcast Stations.
(Canton, South Dakota)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: January 22, 1991; Released: January 30, 1991

By the Acting Chief, Allocations Branch:

1. At the request of Dallas M. Tarkenton ("petitioner"), the Commission has before it the *Notice of Proposed Rule Making*, 4 FCC Rcd 8793 (1989), proposing the substitution of Channel 274A for Channel 273A at Canton, South Dakota, and the modification of petitioner's construction permit for Station KIXS to specify the alternate Class A channel. Petitioner filed comments reiterating his intention to apply for Channel 274A, if allotted. No other comments were received.[1]

2. We believe the public interest would be served by substituting Channel 274A for Channel 273A at Canton, South Dakota, since it could enable Station KIXS to specify 6 kW operation. Channel 274A can be allotted to Canton in compliance with the Commission's minimum distance separation requirements and can be used at the site specified in Station KIXS' outstanding construction permit.[2]

3. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **March 18, 1991,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the community listed below, to read as follows:

City	Channel No.
Canton, South Dakota	274A

4. IT IS FURTHER ORDERED, pursuant to Section 316(a) of the Communications Act of 1934, as amended, that the construction permit of Dallas M. Tarkenton, for Station KIXS, Canton, South Dakota, IS MODIFIED to specify operation on Channel 274A, in lieu of Channel 273A, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the permittee shall submit to the Commission a minor change application for a construction permit (Form 301).

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620.

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

5. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

6. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Andrew J. Rhodes
Acting Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

FOOTNOTES

[1] On December 13, 1990, petitioner filed a petition for rule making requesting the substitution of Channel 274C2 for the Class A channel at Canton and the modification of Station KIXS accordingly (RM-7598). That petition will be the subject of a separate *Notice of Proposed Rule Making*.

[2] The coordinates for Channel 274A at Canton are North Latitude 43-17-05 and West Longitude 96-32-49.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-455

In the Matter of

Amendment of Section 73.202(b), RM-7356
Table of Allotments,
FM Broadcast Stations.
(Bloomer, Wisconsin)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: January 22, 1991; Released: January 30, 1991

By the Acting Chief, Allocations Branch:

1. The Commission has before it for consideration the *Notice of Proposed Rule Making*. 5 FCC Rcd 6194 (1990), issued in response to a petition filed by Starcom, Inc. ("petitioner"), proposing the substitution of FM Channel 236C3 for Channel 236A at Bloomer, Wisconsin. Petitioner also requested modification of its construction permit (BPH-880421MI) for Station WPHQ(FM) to specify operation on Channel 236C3 in lieu of Channel 236A. Petitioner filed supporting comments in which it reaffirmed its interest in the channel. No other comments were received.

2. We believe the public interest would be served by the substitution of Channel 236C3 for Channel 236A at Bloomer, Wisconsin, since it could provide the community with a wide coverage area FM station. The substitution can be made in compliance with the minimum distance separation requirements of Section 73.207 of the Commission's Rules at the site specified by the petitioner.[1] In addition, we will modify the construction permit for Station WPHQ(FM), Bloomer, to specify operation on Channel 236C3 in accordance with Section 1.420(g) of the Commission's Rules.

3. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **March 18, 1991,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, to read as follows:

City	Channel No.
Bloomer, Wisconsin	236C3

4. IT IS FURTHER ORDERED, pursuant to the authority contained in Section 316(a) of the Communications Act of 1934, as amended, that the construction permit for Station WPHQ(FM), Bloomer, Wisconsin, IS MODIFIED to specify operation on Channel 236C3, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the permittee shall file with the Commission a minor change application for construction permit (Form 301), specifying the new facility.

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620.

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

5. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

6. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Andrew J. Rhodes
Acting Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

FOOTNOTE

[1] The coordinates for Channel 236C3 are 45-00-30 and 91-19-59.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-145

In the Matter of

Amendment of Section 73.202(b),	RM-6201
Table of Allotments,	RM-6408
FM Broadcast Stations.	RM-6409
(Summerville, Summerton and Bowman, South Carolina)	

ERRATUM

Released: January 30, 1991

By the Assistant Chief, Policy and Rules Division:

1. By *Report and Order*, released December 13, 1990, the Commission *inter alia*, substituted Channel 227C2 for Channel 228A at Summerville, South Carolina, and modified the license of Millennium Communications of Charleston, Inc., for Station WWWZ-FM to specify operation on the higher powered channel. The staff inadvertently stated, in footnote 6, that an application for Channel 227C2 at Summerville would not be accepted until action is taken by the Court of Appeals in *Chester County Broadcasting Co. v. FCC*, Nos. 90-1496 *et al.* (D.C. Cir. Oct. 19, 1990). By this *Erratum*, the last sentence of footnote 6 is amended to read as follows:

> Therefore, we will delay the opening of the application filing window for Channel 238A at Summerton until action is taken by the Court of Appeals.

FEDERAL COMMUNICATIONS COMMISSION

Beverly McKittrick
Assistant Chief
Policy and Rules Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-652

In re Applications of

BRIARWOOD PRESBYTERIAN CHURCH (hereafter "Briarwood")	File No. BPED-870812MC
THE UNIVERSITY OF ALABAMA (hereafter "UNIV")	File No. BPED-880603MA

For Construction Permit for a New
Noncommercial FM Station on
Channel 203 in Birmingham, Alabama

HEARING DESIGNATION ORDER

Adopted: December 31, 1990; Released: January 30, 1991

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.

2. While UNIV indicated in a letter dated March 10, 1989, that the applicants were "communicating" *vis-a-visa* share-time agreement, no such agreement has been filed to date. Therefore, an issue will be specified to determine whether a share-time arrangement between the applicants would be the most effective use of the frequency, and thus better serve the public interest. *Granfalloon Denver Educational Broadcasting, Inc.*, 43 Fed. Reg. 49,560, published October 24, 1978. In the event that this issue is resolved in the affirmative, an issue will also be specified to determine the nature of such arrangement. It should be noted that our action specifying a share-time issue is not intended to preclude the applicants, either before the commencement of the hearing or at any time during the course of the hearing, from continuing negotiations with a view toward establishing a share-time arrangement.

3. The applicants below have petitioned for leave to amend their application on the dates shown. The accompanying amendments were filed after the last date for filing amendments as of right. Under Section 1.65 of the Commission's Rules, the amendments are accepted for filing. However, an applicant may not improve its comparative position after the time for amendments as of right has passed. Therefore, any comparative advantage resulting from the amendments will be disallowed.

APPLICANTS	AMENDMENTS FILED
UNIV	December 14, 1990

4. Briarwood failed to submit information regarding the areas and populations which would receive service from its proposal. Accordingly, Briarwood must supply this information in the form of an amendment to its application submitted to the presiding Administrative Law Judge within 30 days of the release of this Order.

5. *Petitions to deny.* Great American Television and Radio Company, Inc. (Great American) filed petitions to deny against Birmingham and UNIV on June 2, 1988 and March 6, 1989 respectively. The petitions allege that each applicant failed to comply with Commission Rule 73.525 (47 CFR §73.525) and should therefore be amended or dismissed. Rule 73.525 governs TV channel 6 protection from interference.

6. Great American alleges that when measuring its proposal's interference with Channel 6 reception, Briarwood incorrectly extrapolated Channel 6 field strength above 90 dBu. On July 5, 1988, Briarwood filed an Opposition to Petition to Deny stating that it was in full compliance with Commission Rule 73.525[1]. It also stated that any claim of interference should be tempered by the affected station's (WBRC-TV) alleged refusal to consider the co-location of Briarwood's antenna on the Channel 6 tower.

7. Briarwood is proposing to locate 8.7 kilometers from Channel 6 TV Station WBRC-TV, Birmingham. 47 CFR § 73.525(c) states that for new NCE-FM stations proposing to operate on Channels 201-220, a showing must be submitted indicating that the predicted interference area resulting from the proposed facility will contain no more than 3,000 persons. This interference area is to be calculated pursuant to 47 CFR § 73.525(e) which incorporates the graphs contained in Section 73.599. Pursuant to paragraphs 29 and 30 of the *Second Further Notice of Proposed Rule Making*, Docket 20735, FCC 82-225, released May 26, 1982, the field strength of 90 dBu is to be used for those locations where the predicted TV field strength exceeds 90 dBu. However, an engineering review of Briarwood's proposal indicates that it used the actual Channel 6 TV field strength value for Channel 6 TV field strengths greater than 90 dBu. Since Birmingham's interference showing is based on Channel 6 TV field strengths in excess of 90 dBu, the showing does not comply with Commission rules.

8. Further, WBRC-TV is under no obligation to provide space on its tower in order to allow Briarwood to co-locate with it. The Commission encourages, but does not require, co-location of NCE-FM stations and Channel 6 TV stations. Briarwood's inability to co-locate with WBRC-TV, for whatever reason, does not excuse it from complying with Commission rules.

9. Regarding UNIV,[2] Great American states that UNIV's proposed operation would be within 400 meters of a Channel 6 tower and it is therefore subject to the requirements of Section 73.525(d)(2) of the Commission's Rules. Great American alleges that UNIV is not in compliance with these requirements.

10. UNIV is proposing to locate 0.1 kilometer away from Channel 6 TV Station WBRC-TV Birmingham. 47 CFR § 73.525(d)(2) states, in part, that an application for an NCE-FM station operation on Channels 201-220 and located at 0.4 kilometers or less from a TV Channel 6 station are collocated and will be accepted if the NCE-FM application includes a certification that the applicant has coordinated its antenna with the affected TV station by either employing the same number of antenna bays with radiation centers separated by no more than 30 meters

vertically (approximately 100 feet) or the FM vertical pattern not exceeding the TV vertical pattern by more than 2 dB. UNIV states that "[t]he proposed ERP in conjunction with the vertical radiation pattern of the 4 bay FM antenna is sufficient to avoid causing any interference despite the fact that the radiation center of the proposed FM is not within 100 feet of the existing TV Channel 6 operation." An engineering study of UNIV's proposal indicates that the proposed vertical pattern would exceed WBRC-TV's vertical pattern by more than 2 dB.

11. In light of the above discussion, UNIV and Briarwood must verify that their showings are in compliance with the Commission's rules regarding protection of TV Channel 6 stations, or resolve the noted discrepancies by submitting appropriate amendments to the presiding Administrative Law Judge within 30 days of this Order, or an appropriate issue will be specified by the judge.

12. UNIV is the defendant in numerous "discrimination" complaints, which are catalogued in Exhibit II, Sections D-E of its application. [3] Accordingly, while UNIV will be allowed to proceed to comparative hearing, it shall be ordered that any construction permit awarded to it as a result of this proceeding shall be without prejudice to whatever action, if any, the Commission deems appropriate in light of these pending actions.

13. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

14. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

> 1. To determine: (a) whether a share-time arrangement between the applicants would result in the most effective use of the channel and thus better serve the public interest and, if so, the terms and conditions thereof; (b) the extent to which the proposed operations will be integrated into the overall cultural and educational objectives of the respective applicants; and (c) whether other factors in the record demonstrate that one applicant will provide a superior FM educational broadcasting service.
>
> 2. To determine, in light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

15. IT IS FURTHER ORDERED, That the petition for leave to amend filed by UNIV IS GRANTED, and the corresponding amendment IS ACCEPTED to the extent indicated herein.

16. IT IS FURTHER ORDERED, That within 30 days of the release of this Order, Briarwood shall submit an amendment to the presiding Administrative Law Judge containing information regarding the areas and populations that will receive service from its proposal.

17. IT IS FURTHER ORDERED, That within 30 days of the release of this Order, Briarwood and UNIV shall submit amendments demonstrating compliance with Commission rule 73.525, pursuant to the discussion in paragraphs 5 through 11, *supra*, and that the petition to deny filed by Great American IS GRANTED to the extent indicated herein and IS DENIED in all other respects.

18. IT IS FURTHER ORDERED, That, in the event a construction permit is granted to UNIV, it shall be without prejudice to whatever action, if any, the Commission deems appropriate in light of the pending complaints listed in Exhibit 2, Sections C-E of its application.

19. IT IS FURTHER ORDERED, That a copy of each document filed in this proceeding subsequent to the date of adoption of this Order shall be served on the counsel of record in the Hearing Branch appearing on behalf of the Chief, Mass Media Bureau. Parties may inquire as to the identity of the counsel of record by calling the Hearing Branch at (202) 632-6402. Such service shall be addressed to the named counsel of record, Hearing Branch, Enforcement Division, Mass Media Bureau, Federal Communications Commission, 2025 M Street, N.W., Suite 7212, Washington, D.C. 20554. Additionally, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall also be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Federal Communications Commission, Room 350, 1919 M Street, N.W., Washington, D.C. 20554.

20. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

21. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

FOOTNOTES

[1] On July 20, 1988, Great American filed a Reply to Briarwood's Opposition.

[2] UNIV, to date, has not filed an Opposition to the Petition to Deny.

[3] These include four pending court cases, twenty pending EEOC complaints, and two other administrative matters involving charges of sex and race discrimination. For the sake of brevity, these will not be enumerated in this document.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-654

In re Applications of

THE CEDARVILLE COLLEGE (hereafter "College")	File No. BPED-881214MN
Ohio University (hereafter "University")	File No. BPED-890922MA

For Construction Permit
for a New FM Station on Channel 220A
in Chillicothe, Ohio

HEARING DESIGNATION ORDER

Adopted: December 31, 1990; Released: January 30, 1991

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new, non-commercial, educational FM station.

2. *College.* Section II, Item 8 of FCC Form 340 (May 1989) requires that an applicant specify the home address of each of its principals. College has not completed Item 8 correctly. College's application does not list the residence address for any of its board members. Accordingly, College must submit an amendment which gives all the information required by Section II, Item 6 to the presiding Administrative Law Judge after this Order is released.

3. The USA-Canada Broadcast Agreement requires formal coordination between the countries for any broadcast station proposal for which an allocation has not previously been established. Since educational stations do not have predesignated allotments, this proposal has been reviewed under the provisions of the agreement. As College's proposal does not violate any provisions of the treaty, formal coordination with the Canadian government has been initiated, but that government's concurrence has not yet been received. Consequently, should College be awarded a construction permit as a result of this proceeding, the grant shall be made contingent upon receipt of concurrence from Canada regarding College's application.

4. *Other Matters.* Section 73.1125 of the Commission's Rules requires that the main studio of an FM station be located within the station's 3.16 mV/m (70 dBu) contour, but on a showing of good cause may be located outside that contour. Neither College nor University propose to operate with a main studio within the predicted 70 dBu contour. College proposes to duplicate the programming of its Cedarville, Ohio station, WCDR-FM and University proposes to duplicate the programming of its Athens, Ohio facility, WOUB-FM.

5. In support of waiver requests of Section 73.1125 of the rules, both applicants indicate that they will ensure that local issues in Chillicothe will be met. College represents that it will (1) maintain a toll-free telephone line to the studios and offices; (2) use individuals in Chillicothe to serve as news and public affairs reporters and (3) review annually the need and feasibility for a local studio, staffed by station personnel, for the purpose of improving the coverage of local events. Similarly, University represents that it will ascertain any and all reasonable means including (1) reading local papers, (2) periodic interviews with local business, charity and labor leaders and (3) conversations with local activists in a variety of areas.

6. The Commission has traditionally allowed noncommercial educational licensees to operate in this matter. *See Nebraska Educational Television Commission*, 4 RR 2d 771 (1965). In so doing, the Commission recognizes the realities of public broadcasting funding and the ongoing problems of educational licensees in raising the necessary funds to expand and provide noncommercial educational programming to as many viewers as possible. College and University proposals are consistent with this concept. The savings realized from not having to construct a main studio can be utilized to assist both applicants in expanding quality programming to a greater number of listeners. We conclude, therefore, that good cause exists for not locating a main studio in Chillicothe and, in light of the above, College and University's request for waiver of 47 C.F.R. § 73.1125(a) is granted.

7. *Share-time Arrangement.* An issue will be specified to determine whether a share-time arrangement between the applicants would be the most effective use of the frequency and thus better serve the public interest. *Granfallon Denver Educational Broadcasting, Inc.*, 43 Fed. reg. 49560 (October 24, 1978). It should be noted that our action specifying a share-time issue is not intended to preclude the applicants, either before the commencement of the hearing or at any time during the course of the hearing, from participating in negotiations with a view toward establishing a share-time agreement between themselves.

8. Inasmuch as it appears that there would be a significant difference in the size of the populations which would receive service from the proposals, and since this proceeding involves competing applicants for noncommercial educational facilities, the standard population issue will be modified in accordance with the Commission's prior action in *New York University*, FCC 67-673, released June 8, 1967, 10 RR 2d 215 (1967). Thus, the evidence adduced under this issue will be limited to available non-commercial educational FM signals within the respective service areas.

9. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

10. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine: (a) whether a share-time arrangement between the applicants would result in the most effective use of the channel and thus better serve the public interest, and, if so, the terms and conditions thereof; (b) the extent to which each of the proposed operations will be integrated into the overall educational operation and objectives of the respective applicants; and (c) whether other factors in the record demonstrate that one applicant will provide a superior FM educational broadcast service.

2. To determine, in light of the evidence adduced pursuant to the specified issue, which of the applications should be granted, if any.

11. IT IS FURTHER ORDERED, That College shall submit an amendment which contains the information required by Section II, Item 8 of FCC Form 340, to the presiding Administrative Law Judge within 30 days after the release of this Order.

12. IT IS FURTHERED ORDERED, That if College is awarded a construction permit as a result of this proceeding, it shall be contingent upon receipt of concurrence from Canada.

13. IT IS FURTHERED ORDERED, That the waiver requests of Section 73.1125 of the Commission's Rules, filed by College and University, ARE GRANTED.

14. IT IS FURTHER ORDERED, That a copy of each document filed in this proceeding subsequent to the date of adoption of this Order shall be served on the counsel of record in the Hearing Branch appearing on behalf of the Chief, Mass Media Bureau. Parties may inquire as to the identity of the counsel of record by calling the Hearing Branch at (202) 632-6402. Such service shall be addressed to the named counsel of record, Hearing Branch, Enforcement Division, Mass Media Bureau, Federal Communications Commission, 2025 M Street, N.W., Suite 7212, Washington, D.C. 20554. Additionally, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall also be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Federal Communications Commission, Room 350, 1919 M Street, N.W., Washington, D.C. 20554.

15. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

16. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-653

In re Applications of

GRANITE STATE EDUCATIONAL FELLOWSHIP, INC. (hereafter "GSEF")	File No. BPED-890321MR
For Construction Permit for a New Noncommercial FM Station on Channel 219 in Walpole, New Hampshire	
KEENE STATE COLLEGE (hereafter "Keene State")	File No. BPED-880426MP
For Modification of the Facilities of Station WKNH(FM), Keene, New Hampshire	

HEARING DESIGNATION ORDER

Adopted: December 31, 1990; Released: January 30, 1991

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive application for a new noncommercial FM station in Walpole, New Hampshire, and the mutually exclusive application to modify the facilities of Station WKNH(FM), Keene, New Hampshire.[1]

2. *Section 307 (b).* The respective proposals, although for different communities, would serve substantial areas in common. Consequently, in addition to determining pursuant to 47 U.S.C. Section 307(b) which of the proposals would better provide a fair, efficient and equitable distribution of radio service, a contingent comparative issue will be specified.

3. *Areas and Populations.* Inasmuch as it appears that there would be a significant difference in the size of the areas and populations which would receive service from the proposals, and since this proceeding involves competing applications for noncommercial educational facilities, the standard areas and populations issue will be modified in accordance with the Commission's prior action in *New York University*, FCC 67-673, released June 8, 1967, 10 RR 2d 215 (1967). Thus, the evidence adduced under this issue will be limited to available noncommercial educational FM signals within the respective areas.

4. On behalf of Keene State, New Hampshire Public Radio wrote to GSEF on November 2, 1990, proposing a possible solution to the mutually exclusive applications. New Hampshire Public Radio proposed that GSEF withdraw its application for Channel 219 and file an application for a new frequency on Channel 201. GSEF did not respond to this correspondence.

5. *Sharetime Agreement.* It does not appear that the applicants have discussed negotiations of a possible sharetime arrangement. Therefore, an issue will be specified to determine whether a share-time arrangement between the applicants would be the most effective use of the frequency and thus better serve the public interest. *Granfalloon Denver Educational Broadcasting, Inc.*, 43 Fed. Reg. 49560 (October 24, 1978). In the event that this issue is resolved in the affirmative, an issue will also be specified to determine the nature of such an arrangement. It should be noted that our action specifying a share-time issue is not intended to preclude the applicants, either before the commencement of the hearing, or at anytime during the course of the hearing, from participating in negotiations with a view toward establishing a share-time agreement between themselves.

6. *Eligibility of GSEF.* GSEF filed on FCC Form 340, and did not demonstrate that it is eligible to be a noncommercial educational (NCE) applicant. It failed to include a program narrative or provide any examples demonstrating that its proposed programming will carry forward an acceptable educational format in compliance with 47 C.F.R. Section 73.503. These standards of eligibility were published in Appendix A to the *Notice of Inquiry* in Docket No. 78-164, 43 Fed. Reg. 30842 (1978). As a result, an appropriate issue will be specified.

7. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

8. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

> 1. To determine: (a) the number of other reserved channel noncommercial educational FM services available in the proposed service area of each applicant, and the area and population served thereby; (b) whether a share-time arrangement between the applicants would result in the most effective use of the channel and thus better serve the public interest, and, if so, the terms and conditions thereof; and (c) in light of 47 U.S.C. Section 307(b), which of the proposals would better provide a fair, efficient and equitable distribution of radio service.
>
> 2. To determine whether GSEF is qualified to be a noncommercial educational FM licensee.
>
> 3. To determine, in the event it is concluded that a choice between the applications should not be based solely on considerations relating to 47 U.S.C. Section 307(b), the extent to which each of the proposed operations will be integrated into the overall cultural and educational operation and objectives of the respective applicants; and whether other factors in the record demonstrate that one applicant will provide a superior FM educational broadcast service.

4. To determine, in light of the evidence adduced pursuant to the foregoing issues, which of the applications should be granted, if any.

9. IT IS FURTHER ORDERED, That in addition to the copy served on the Chief, Hearing Branch, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Room 350, 1919 M Street, N.W., Washington, D.C. 20554.

10. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

11. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

FOOTNOTE

[1] On June 28, 1989, the Commission returned Granite State Educational Fellowship, Inc.'s (GSEF) application for a new facility. This application was mutually exclusive with Keene State College's application to change frequencies to Channel 219. The Commission then, having found Keene State's application grantable, granted the modification on October 12, 1989. However, the Commission inadvertently failed to take into account the Petition for Reconsideration filed July 28, 1989 by GSEF, which was ultimately granted, and the application, as amended, was accepted *nunc pro tunc*. Accordingly, the Commission rescinded Keene State's October 12, 1989 construction permit BPH-880426MP and restored the mutual exlusivity of both applications.

Before the
Federal Communications Commission
Washington, D.C. 20554

PR Docket No. 89-45

In the Matter of

Amendment of Part 90 of the
Commission's Rules to Expand
Eligibility and Shared Use Criteria
For Private Land Mobile Frequencies

REPORT AND ORDER

Adopted: January 17, 1991; Released: January 30, 1991

By the Commission:

I. BACKGROUND

1. We initiated this proceeding in March 1989 with the goal of introducing greater flexibility into the shared use of licensed private land mobile facilities.[1] We proposed to accomplish this goal by making three specific changes to the Part 90 eligibility criteria. First, we proposed to permit non-eligible entrepreneurs (private carriers) to be licensed directly in most Part 90 radio services below 800 MHz. Private carriers would be able to serve only those end users eligible within a particular service. Second, we proposed to allow private carriers operating in the Business Radio Service to serve all Part 90 eligibles, rather than only Business Radio Service eligibles. Finally, we proposed to permit private carrier paging providers licensed on paging-only channels in the Business Radio Service below 800 MHz and on the Private Carrier Paging channels at 900 MHz (who currently may offer service only to Part 90 eligibles) to serve individuals and the Federal Government as well. We believed that these rule changes would enhance the public interest by creating additional communication service options, promoting more efficient use of the spectrum, and encouraging use of new technologies. In addition, we expected that the rule changes would make private land mobile service more affordable and extend its availability to a broader range of eligible end users.

2. We received over 500 comments and reply comments in response to the *Notice*. Most of the comments come from members of the public safety community who discuss only the first of the three proposals. Their primary concern is that the private carrier systems described in the *Notice* would permit an outside entrepreneur to have ultimate control of systems operating on public safety frequencies,[2] depriving public safety agencies of the control over their communications systems. They believe that this control is essential to ensure the reliability, coverage, and technical features necessary for prompt response to emergencies. [3]

3. In addition, various trade associations submitted comments in response to the aspect of our first proposal concerning the licensing of private carriers on the Industrial and Land Transportation channels. In support of this aspect of the proposal, The American SMR Network Association, Inc., (ASNA) states that private carriers are able to promote efficient use of the private radio spectrum. ASNA also notes that, in essence, private carriers already exist in each of the Part 90 services; current rules, however, require the licensee itself to be eligible or, if an entrepreneur wishes to provide service, that the entrepreneur convince an eligible end user to be the licensee. Finally, ASNA notes that under the proposal, private carrier service would merely be an option, and no end user would be required to use the services of a private carrier.[4] Generally, parties opposing this aspect of the proposal argue that direct licensing of private carriers may cause interference and increase congestion.[5] Commenters also express concern that private carriers will not satisfy the unique communications requirements of Industrial and Land Transportation entities.[6]

4. Commenters supporting the second proposal in the *Notice*, which would permit private carriers in the Business Radio Service to serve all Part 90 eligibles, generally view it as an opportunity to relieve crowding on public safety channels by transferring non-critical communications to other frequencies.[7] In addition, these commenters express their belief that the proposal would assist small underfinanced agencies, particularly those in rural areas.[8] These commenters also view the proposal as an opportunity to provide public safety agencies increased options, greater flexibility and improved service.[9] In general, however, commenters opposed this proposal and raised the concern that it would have a negative impact upon spectrum efficiency and communications quality. In the opinion of the opposing commenters, the proposal would lead to underutilization of public safety spectrum coupled with increased traffic on already congested business frequencies.[10]

5. Finally, private carrier paging companies generally support our third proposal, which would permit private carrier paging systems operating on paging-only channels to offer service to individuals and the Federal Government. According to these parties, private paging is a cost effective and spectrum efficient communications option that should be made available to additional end users.[11] In opposition to the proposal, public safety end users, common carriers, and others raise the concern that private spectrum is overcrowded and that individuals and the Federal Government have sufficient existing options on common carrier paging systems and Federal Government spectrum.[12] They also argue that allowing these additional users onto private systems would blur the distinction between private carriage and common carriage.

II. DISCUSSION

6. After reviewing the record and considering the concerns raised in the comments, we have decided to adopt certain aspects of our proposal that can be accomplished on one-way paging-only channels. We conclude, however, that it is not prudent at the present time to proceed with the aspects of our proposal affecting two-way operations.

Two-Way Operations

7. When we proposed to expand private carrier operations on two-way channels below 800 MHz, we considered it a logical extension of our prior success in licensing Specialized Mobile Radio (SMR) systems.[13] However, problems exist on shared frequencies that do not exist for SMR systems, which have exclusive use of channels in a given area. These problems include congestion and less sophisticated technologies. As the result of comments addressing these issues, we have reevaluated the role of private carriers in shared spectrum. We conclude that the current operating environments, *i.e.*, the lack of channel exclusivity, would limit the ability of private carriers on shared frequencies to offer end users benefits comparable to those attainable on SMR channels.

8. To address the problems that exist on shared channels, we may need to implement improvements more significant than those that private carriers can offer. Private carriers may be able to reduce congestion slightly in the short run but also may encourage new and existing end users to remain on these congested frequencies. This may impede long term spectrum management efforts of a greater magnitude.[14] Due to this overriding spectrum management issue, we will not adopt our proposal to license non-eligible private carriers in these private land mobile radio services. Nor will we permit licensees operating on two-way channels in the Business Radio Service to share these channels with entities not currently eligible in the Business Radio Service. Rather than offering additional service options in this crowded spectrum, we are encouraging end users to seek other available options that employ less crowded frequencies, including using SMR services. Although we take no action at this time to implement a private carrier option on two-way channels, we note that such private carriers might, at some future date, provide a useful means for implementation of new technologies. Therefore, we terminate this aspect of this proceeding without prejudice to considering this option further at a later time.

One-Way Paging-Only Channels

9. Most private land mobile channels can be used for two-way operations. There are, however, a limited number of frequencies reserved for one-way paging-only purposes. These frequencies are part of the Special Emergency Radio Service, the Business Radio Service, and the 929-930 MHz band.

10. Paging-only channels generally have a greater capability to accommodate additional users. Paging occurs in short bursts and, thus, additional communications do not use significant air time. *See* Comments of NABER at 6-7; Comments of Message Center Beepers at 3-4. Furthermore, one-way channels can utilize more spectrum efficient technologies, such as batch processing digital paging, which are not available on two-way channels. *See* Comments of Celpage at 5-6. Thus, a single paging channel can accommodate over 10,000 subscribers. *See* Reply Comments of Celpage at 4-5. Similar technical factors recently led to our determination that paging-only channels in the Special Emergency Radio Service (SERS) could easily accommodate additional traffic. *See Memorandum Opinion and Order*, PR Docket No. 87-312, 5 FCC Rcd 3471 (1990). We reach the same conclusion with respect to paging-only channels in the Business Radio Service and Private Carrier Paging (PCP) channels in the 929-930 MHz band.

11. Under current rules, licensees on paging-only channels in the Business Radio Service may share their systems only with other Business eligibles, which generally excludes entities eligible in the Police, Fire, Local Government and other public safety radio services. The record of this proceeding includes comments from local agencies and their representatives who think that access to private systems could provide additional flexibility. *See* Comments of Bergen County Department of Public Safety at 2; Comments of Public Safety Communications Council at 2; Comments of AASHTO at 3. They say, for example, that this option is particularly useful for small agencies without adequate funding to build their own systems, especially in rural areas where there may be an existing Business Radio Service private carrier but not another local government agency with a system to share. *See* Comments of Los Angeles County at 3; Comments of ASNA at 7. Based on our consideration of these comments, we conclude that it would be in the public interest for public safety entities to be eligible as end-users of paging-only systems in the Business Radio Service and shall amend our Rules accordingly.

12. Next, we consider whether the Federal Government should be eligible to use private carrier paging services. Under current rules, the Federal Government cannot use private carrier systems either in the Business Radio Service or on the PCP channels in the 929-930 MHz band because the Federal Government is not eligible in the Business Radio Service or in any other service in Part 90. We have been approached a number of times to satisfy Federal Government requirements using private systems and, on occasion, have waived this eligibility requirement to allow private paging systems to serve the Federal Government. *See Request for Waiver of Pass Word, Inc.*, 5 FCC Rcd 1180 (Private Radio Bureau 1990). In one case, for example, we found that frequencies reserved for Federal Government systems are not suitable for certain law enforcement needs of the Drug Enforcement Administration. *Id.*

13. Moreover, established National Telecommunications and Information Administration (NTIA) policies provide that the Federal Government typically should not use Federal Government frequencies to provide telecommunications service to government agencies unless commercial services are either unavailable, are not suitable, or are significantly more expensive.[15] As a result, the Federal Government relies very heavily on the private sector for its telecommunications service.[16] In general, a Federal Government radio system would be acceptable only if it would be at least ten percent less expensive than a commercial alternative that provided essentially equivalent service.[17]

14. These long-standing policies were originally focused on the use of communications common carriers because communications private carriers did not exist at the time. As the private carrier industry developed starting in the late 1970's, use of these private systems typically was limited to what were the traditional private land mobile radio users at that time, which excluded Federal Government entities. As previously observed, however, in recent years we have have received a number of requests to waive our eligibility requirements to permit Federal Government users to avail themselves of mobile communication service from private carriers. In this regard, it is not always economical for governmental entities to operate their own paging systems. In rural areas and small cities,

for example, government offices may not be large enough to warrant the expense to taxpayers of constructing paging systems. These entities, moreover, may have specialized communications needs that the private radio services are uniquely able to provide. Licensees on paging-only channels in the Business Radio Service and on PCP channels in the 929-930 MHz band[18] are well situated to provide Federal Government users these communications alternatives.[19] We will, therefore, adopt our proposals to allow these licensees to serve the Federal Government.[20] This is consistent with NTIA policy and is a natural extension of the rapid growth and development of the private carrier industry and its ability to provide a wide array of mobile communication services at competitive prices.

15. We will not, however, adopt our proposal to expand private carrier paging service to individuals. Unlike the Federal Government, individuals do not generally have communications needs that cannot be satisfied within existing options. Although several private carrier paging companies filed comments supporting our proposal, they focus primarily on their desire and ability to serve additional customers rather than on the need among individuals for private carrier service.[21] Therefore, we find these comments to be an insufficient basis for adopting the proposal. Additionally, in the case of individuals, there is no history of waiver grants to form an independent basis for adopting the proposal. Accordingly, we determine that, at this time, individuals shall remain ineligible to use private carrier paging service.[22]

III. CONCLUSION

16. In summary, this proceeding amends our Rules as follows: (1) to permit private carrier paging licensees operating on paging-only channels in the Business Radio Services to provide radio communications service to all Part 90 eligibles and to the Federal Government; and (2) to allow Private Carrier Paging licensees operating in the 929-930 MHz band to serve the Federal Government. These amendments will extend the benefits of private radio communications service to a greater number of users by providing additional service options for eligibles in a manner responsive to present day demands and capabilities.

IV. FINAL REGULATORY FLEXIBILITY ANALYSIS

Reason for Action

17. We are expanding end user eligibility on private carrier paging systems to respond to the needs of governmental entities requiring additional communications options. Our decision is based on the ability of paging-only frequencies to handle additional traffic. We decline to introduce new private carrier options on two-way frequencies in recognition of current congestion on those frequencies and the need for long term spectrum management efforts.

Effect on Small Entities

18. This action will provide small governmental agencies an additional service option and will give small paging companies the opportunity to serve additional customers. Due to the short-burst nature of paging operations, providing these additional options on one-way paging channels will have no effect on small entities already using the channels. One commenter, NABER, specifically addressed our Initial Regulatory Flexibility Analysis, saying that extending eligibility on congested two-way channels could adversely affect small businesses. *See* Comments of NABER at 5. This concern is moot in view of our decision to amend only those rules pertaining to one-way channels. NABER agrees that one-way channels can accommodate additional traffic. *Id.* at 6.

Alternatives Considered

19. Aside from maintaining the status quo, there are no significant alternatives besides those considered in this *Report and Order*.

V. PAPERWORK REDUCTION ACT STATEMENT

20. The action taken herein has been analyzed with respect to the Paperwork Reduction Act of 1980 and found to contain no new or modified form, information collection and/or recordkeeping, labeling, disclosure, or record retention requirements and will not increase or decrease burden hours imposed on the public.

VI. ORDERING CLAUSES

21. Accordingly, IT IS ORDERED that, pursuant to Sections 4(i), 303(g), 303(r) and 331(a) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 303(g), 303(r) and 332(a), Part 90 of the Commission's Rules, 47 C.F.R. Part 90, IS AMENDED as set forth in Appendix A below, effective 30 days after Federal Register publication.

22. IT IS FURTHER ORDERED that this proceeding is TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX

Part 90 of Chapter 1 of Title 47 of the Code of Federal Regulations is amended as follows:

1. The authority citation for Part 90 continues to read as follows:

Authority: Sections 4, 303, 48 STAT., as amended, 1066, 1082, 47 U.S.C. 154, 303, unless otherwise noted.

2. 47 C.F.R. § 90.75 is amended by revising paragraph (c)(10) to read as follows:

§ 90.75 Business Radio Service

* * * * *

(c) * * *

(10) This frequency is assigned only for one-way paging communications to mobile receivers. Only A1D, A2D, A3E, F1D, F2D, F3E or G3E emissions may be authorized. Licensees may provide one-way paging commu-

nications on this frequency to persons eligible for licensing under Subparts B, C, D or E of this part and to representatives of Federal Government agencies.

* * * * *

3. 47 C.F.R. § 90.494 is amended by revising footnote 1 in the table in paragraph (a) to read as follows:

§ 90.494 One-way paging operations in the 929-930 MHz Band

(a) * * *

FOOTNOTE TO APPENDIX

[1] Above Line A this frequency is available only to eligibles in Pool 1. Frequencies listed in Pool 1 are available for shared use by all eligible Part 90 users except those eligible as private carrier paging (PCP) licensees. Frequencies listed in Pool 2 are available only for shared use by private carrier paging (PCP) licensees in providing one-way paging service to representatives of Federal Government agencies and to persons eligible for licensing under Subparts B, C, D or E of this part. Frequencies 929.7625 and 929.9875 are available for shared use in multi-area paging systems by private carrier paging (PCP) licensees. Frequencies 929.2625 and 929.4875 are available only for shared use in multi-area paging systems for all Part 90 users except private carrier paging (PCP) licensees.

* * * * *

FOOTNOTES

[1] Notice of Proposed Rule Making, PR Docket No. 89-45, 4 FCC Rcd 2589 (1989) (*Notice*).

[2] In the *Notice*, we proposed to extend the private carrier concept to only two of the five radio services that comprise the public safety category, these being the Highway Maintenance and Forestry-Conservation Radio Services. We tentatively proposed to continue our existing prohibition on licensing entrepreneurs in the Local Government, Police and Fire Radio Services, the remaining public safety services.

[3] *See, e.g.*, Comments of Associated Public-Safety Communications Officers (APCO) at 9-11; Comments of Montgomery County Telecommunications Section at 3-4; Comments of California Department of General Services at 5-6; Comments of Connecticut State Police at 3.

[4] *See* Comments of ASNA at 4-7.

[5] *See, e.g.*, Comments of Special Industrial Radio Service Association (SIRSA) at 11; Comments of Manufacturers Radio Frequency Advisory Committee (MRFAC) at 2; Comments of Association of American Railroads (AAR) at 3-9; Comments of Forest Industries Telecommunications (FIT) at 3,7.

[6] *See, e.g.*, Comments of SIRSA at 10; Comments of Telecom Plus Transmission Services (Telecom) at 3-4; Comments of American Petroleum Institute (API) at 5-6; Comments of Utilities Telecommunications Council (UTC) at 3-6; Comments of AAR at 2-3.

[7] *See, e.g.*, Comments of APCO at 21; Comments of Public Safety Communications Council at 2.

[8] *See, e.g.*, Comments of ASNA at 7; Comments of California Department of General Services at 1.

[9] *See, e.g.*, Comments of ASNA at 8; Comments of North Dakota Radio Communications Department at 1.

[10] *See, e.g.*, Reply Comments of SIRSA; Comments of FIT at 5; Comments of UTC at 8; Comments of National Association of Business and Educational Radio at 4-5.

[11] *See, e.g.*, Reply Comments of Celpage, Inc. at 4-5; Reply Comments of Metagram America, Inc., at 6; Comments of ASNA at 9.

[12] *See, e.g.*, Comments of City of Mesa, Arizona at 3-4; Comments of Minnesota Department of Transportation at 4; Comments of Telocator at 13-14; Comments of API at 17-18.

[13] *See* Second Report and Order, Docket No. 18262, 46 FCC 2d 752 (1974), *recon.*, Memorandum Opinion and Order, Docket No. 18262, 51 FCC 2d 945 (1975), *aff'd sub nom.* NARUC v. FCC, 525 F.2d 630 (D.C. Cir.), *cert. denied*, 425 U.S. 992 (1976). In 1982, Congress enacted legislation codifying the regulatory status of private carriers in the land mobile services. Communications Amendments Act of 1982, §§ 331(c)(1) & (2), 47 U.S.C §§ 332(c)(1) & (2).

[14] *See* Memorandum Opinion and Order, PR Docket No. 87-312, 5 FCC Rcd 3471 (1990).

[15] National Telecommunications and Information Administration, U.S. Department of Commerce, NTIA TELECOM 2000, p. 376 (1988).

[16] *Id.*

[17] *Id.* at 377.

[18] Cue Paging Corp. asks whether expanded eligibility on Part 90 private radio paging systems will apply to carriers offering private paging on broadcast subcarrier frequencies governed under Part 73. Comments of Cue Paging *passim*. In FM Subsidiary Communications Authorizations, 53 R.R. 2d 1519 (1983), the Commission expressly authorized paging services on FM subcarrier frequencies. Subcarrier paging operators can choose to offer paging services on either a private or a common carrier basis. Subcarrier paging operators that decide to provide private land mobile paging services are subject to Part 90 of the Commission's Rules, and are permitted to serve the broadest class of end users authorized to operate on systems licensed to Part 90 eligibles. As we permitted exclusively-licensed SMR operators to serve the Federal Government and individuals, so can subcarrier operators. *See* Report and Order, PR Docket No. 86-404, Subparts M and S, 3 FCC Rcd 1838 (1988), *aff'd* Memorandum Opinion and Order, PR Docket No. 86-404, 4 FCC Rcd 356 (1989). Service to individuals and the Federal Government on broadcast subcarrier frequencies does not raise the same frequency congestion concerns as service to these groups on shared private land mobile radio channels.

[19] We reject comments arguing that by extending end user eligibility to the Federal Government we would blur the distinction between private carriage and common carriage thereby putting the concept of private carriage in jeopardy. It is well settled that this Commission has broad discretion to modify eligibility on private systems without affecting the private status of land mobile systems. *See* Memorandum Opinion and Order, PR Docket No. 86-404, Subparts M and S, 4 FCC Rcd 356, 356-57 (1989); *see also* 47 U.S.C. § 332.

[20] We wish to clarify that in extending *end user* eligibility on paging systems we are not expanding eligibility to obtain one's own license. For example, although we are now allowing local governments to be customers on paging systems in the Business Radio Service, local governments still cannot be licensed to operate their own systems on Business Radio channels.

[21] The paging company that most closely addresses the needs of individuals, for example, argues that if permitted to serve individuals it could offer them access to regional paging networks, new technologies, and combined business/personal use of paging systems. *See* Comments of PageMart (ex parte) at 2-3. The commenter notes, however, that all of these options are currently available to individuals through common carrier systems. *Id.*

[22] Of course, individuals who need pagers for business purposes, as opposed to individuals who are simply members of the general public with no business requirements for pagers, are eligible in their own right under current rules, and our action today will not affect this policy. *Cf.* Comments of NABER at 8-9 (asking for clarification of this point).

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 78-72

CC Docket No. 80-286

In the Matter of

MTS and WATS
Market Structure

Amendment of Part 36
of the Commission's Rules and
Establishment of a Joint Board

MEMORANDUM OPINION AND ORDER ON RECONSIDERATION

Adopted: December 20, 1990; Released: January 30, 1991

By the Commission:

I. INTRODUCTION

1. The *Bifurcation Order* required, in most circumstances, that local exchange carriers ("LECs") implement a one cent per minute originating Carrier Common Line ("CCL") charge.[1] Four petitions have been filed seeking reconsideration of that Order. After careful evaluation of the record, we deny the petitions for reconsideration and reaffirm our rule adopting the one cent rate structure.

II. BACKGROUND

2. The Commission's initial access charge rules required recovery of the costs allocated to the CCL rate element through equal per minute originating and terminating charges.[2] In 1986, however, the Commission adopted temporary measures to reduce the incentive for uneconomic bypass by freezing the terminating CCL charge, and providing that cost reductions would be used solely to reduce the originating charge. [3] By rule, this structure was scheduled to expire on December 31, 1987.[4] In response to concerns expressed by the Federal-State Joint Board, the requirement that originating and terminating CCL rates be equalized was deferred until December 1, 1988.[5] The Commission subsequently deferred the implementation of equalized CCL rates through March 31, 1989, and requested comment on whether bifurcated rates should be continued, and if so, how such rates should be structured.[6]

3. Based on the record developed in response to that request for comments, the Commission adopted the *Bifurcation Order* requiring a one cent per minute originating CCL charge, with recovery of the remaining CCL revenue requirement through the charge for terminating traffic. The Commission also required the equalization of originating and terminating charges if use of a one cent originating CCL charge would result in a terminating charge of less than one cent.[7] These rule changes became effective April 1, 1989.

4. The decision to adopt a "one cent rate structure" was based on an analysis of the effects of both equalized and bifurcated rates. Observing that there are advantages and disadvantages inherent in both options, the Commission adopted "a balanced approach that captures many of the benefits of both bifurcation and equalization, while at the same time minimizing the disadvantages of each method."[8] In adopting this rate structure, the Commission considered a number of factors, including the incentives for bypass, the ability of high cost exchange areas to attract competition from additional interexchange carriers ("IXCs"), the pricing of interexchange services, rate and customer churn, traffic flows among regions, pressure for toll rate deaveraging, revenue recovery from services using switched access on only one end, billing accuracy, and implications for the tariff review process.[9]

III. POSITIONS OF THE PARTIES

A. Petitions for Reconsideration and Supporting Comments

5. Four petitions seek reconsideration of the *Bifurcation Order*.[10] ACTA requests that we require facility-based IXCs to reduce their charges to resellers by one cent for each minute of reseller traffic that the facility-based IXCs carry, and maintain a flexible schedule for the submission of additional comments. Call America requests elimination of the originating CCL charge or a reduction of that charge to one-half cent per minute. MidAmerican asks that we initiate an investigation of the economic effects of increasing the originating CCL rate from zero to one cent. US West asks us to adopt an originating CCL rate of zero.

6. The petitioners present a variety of arguments in support of their requests for reconsideration. Several petitioners contend that the Commission's request for comments was not sufficiently specific to develop an adequate record concerning the effect of a one cent rate structure.[11] For example, US West argues that because the Commission requested comments on equalized versus bifurcated CCL rates, none of the parties focused on a one cent originating CCL rate structure with the result that the record is devoid of studies or other evidence concerning the effect of a one cent originating charge.

7. The petitioners also challenge the Commission's analysis of the conflicting concerns considered in reaching the decision to implement a one cent originating CCL charge.[12] Several petitioners argue that interexchange resale carriers would be seriously harmed by a one cent rate structure, and that many of these carriers would be forced to leave the market, harming consumers and undermining interexchange competition.[13] A number of parties also argue that a zero originating rate has been effective in deterring bypass, and allege that implementation of the one cent rate structure will substantially increase originating end bypass.[14] They also contend that the record does not contain sufficient evidence concerning the potential for terminating end bypass to warrant a reduction in the terminating charge. Several parties also allege that a one cent originating charge will result in rate churn, adversely affecting the industry and ratepayers.[15] In particular, they argue that the IXCs will have to revise the rates for switched services, forcing customers to redesign their telecommunications systems to reflect the new rate relation-

ships. These parties also question the Commission's conclusion that a one cent originating charge would allow more accurate traffic projections and facilitate billing for certain services.[16]

8. Several petitioners also challenge the manner in which IXCs propose to flow the access charge changes through in the rates for services resellers use to terminate their interexchange traffic.[17] They allege that IXCs will gain "windfall" profits since LEC collection of the originating charge will not be accompanied by equivalent reductions in IXC charges to resellers for services using terminating access.

9. Seven parties filed comments supporting reconsideration.[18] Many of these parties urge the Commission to accord the LECs a degree of flexibility in setting the originating CCL charge.[19] In particular, they suggest that we establish a range within which the LECs could set the originating charge, or propose that the Commission allow the LECs to choose an originating charge of zero, one-half cent, or one cent.[20] NTCA states that its members could accept a one-half cent originating CCL charge as a compromise, but emphasized its opposition to continuation of a zero originating CCL charge. OPASTCO states that it does not support the proposals to retain a zero originating rate, but would support a one half-cent originating CCL charge.

10. The parties supporting reconsideration also reiterate many of the basic concerns raised by the petitioners. Several parties argue that there is inadequate record support for the one cent rate structure.[21] They contend that an increase in the originating CCL rate will substantially increase originating end bypass without adequate offsetting benefits in terms of reduced terminating end bypass.[22] In addition, they argue that a one cent originating CCL charge will adversely affect services developed in reliance on the current bifurcated rate structure and may cause customers to migrate to different service offerings. A number of these parties also join the petitioners in arguing that the one cent rate structure will not enhance the accuracy of traffic measurement.[23]

B. Opposing Comments

11. Four parties oppose reconsideration.[24] Several of these parties contend that the Commission provided adequate notice,[25] and that the reseller petitions are procedurally improper since those petitioners did not participate in this proceeding prior to filing reconsideration petitions.[26] In particular, they contend that the petitioners had adequate time to perform, and present, quantitative analyses prior to the Commission decision.[27]

12. Opponents of reconsideration also argue that no new information has been presented that warrants reconsideration.[28] These parties contend that recovering the entire CCL revenue requirement from the terminating CCL charge discriminates against services that use only terminating end CCL service, and state that the one cent originating rate structure ameliorates some of the discriminatory effects that were inherent in a zero CCL originating rate.[29] These parties also argue that reseller claims of harm should be discounted since resellers recently paid originating CCL rates that were substantially higher than one cent.[30] These parties add that the *Bifurcation Decision* was based upon an adequate record, and that it demonstrates a careful balancing of conflicting public policy considerations.

IV. DISCUSSION

A. Notice

13. Several petitioners argue that the Commission did not provide sufficient notice to apprise interested parties that a specific originating CCL rate might be adopted.[31] That contention is unfounded. An agency is not required to issue further notices for comment as long as the "final rules represent a 'logical outgrowth' of the proposals."[32] While the Commission tentatively concluded that equalized charges are superior to bifurcated rates, it specifically asked interested parties to address the issue of whether bifurcated rates should be continued, as well as the amount of any originating charge in a bifurcated rate structure:[33]

> [t]o the extent parties contend that we should continue bifurcated rates beyond March 31, 1989, they should address the structure of the bifurcation scheme, *i.e.*, whether we should continue with a frozen terminating charge or move to a frozen originating charge . . . *and at what level.*[34]

In light of this language, we do not believe that the request for comments can reasonably be interpreted, as some petitioners state they did, to indicate that the Commission would focus only on the broad policy question of a bifurcated versus an equalized rate structure and not on the establishment of a specific originating CCL rate. Nor do we find persuasive the contention that this language failed to afford interested parties a full opportunity to address the merits of an originating CCL rate greater than zero but less than the level resulting from full equalization.

Adoption of such a specific level for the originating charge is a "logical outgrowth" of the request for comments on this issue. Indeed, USTA itself proposed a specific level of more than zero (one half cent) for the originating charge, absent increased pricing flexibility.[35]

B. Standing

14. ARINC argues that the resale petitioners should not be accorded standing to seek reconsideration of the *Bifurcation Order* since they did not participate in the earlier stages of this proceeding.[36] Ad Hoc also argues that these petitioners' "tactics" threaten the integrity of the Commission's processes. Section 405 of the Communications Act, however, authorizes "any . . . person aggrieved or whose interests are adversely affected" to petition for reconsideration of Commission action.[37] Thus, these petitioners have standing under the Act to seek reconsideration of the Commission's decision to implement a one cent originating CCL charge.

15. Despite this, the Commission's rules provide that requests for reconsideration relying on facts that have not previously been presented to the Commission will be granted only in limited circumstances.[38] It appears that some of the information presented in support of the requests for reconsideration could have been, but was not, presented to the Commission previously.[39] We believe, however, that public interest factors warrant consideration of this information in this instance.[40]

C. Record Evidence

16. US West and several other parties argue that the existing record is inadequate to support adoption of a one cent originating charge because there were no studies or other evidence concerning the effect of a one cent charge on bypass or on telecommunications providers and their customers. Accordingly, they argue that there is no record evidence to support the Commission's conclusion that a one cent originating charge is appropriate.

17. In notice and comment Rule Making proceedings such as this, conducted pursuant to Section 553 of the APA,[41] the Commission is required to make a reasoned decision.[42] Thus, if the commenting parties file studies concerning the effect of proposed Commission actions, we must consider these filings in our decision making process.[43] However, the Commission is not required to conduct independent econometric or other studies concerning the effect of proposed decisions. Instead, in a proceeding such as this, we are permitted to make a decision based on the arguments and information contained in the comments or otherwise before us as well as our exercise of agency expertise in evaluating these filings.[44] We believe that there is ample support for the decision.

D. Flexibility

18. Many of the LECs filing in support of the petitions for reconsideration argue that the Commission should afford them flexibility in setting the originating CCL charge, allowing the LECs complete, or at least partial, discretion to set the originating and terminating charges at levels they deem appropriate. The Commission's request for comments on whether to continue bifurcation of the CCL rate structure specifically stated that the Commission did not intend to consider broader questions concerning CCL rate flexibility.[45] Thus, the Commission correctly concluded that it would be inappropriate to address the broad question of CCL rate flexibility in the *Bifurcation Order*.

19. One of these parties, however, argues that allowing the LECs to choose between alternative originating CCL rate levels involves such a limited degree of flexibility that it falls within the scope of the notice. We do not share this view. Nor do we believe that limited flexibility should be adopted in the present proceeding even if encompassed within the request for comments. Among other things, the considerations discussed below lead us to conclude that a zero originating charge is no longer desirable even on an optional basis as advocated by the parties.[46] We also note that, in light of the Commission's statement that it would not address rate flexibility issues, the current record does not fully explore the possible collateral consequences of multiple rate structures.

E. Balancing of Competing Considerations

20. The petitioners also challenge the Commission's analysis of the various competing considerations underlying adoption of this rate structure, arguing that the Commission failed to recognize the adverse effect of this rate structure on interexchange resale carriers as well as the implications of this rate structure for bypass. We recognize that some resale carriers will experience increased access costs due to the institution of a one cent originating CCL charge, although other interexchange carriers will apparently experience decreases.[47] The petitioners allege that this will reduce carrier profitability and force resellers to leave the market. To the extent that this harm is due to reseller decisions to take advantage of market opportunities created by the zero originating charge, we emphasize that the Commission clearly stated from the beginning that use of the particular bifurcated CCL rate structure was a temporary measure.[48] Thus, we conclude that any harm to particular resellers due to their reliance on continuation of this rate structure should be accorded only limited weight. We also agree with Ad Hoc that the resellers' claims of extreme harm are difficult to credit in light of the fact that an originating CCL charge of 1.55 cents was in effect less than two years before the April 1, 1989 date for implementation of the present rate structure. In addition, we note that petitioners' claims that a one cent originating CCL charge would drive many resellers from the market, undermining competition and harming consumers have proved unfounded.[49]

21. As previously indicated, the petitioners and a number of parties filing in support of reconsideration argue that the Commission failed to recognize that a one cent originating CCL charge would substantially increase originating end bypass. We recognize that originating end bypass presently appears more feasible than terminating end bypass,[50] and that an increase in originating end charges will increase incentives for originating end bypass to some extent. We do not view this fact as dispositive, however. The pressure for bypass has been significantly reduced by the implementation of subscriber line charges which was completed on April 1, 1989. This flat rate recovery of non-traffic sensitive local loop costs allows reduced charges for interstate switched access services, making them more competitive with bypass alternatives.[51] Thus, we conclude that a one cent originating CCL charge does not create undue pressure for originating end bypass in conjunction with implementation of subscriber line charges. Furthermore, we do not believe that there has been a major upsurge in originating-end bypass due to the one cent originating charge as petitioners predicted.

22. US West and several of the other petitioners also argue that implementation of a one cent originating CCL charge will generate administrative burdens and customer churn. As certain parties anticipated, the IXCs revised their rates for switched services in light of the one cent originating charge with the result that large customers undoubtedly reassessed their communications networks to ensure that they were obtaining the best value for their communications expenditures. This is true, however, in the case of any change in access rates. We also note that these changes due to the one cent originating CCL charge have already taken place and that grant of the relief the parties request would only result in further changes in access rates and additional customer churn.

23. US West also questions the significance of certain administrative benefits cited by the Commission in support of a one cent originating charge. The Commission did note that 700, 800 and 900 services terminating on common lines are more difficult to bill properly with bifurcated charges, but recognized that the credit mechanisms developed to ensure proper billing for these services are working satisfactorily and are expected to improve. The Commission also concluded that a one cent originating charge would facilitate the tariff review process by assuring a more accurate count of originating minutes due to the billings associated with them. At the same time, however, the Commission recognized that the

problems associated with the need to estimate terminating MOUs based on originating traffic was diminishing rapidly with the implementation of equal access since terminating switched access traffic can be measured in end offices that have been converted to equal access. Thus, it does not appear that the Commission accorded undue weight to these factors.

24. In opposing the requests for reconsideration, ARINC, Ad Hoc, and ADAPSO argue that customers using services with switched access on one end have been paying a disproportionate share of switched access costs under the previous system of bifurcated CCL charges. With a zero originating CCL charge, services that use special access on one end and switched access on the other end, such as WATS and 800, pay approximately twice as much in CCL charges per minute of switched access traffic as services using switched access on both ends.[52]

25. Based on a careful evaluation of the contentions raised by the parties in this proceeding, we reaffirm the Commission's decision to implement a one cent originating CCL charge effective April 1, 1989. The dire predictions by petitioners concerning the effect of this rate structure on resale carriers and bypass have not proven accurate. To the contrary, the one cent originating charge does not appear to have undermined the vitality of the resale segment of the interexchange industry, and we do not believe that there has been a major upsurge in originating-end bypass due to the one cent charge. Nor are we persuaded to modify the Commission's decision based on the contentions concerning rate and customer churn or the limited benefits of an originating charge for increased accuracy in the tariff review process.

F. Flow Through of CCL Rate Changes

26. Several petitioners argue that the IXCs should be required to flow the reductions in the terminating CCL charge through to resale carriers or give resellers a one cent per minute credit for use of the facility-based carriers' services. ARINC also supports Commission action requiring full flow through of the reduction in terminating CCL rates, although opposing reconsideration of the one cent originating charge. Issues concerning the manner in which the changes in the CCL rate structure have been reflected in IXC rates are beyond the scope of this proceeding concerning the CCL rate structure. Such suggestions cannot properly be considered in the reconsideration of a Rule Making decision that was designed to establish or modify rules for the computation of LEC charges.[53]

V. CONCLUSION

27. For the reasons discussed above, we affirm the Commission's decision to implement a one cent originating CCL charge with the remainder of the CCL revenue requirement recovered through the terminating charge, except when this would result in a terminating charge of less than one cent. Based on the preceding analysis, and the other factors discussed in the *Bifurcation Order*, we believe that this decision represents a reasoned consideration of the advantages and disadvantages of alternative CCL structures.

VI. ORDERING CLAUSE

28. ACCORDINGLY IT IS ORDERED THAT the petitions for reconsideration of the *Bifurcation Order* ARE DENIED, and the petitions for stay ARE DISMISSED as moot.

FEDERAL COMMUNICATIONS COMMISSION

Donna Searcy
Secretary

FOOTNOTES

[1] MTS and WATS Market Structure and Amendment of Part 67 of the Commission's Rules, 4 FCC Rcd 5048 (1988)(" *Bifurcation Order* "). The phrases, "bifurcation" and "bifurcated rates," describe the use of originating and terminating CCL charges that are not equal.

[2] 47 C.F.R. § 69.105 (1983). The CCL rate element serves primarily to recover the portion of local loop costs assigned to the interstate jurisdiction through the separations process and not recovered through the subscriber line charge. It also covers certain other costs, however.

[3] *See* WATS Related and Other Amendments of Part 69 of the Commission's Rules, CC Docket No. 86-1, FCC 86-115, 51 Fed. Reg. 10839 (Mar. 31, 1986) ("*WATS Order* ").

[4] *Id.* at 51 Fed. Reg. 10841.

[5] MTS and WATS Market Structure and Amendment of Part 67 of the Commission's Rules, 2 FCC Rcd 2953 at paras. 13, 27, Appendix A at para. 12 (1987) ("*NTS Recovery Order*").

[6] MTS and WATS Market Structure and Amendment of Part 67 of the Commission's Rules, 3 FCC Rcd 4543, at 4549-50, 4553, 4560 (1988)("*NTS Recovery Reconsideration Order*"), *aff'd Public Service Commission of the District of Columbia* v. *FCC*, D.C. Cir. No. 88-1661 (D.C. Cir. Mar. 14, 1990) In this Order, the Commission also affirmed its prior decisions concerning subscriber line charges, CCL pooling requirements, high cost assistance and lifeline benefits with several minor modifications.

[7] *Bifurcation Order*, 4 FCC Rcd 5048 at 5053 (1988).

[8] *Id.* at 5051 (1988).

[9] *Id.* at 5051-53.

[10] Petitions for reconsideration were filed by: the Alternative Carrier Telecommunications Association ("ACTA"); the Mountain States Telephone and Telegraph Company, Northwestern Bell Telephone Company, and Pacific Northwest Bell Telephone Company (collectively, "US West"); Call-America, Midco Communications, Inc., and Telephone Associates and Touch America, Inc. (collectively, "Call-America"); and MidAmerican Long Distance Company ("MidAmerican").

ACTA, Call-America, and MidAmerican also filed Motions for Stay of the Commission's decision to implement a one cent originating CCL charge. We dismiss those motions as moot since we are reaffirming the Commission's decision in this Order. Accordingly, we do not discuss the arguments raised in support of the requests for stay.

[11] *See, e.g.*, US West Petition at 7.

[12] *See, e.g.*, Call-America Petition at 2-10.

[13] *See, e.g.*, US West Petition at 9, Call-America Petition at 2-10.

[14] *See, e.g.*, Call-America Petition at 2-3.

[15] *See, e.g.*, Mid-American Petition at 4-5.

[16] *See, e.g.*, Call-America Petition at 4-5.

[17] *See, e.g.*, ACTA Petition at 4.

[18] These parties were: the GTE Telephone Operating Companies ("GTE"), New England Telephone and Telegraph Company and New York Telephone Company ("NYNEX"), United States Telephone Association ("USTA"), National Telephone Cooperative Association ("NTCA"), Organization for the Protection and Advancement of Small Telephone Companies ("OPASTCO"), American Telephone and Telegraph Company ("AT&T") and U.S. Sprint Communications Company Limited Partnership ("Sprint").

[19] *See, e.g.*, USTA Comments at 2.

[20] *See, e.g.*, *id.*; GTE Comments at 4-7.

[21] *See, e.g.*, GTE Comments at 1-2.

[22] *See, e.g.*, *id.* at 3.

[23] AT&T also filed an *ex parte* letter supporting a one-half cent originating CCL charge on the ground that this would reduce the disparity between access costs as incurred by AT&T and the manner in which changes in access costs are allocated among services under the price cap rules. Letter from Douglas Dunn, Vice President, Federal Regulation Dept., AT&T, to Gerald Brock, Chief, Common Carrier Bureau, FCC, dated May 11, 1989. *See* para. 26 *supra*.

[24] Those parties were: the Ad Hoc Telecommunications Users Committee ("Ad Hoc"), Aeronautical Radio, Inc. ("ARINC"), Contel Corporation ("Contel"), and ADAPSO.

[25] *See, e.g.*, Contel Comments at 6-8.

[26] *See, e.g.*, ARINC Comments at 1-2.

[27] *See, e.g.*, *id.*

[28] *See, e.g.*, *id.*

[29] *See, e.g.*, *id.* at 8-11.

[30] *See, e.g.*, Ad Hoc Comments at 10.

[31] *See, e.g.*, ACTA Petition at 1, n.1.

[32] Action Alliance of Senior Citizens of Philadelphia v. Bowen, 846 F.2d 1449 at 1455 (D.C. Cir. 1988), *quoting* Small Refiner Phase-Down Task Force v. EPA, 705 F.2d 506 at 547 (D.C. Cir. 1983). *See also* Central Lincoln Peoples' Utility District v. Johnson, 735 F. 2d 1101 at 1118 (9th Cir. 1984)(a final rule must be sufficiently related to proposal); American Transfer & Storage Co. v. ICC, 719 F.2d 1283 at 1303 (5th Cir. 1984)("The notice need not specifically identify 'every precise proposal which [the agency] may ultimately adopt as a rule.'").

[33] *NTS Recovery Reconsideration Order*, 3 FCC Rcd 4543 at 4550 (1988).

[34] *Id.* at 4560 n.96 (emphasis added).

[35] USTA Comments at 4-5.

[36] ARINC Comments at 2 n.2.

[37] 47 U.S.C. § 405.

[38] Section 1.429 (b) of the Commission's Rules, 47 C.F.R. § 1.429 (b).

[39] The arguments concerning the effect of a one cent originating CCL charge on interexchange resale carriers, for example, appear to fall into this category.

[40] *See* Section 1.429 (b)(3) of the Commission's Rules, 47 C.F.R. § 1.429 (b)(3).

[41] This proceeding involves Rule Making rather than adjudication since it constitutes "an agency statement of general . . . applicability and future effect designed to implement, interpret, or prescribe law or policy." 5 U.S.C. § 551 (4). Rule Making proceedings are conducted pursuant to the notice and comment procedures of Section 553 of the APA, except when "required by statute to be made on the record after opportunity for an agency hearing" in which case Sections 556 and 557 of the APA apply. 5 U.S.C. § 553 (c). Sections 201 and 205 of the Communications Act provide, respectively, for an "opportunity for hearing" and a "full opportunity for hearing" -- language that does not trigger the applicability of Sections 556 and 557 of the APA. United States v. Florida East Coast Railway Co., 410 U.S. 224 (1972).

[42] U.S. West appears to suggest that the Commission must support its decision with "substantial evidence." While it is up to a reviewing court, not us, to apply the appropriate standard of review, we note that in informal notice and comment Rule Making proceedings such as this, which are subject to Section 553 of the APA, reviewing courts are to set aside agency actions that are "arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law." 5 U.S.C. § 706 (2)(A). In the case of those other proceedings that are subject to Sections 556 and 557 of the APA "or otherwise reviewed on the record of an agency hearing provided by statute," the courts are also required to set aside agency actions that are "unsupported by substantial evidence." 5 U.S.C. § 706 (2)(E).

[43] As previously discussed, affected parties had ample notice of the range of options under consideration in this proceeding, and could have filed studies concerning the effect of re-instituting equalized rates -- an approach that involves more cost recovery through originating charges than the one cent originating charge eventually adopted by the Commission.

[44] American Telephone and Telegraph Co. v. FCC, 572 F.2d 17 at 24 (2d Cir. 1978). *See also* FCC v. WNCN Listeners Guild, 450 U.S. 582 at 594-95 (1981); FCC v. National Citizens Committee for Broadcasting, 436 U.S. 775 at 803-05, 814 (1978).

[45] *NTS Recovery Reconsideration Order*, 3 FCC Rcd at 4560 n.96.

[46] This is true regardless of whether LEC pricing flexibility would create additional pressure for toll rate deaveraging.

[47] The data filed by US West indicate that the number of its carrier-customers experiencing decreases in their access costs with a one cent originating CCL charge greatly exceeds the number of carrier-customers experiencing access cost increases. US West Errata to Petition for Reconsideration, dated March 13, 1989.

[48] *WATS Order* FCC-86-115 at paras. 53-55, 51 Fed. Reg. 10840-41 (Mar. 31, 1986); *NTS Recovery Order*, 2 FCC Rcd 2953 at 2964-65 (1987); *NTS Recovery Reconsideration Order*, 3 FCC Rcd 4543 at 4549-50, 4555-56 (1988).

[49] In fact it is clear that there has been no significant decline in the number of carriers providing interstate services since implementation of the one-cent originating charge on April 1, 1989. Based on data supplied by the BOCs, the Common Carrier Bureau estimated that there were 519 IXCs as of March 1989, with 274 of these carriers purchasing equal access. The Bureau estimated that, as of December 1989, there were 519 IXCs, 318 of which used equal access. "Summary of Long Distance Carriers," Industry Analysis Division, FCC, June 5, 1990, at p.6 Table 3. The Bureau implemented certain data corrections for the first time in its estimate of the number of IXCs operating in March 1990. It eliminated 37 firms reported by the BOCs as purchasers of interstate access based on the conclusion that they are purchasing access for their own internal corporate communications. It also eliminated certain other firms that the BOCs continued to list as purchasing access even though they had disappeared through mergers. After making these corrections, the Bureau estimated that there were 466 long distance telephone carriers in March 1990 with 289 of them purchasing equal access. *Id.* Thus it appears that the change in the number of interstate carriers between December 1989 and March 1990 resulted from these

data corrections rather than market exit by a significant number of long distance carriers. *See id.* at 3. The Bureau's most recent estimate is that there were 462 long distance carriers purchasing equal access as of September 1990, with 304 of them identified as purchasing equal access. Summary of Long Distance Carriers, Industry Analysis Division, FCC, December 17, 1990, at pp. 5-6, Tables 1 & 2.

[50] *See Bifurcation Order*, 4 FCC Rcd 5048 at 5052.

[51] Approximately 27 percent of local loop costs (*i.e.*, the cost of connecting the subscriber to the local telephone company central office) are presently assigned to the interstate jurisdiction. The initial access charges recovered these costs solely through charges paid by the interexchange carriers that were indirectly paid by consumers through interstate toll rates that were usually based on usage. With the implementation of subscriber line charges, end users now pay a portion of these costs directly through flat monthly charges. This has allowed major reductions in interstate toll charges.

[52] This occurs because, with a zero originating charge, the entire CCL revenue requirement is recovered through "terminating" charges. Customers that use switched access on one end pay the full terminating CCL charge for one minute of switched access usage. Section 69.105 of the Commission's Rules, 47 C.F.R. § 69.105. Customers that use switched access on both ends receive *two* minutes of switched access usage for the same charge -- the originating minute, for which they are not charged, and the terminating minute.

[53] In particular, questions concerning any differences between the manner in which access charges are billed to the IXCs and the way in which the *Price Caps Order*, 4 FCC Rcd 2873 at 3325-26 (1989), adjusts AT&T's price caps for access charge changes are properly considered in the context of petitions for reconsideration in that proceeding.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-606

In re Applications of

RAYMOND J. AND JEAN-MARIE STRONG	File No. BPH-871223MQ
Robert C. Byrd, Milton J. Rodgers & Harold W. Byrd, A General Partnership d/b/a BARTLETT MEDIA	File No. BPH-871224MC
RICHARD P. BOTT	File No. BPH-871224ME
BELZ BROADCASTING CO.	File No. BPH-871223MI

For Construction Permit for a
New FM Station on Channel 225A
in Bartlett, Tennessee

Appearances

James J. Freeman, Michael D. Smith on behalf of Raymond J. and Jean-Marie Strong; *Marvin Rosenberg, Vincent J. Curtis, Jr., Frank R. Jazzo, David N. Roberts* on behalf of Robert C. Byrd, Milton J. Rodgers & Harold W. Byrd, A General Partnership d/b/a Bartlett Media; *Harry C. Martin, Cheryl A. Kenny* on behalf of Richard P. Bott; and *Barry D. Wood, Merilyn M. Strailman, Ronald D. Maines* on behalf of Belz Broadcasting Company.

INITIAL DECISION OF ADMINSTRATIVE LAW JUDGE EDWARD J. KUHLMANN

Issued: January 18, 1991; Released: January 31, 1991

1. The four applications in the caption and one other, now dismissed, for a commercial FM facility at Bartlett, Tennessee were designated for hearing on December 12, 1989. *Hearing Designation Order*, 5 FCC Rcd 339 (1990). The following issues will be decided in this decision:

> 1. (a) To determine whether Bartlett Media had reasonable assurance of sufficient funds to build and operate the proposed Bartlett FM facility when it certified that it was financially qualified;
>
> (b) To determine whether Bartlett Media engaged in misrepresentation or exhibited a lack of candor about its financial qualifications.
>
> (c) To determine in light of evidence adduced pursuant to the foregoing issues whether Bartlett Media is qualified to be a Commission licensee.
>
> 2. To determine which of the proposals would, on a comparative basis, best serve the public interest.
>
> 3. To determine, in light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

2. A prehearing conference was held on March 20, 1990 and sessions to cross-examine the witnesses presenting written testimony were held on July 9-16, 1990. The record was closed on July 16, 1990. *Memorandum Opinion and Order*, FCC 90M-211, released July 18, 1990.

FINDINGS OF FACT

Issue 1: Bartlett Media's Financial Qualifications

3. Bartlett Media is a general partnership comprised of three general partners, Robert C. Byrd with 40% equity, Milton J. Rodgers with 20% equity, and Harold W. Byrd with 40% equity. Bartlett Media Exh. 1. The Byrds and Mr. Rodgers entered into a written partnership agreement on December 14, 1987. *Id.*

4. Robert Byrd was responsible for certifying that Bartlett Media had sufficient committed funds or net liquid assets to be considered financially qualified. Prior to responding to the financial certification question, Robert Byrd reviewed correspondence from Frank Jazzo, one of Bartlett Media's communications attorneys, which discussed the requirements of any letter from a bank. Bartlett Media Exh. 6, at 2.

5. Robert Byrd is chairman of the board of the Bank of Bartlett (the Bank). Together, Robert and his brother, Harold Byrd, own approximately 18% of the stock of the Bank, through their ownership of West Tennessee Bancshares, Inc. (WTB), a one bank holding company which was formed to acquire the Bank. WTB owns 100% of the Bank's stock. Bartlett Media Exh. 2, at 5. The board of directors of the Bank is comprised of Robert Byrd, four of his brothers and four close friends. The five Byrd brothers and the four close friends comprise 60% of the ownership of WTB and total control of the Bank. *Id.*

6. Robert Byrd approached Bruce Smith, who was then and is now president, chief executive officer (CEO), and a director of the Bank, about obtaining a reasonable assurance letter from the Bank. Smith was advised that Robert and Harold Byrd and Milton Rodgers were putting together an application for a radio station in Bartlett and needed a "letter or evidence of a line of credit" in connection with the preparation of that application. Bartlett Media Exh. 5, at 2; Tr. 787-88. Smith believed the letter did not need to be a binding commitment from the Bank, but had to provide the partners with reasonable assurance that funding would be available from the Bank. Bartlett Media Exh. 5, at 2.

7. Smith testified he knew the three were forming a partnership and therefore could have addressed a loan letter to the partnership, but did not do so because he did not have the partnership agreement or the partnership's name. Tr. 802. He noted that had a partnership actually existed, it would have been natural to address it in the

letter. Tr. 803. The Bartlett Media partnership agreement was executed on December 14, 1987. Bartlett Media Exh. 1, at 1.

8. Smith testified that in making a loan to a partnership, the bank will look at who is in the partnership and who is really "calling the shots." Tr. 804. He said that the partners told him that Milton Rodgers would run the operation. Harold Byrd would be involved in business development and sales and "Bobby would be, basically, the chairman of the board, as he is with the bank." Tr. 804-05. It is still Smith's understanding that those are the positions Messrs. Byrd and Rodgers will hold at the station. Tr. 806.

9. Smith issued a letter dated December 14, 1987 to "Robert C. Byrd, Harold W. Byrd and Milton J. Rodgers." Bartlett Media Exh. 5, at 5. The letter's heading is "Letter of Intent for financing of FM Radio Station equipment and furnishings." The text of the letter is as follows:

> Subject to appropriate documentation and verifications of a valid construction permit, the Bank of Bartlett will be interested in financing up to $200,000 for an FM radio Station for the Bartlett area.
>
> The Bank would expect an amortization of ten years at a floating rate of 1% over prime with the equipment and furnishings serving as collateral for the loan.

Bartlett Media Exh. 5, at 5; Tr. 460.

10. Smith said it was not his intent to limit the loan to the purpose in the subject heading, but said the loan would be used to acquire equipment and furnishings, as well as to provide additional working capital for a period of three to six months. Bartlett Media Exh. 5, at 3. The words "subject to appropriate documentation and verifications of a valid construction permit" meant that the partners would be required to provide the Bank information such as building permits, FCC permits and contracts with contractors, to demonstrate that the station could and would be constructed. Smith said there was nothing else required personally from any of the partners concerning their financial ability. *Id.*

11. Smith stated, in his June 7, 1990 declaration attached to Bartlett Media's opposition, that "[n]o letter was necessary as an accommodation, because Robert Byrd, as Chairman of the Board, could have himself written such a letter." A copy of the December 14, 1987 letter is, and has been since it was issued, in Robert Byrd's credit file at the bank, to document that the bank could, if Robert Byrd and his partners were to obtain the permit, make the requested loan. Bartlett Media Exh. 5, at 4.

12. Smith maintains that at the time the letter was issued, the Bank had all of the financial information it needed concerning the borrowers. The Bank had personal financial statements of Robert and Harold Byrd for every year since 1980, although at hearing he noted he could not recall if he had reviewed them. *Id.*, at 2; Tr. 807-08. Smith did not recall whether, at the time of his declaration, he saw a personal financial statement for Milton Rodgers. Bartlett Media Exh. 5, at 2. At hearing, Smith said the Bank had a 1986 statement on file for Rodgers but he probably did not review it before executing the December 14, 1987 letter. Tr. 794, 808.

13. Smith testified he was aware of banking regulations limiting loans to insiders in December 1987. Tr. 797. He said when Robert Byrd asked him for a letter he did not ask if the deal was "legal," but whether it was bankable. Tr. 801. With respect to the December 1987 letter, Smith said he planned to make three individual loans and write three individual checks, in the percentage of each partner's equity interest. Tr. 808-09. Smith knew there was a need to limit the liability of Robert Byrd. *Id.*

14. Smith now believes and believed then that the loan could be made to Bartlett Media as a partnership. Tr. 810-11. He testified that all of the loan letters provided to Bartlett Media, including the December 1987 letter, were intended to be secured by partnership assets and the funds were to be used in the partnership's business. Tr. 823.

15. When Robert Byrd received the December 14, 1987 bank letter he sent it to Mr. Jazzo asking that Jazzo let him know if any other item or information were needed. Mr. Byrd did not receive any indication from Mr. Jazzo that anything further was necessary, nor did Jazzo suggest any changes to the bank letter. Bartlett Media Exh. 6, at 2. In his June 7, 1990 declaration attached to Bartlett Media's opposition, Robert Byrd stated that there was "no doubt in his mind" that he could and can obtain a loan from the Bank of Bartlett "to cover all funds needed by Bartlett Media," noting he is chairman of the board of the Bank, part owner of the Bank, that five of the nine members of the board are members of his immediate family (four brothers and him) and that "[m]embers of the Byrd family and close friends control a majority of the ownership of the Bank." Bartlett Media Exh. 6, at 3. Members of the board include Robert Byrd, Bruce Smith, Dennis Campbell, Gary Blume, James Byrd, John Byrd, Dan Byrd, Ervin Robinson and Harold Byrd. Bartlett Media Exh. 5, at 4. Robert Byrd noted later in his June 7 declaration that "together with my family and close friends, we control the Bank." Bartlett Media Exh. 6, at 5.

16. At his deposition on May 22, 1990, Robert Byrd testified, when asked whether or not members of the board of directors of the Bank were aware of the December 14, 1987 letter, "if he had read the minutes of the Loan Committee meeting, a director would be aware of the proposed loan." Bartlett Media Exh. 6 at 3. But in his June 7, 1990 declaration, Byrd claimed that upon returning to his office he was reminded that the subject must have been raised at a board of directors meeting, rather than a loan committee meeting, since the board functions as the loan committee for all extensions of credit to directors and executive officers. Robert Byrd then claimed he specifically recalled raising the matter at a directors meeting, probably the one held December 10, 1987, but he could find no reference to that matter in the minutes of that meeting. Byrd said his remarks were not formally recorded in the minutes because an "absolute binding commitment to lend Bartlett Media and/or Harold, Milton and I the funds was not made at that meeting." He said the proposed loan "to Bartlett Media" was raised during the time set aside at the close of the meeting for consideration of loan requests from Bank directors. Bartlett Media Exh. 6, at 3. Moreover, in its opposition pleading filed June 8, 1990, Bartlett Media made several references to the letter being to "Bartlett Media," rather than to individuals. For example, at page 12 of its opposition it noted that the Bank provided the letter to "Bartlett Media." Belz Exh. 7, at 12. It also represented in that pleading that on June 6, 1990 the board of directors had

unanimously agreed to extend a loan "to Bartlett Media" and that the Bank would have made a similar commitment in December 1987 if one had been requested. *Id.*, at 3-4, 14. The applicant even represented that Robert Byrd had the authority himself "to issue a letter to Bartlett Media." *Id.*, at 4, 11. And on page 13 of the opposition, Bartlett Media noted that "Bartlett Media could obtain any necessary financing from the Bank . . . ." *Id.*, at 13. Nowhere in that opposition pleading did Bartlett Media or Robert Byrd contend that the December 1987 bank loan would be to individuals, rather than to the partnership.

17. On June 6, 1990, after Belz filed its petition to enlarge issues questioning whether the December 14, 1987 letter was an accommodation or otherwise insufficient, the board of directors of the Bank, which includes all of the same persons as the 1987 board, voted unanimously to approve a loan to the partnership. Specifically, a letter dated June 6. 1990 from Bruce Smith and addressed to "Robert C. Byrd, Milton Rodgers, Harold Byrd, a General Partnership d/b/a Bartlett Media," extends a loan commitment in the amount of $500,000 for the equipment, construction and initial operating costs of the station. The loan commitment letter -- Smith described the letter as a binding commitment -- sets forth the amount of the loan, the interest rate, the term, the collateral and the insurance required. Bartlett Media Exh. 5, at 4, 6; Tr. 508, 799. Smith stated in his June 7, 1990 declaration that "[t]he Bank could and would have issued a similar letter and/or taken similar action in December 1987 had such action been requested." Bartlett Media Exh. 5, at 4. He noted at hearing that in early June 1990 the Bank knew there was a partnership and that was the way the loan was requested. Tr. 803. Each partner would be liable for the full amount of the $500,000, regardless of his equity percentage in the partnership, according to Smith. Tr. 805-06, 824.

18. In a declaration dated June 15, 1990, responding to Belz's supplement to petition to enlarge issues, Smith stated that both the December 14, 1987 and June 6, 1990 letters contemplated loans by the bank "to the individual partners as individuals," and it was not the Bank's intention to lend the money to the partnership. Smith stated that the June 6, 1990 letter was originally written and addressed to the three partners by name but was subsequently revised and reissued to the partnership at the request of Bartlett Media's Washington communications counsel. He concluded, "This revision, however, did not affect the Bank's decision to lend the money to the individuals." Bartlett Media Exh. 8, at 2. Smith stated that on the morning of June 11, 1990, Robert Byrd and he rescinded the June 6 letter, which decision was ratified at a meeting of the bank's board of directors on June 14, 1990. *Id.* At that meeting, there was a discussion of state and federal requirements and lending limitations, including a review by the Bank's counsel of all applicable statutory and regulatory requirements. At that meeting, the board of directors approved two new extensions of credit in the total amount originally approved and reflected in the June 6, 1990 letter. One extension of credit was made in the amount of $100,000 to Robert C. Byrd. The other loan, in the amount of $400,000, was approved to Harold Byrd and Milton Rodgers, "jointly and severally." Bartlett Media Exh. 8, at 2-3. Smith stated that prior to the board decision on the June 6 letter, he participated in discussions on the legal lending limit and had recalled a federal regulation restricting loans to executive officers to $100,000, but after reviewing both federal and state regulations, could not locate any regulations that so provided. The Bank's credit review officer, a former FDIC examiner, also was instructed to research and advise the bank as to such restrictions and the only regulation she could locate was a regulation of the Federal Reserve System, Regulation O. Bartlett Media Exh. 8, at 3.

19. Smith stated that as soon as he became aware there was a $100,000 limitation in the state banking regulations he acted, together with Robert Byrd, to rescind the June 6, 1990 bank letter. When the Bank was advised by its Tennessee counsel that the bank may legally lend the funds requested to the individual partners as long as the amount extended to Robert Byrd, together with all of his indebtedness to the Bank, does not exceed $100,000, the board of directors approved the two loans of June 14, 1990.

20. In a declaration dated June 15, 1990, also provided in response to the Belz supplement, Robert Byrd stated his June 7, 1990 declaration "remains true and correct." Bartlett Media Exh. 9, at 2. Robert Byrd said in his June 15, 1990 declaration that until June 8, 1990, when he received a telephone call from communications counsel, he was unaware that the rules of the Tennessee Department of Financial Institutions limited the amount of money the Bank could lend to "me and to Bartlett Media." He stated "[i]t has always been the bank's intention to provide the funds requested for the FM radio station in loans made to the individual partners who make up Bartlett Media and not to the general partnership," and said that it was therefore "valid on its face." He also said the June 6, 1990 loan (which letter was addressed to the general partnership) was approved as a loan to the individuals. Bartlett Media Exh. 9, at 2.

21. Milton Rodgers did not recall whether he considered the December 1987 bank letter to be necessarily to a partnership or to individuals. Nor did he know if there would be more than one check for the loan. He did not know whether he would be personally liable for the entire $200,000 and did not have a number in mind regarding the limit of his liability. He said there had been no discussion between the three partners on the liability question. Tr. 1309-11. Rodgers said he did not know whether the letter was the only source of financing, but that he did not plan to use his own funds for the $200,000 to construct and operate the station. Tr. 1312-13. Harold Byrd testified the applicant was relying only upon the bank letter when it certified its financial qualifications. Tr. 1036.

22. At deposition, when asked whether the loan would be funded with money going to a partnership account, Robert Byrd said yes. Tr. 445. He claimed it did not "occur" to him to mention at deposition that the loan was to three individuals. Tr. 446. Also at deposition, when asked whether the other four members of the board of directors would be aware of the fact that the bank was making a loan "to a partnership composed of yourself, your brother, and one other person," Robert Byrd said yes. Tr. 678.

23. When pressed at hearing as to the fact that it did not make sense that a loan letter contemplating a loan to operate a partnership business, secured by partnership assets, would not be to the partnership, Robert Byrd admitted he should have said he did not recall and that it

could have been contemplated that the December 1987 loan was to be to the partnership. Tr. 702-03. Byrd testified at hearing that when the December 1987 letter was discussed at a board of directors' meeting, the loan was characterized as being to individuals and he believed that there would be a partnership formed, but no final determination about the partnership had been made. Tr. 431. Later he testified that all along it had been contemplated that there would be an option to take the loan as individuals or a partnership. Tr. 444. Still later he testified he did not recall whether it had been disclosed to the board of directors that the loan would be to three individuals as opposed to a partnership. Tr. 678. The Bank has never before lent money to a broadcast station. Tr. 680.

24. Robert Byrd testified at hearing that the loan represented by the December 1987 letter was a commitment to three individuals according to their percentages of the partnership "or thereabouts," on a 40-20-40 basis. Tr. 433-34. But when questioned how that squared with his prior testimony that there was no partnership at the time he had requested the letter, Byrd admitted he was only "pretty sure" he had described to Smith that there would be different amounts for different portions of the total loan, although he did not know whether there would be a partnership. Tr. 436. Byrd later testified that the letter would not have to be "a separate set of loans," but rather it "could have been one loan joint and several. It could have been a loan to different individuals, it could have been a loan to a partnership." Tr. 447. Still later he testified he did not mean to imply there would be joint and several liability on the loan and that there would not be. Tr. 700-01. But at the deposition, Byrd had testified that any bank lending money to a partnership would require joint and several signatures. Tr. 704. Byrd also said he felt he would have shown Smith the partnership agreement to establish a basis for the loan being prorated among individuals. Tr. 700-01.

25. Harold Byrd was a state representative from 1976 to 1982 and he served on the Commerce Committee which oversees banking. Tr. 1055-56. Robert Byrd testified he is familiar with Tennessee banking regulations limiting loans to insiders and was at the time he certified. But he now knows his view was "inaccurate." Tr. 501, 717-18. He did not discuss the loan with the Bank's attorney, although he claims he did ask Smith to check on the letter. Tr. 501.

26. Robert Byrd claimed, in his June 7, 1990 declaration, that at the same time he had obtained the 1987 bank letter, "I also had made a personal commitment to provide my own personal funds to the project. Harold, Milton, and I all agreed to use our own personal resources to provide whatever funds were necessary for the proposed FM station." Bartlett Media Exh. 6, at 4. He further stated, "I believe that our personal financial statements reflected that we had available to us all necessary funds." *Id.* He reiterated that language in his June 15, 1990 declaration, noting that the financial statements of the three indicated they had "available to us all necessary funds even if no loan was ever obtained from the bank." Bartlett Media Exh. 9, at 2. He claimed that his own personal financial statement reflected he could, if required to do so, provide all of the funds necessary to construct and operate the station himself. *Id.* Bartlett Media's opposition pleading contains similar statements, including the representation that it relied on the partners' commitment to "back up any bank financing . . . ." Belz Exh. 7, at 12. At hearing, Robert Byrd first testified that the partners were a source of committed funds for construction and operation of the station, agreeing that they would provide funds, although there had been no decision on whether it would be as loans or capital contributions. Tr. 453-54. Byrd later specifically testified that there was an agreement among the partners to come up with the $200,000 to construct and operate the station "if necessary." Tr. 686. It was only after additional questioning that Robert Byrd changed his testimony to claim that the plan was that the partners would provide only the excess between the $200,000 they estimated it likely would cost to construct and operate and the $235,000 they foresaw as a maximum cost. Tr. 461, 469, 686-87.

27. *Executive Officer.* Under Rules 0180-3-.01(3) and 0180-3-.02 of the Tennessee Department of Financial Institutions, no state bank may extend credit of more than $100,000 to any of its "executive officers" and no "executive officer" shall borrow or "otherwise become indebted" for more than that amount. Belz Exh. 4, at 1-2. Further, under Rules 0180-3-.01(4) and 0180-3-.02, no bank may extend a loan of more than $100,000 to a partnership under which one or more of the bank's "executive officers" are partners and, either individually or together hold a majority interest. *Id.* Rule 0180-3-.03 of the Tennessee Rules defines an executive officer as:

> [E]very officer of a state bank who participates or has authority to participate otherwise than in the capacity of a director, in major policy-making functions of the bank, regardless of whether he has an official title or whether his title contains a designation of assistant and regardless of whether he is serving without salary or other compensation. The chairman of the board, the president, every vice president, the cashier, secretary and treasurer of a state bank are assumed to be executive officers unless, by resolution of the board of directors or by the bank's by-laws, any such officer is excluded from participation in major policy-making functions, otherwise than in the capacity of a director of the bank, and he does not actually participate therein.

Belz Exh. 4, at 2.

28. At his deposition on May 23, 1990, Harold Byrd, who claims he has a very good memory (Tr. 957-58), responded, when asked about his job title, "I've always been an incorporator and a director of the bank, but as far as an actual position at the bank, I'm the marketing person. I am the marketing functions of the bank." Tr. 958. When further asked whether he had an official position such as "vice president in charge of . . .", Mr. Byrd broke in and answered "yes." When asked what that was, his answer was "Vice President of Marketing," a position he claims to have held since 1984. *Id.* Later in his deposition Mr. Byrd testified "I'm a vice president of West Tennessee Bancshares and the Bank of Bartlett." Tr. 975. At another point in his deposition he was asked whether he would give up his position "as vice president of marketing at the bank" to work at the radio station and he said that he would. *Id.* Still later, when asked when he had decided he would "terminate [his] position as vice president of marketing at the bank," he testified that decision was made before the attorneys were hired. *Id.*

Harold Byrd admitted at hearing that he had five opportunities to correct his deposition testimony to reflect he was not vice president of marketing at the bank, but had not done so. Tr. 975-76. Later during his deposition Harold Byrd was asked whether he was "vice president for marketing of the bank?" and again responded that he was. Tr. 1000. Byrd's last acknowledgment that he was vice president of the Bank occurred when he was asked whether he was going to terminate his position "as vice president of marketing at the bank", to which he responded yes. *Id.*

29. When pressed as to why he did not correct his deposition testimony if he was not actually a vice president of the Bank, Harold Byrd testified he was not particularly concerned with titles, that he "handled the marketing duties at the Bank" and that "since all this has come up, my title actually, I think, is marketing -- is marketing director and business development officer." Tr. 986.

30. Harold Byrd claimed that his functions at the Bank are not the same as those of a vice president of marketing at a larger bank, since they would differ because a larger bank would have a larger marketing program. Tr. 977. But when asked if a larger bank had only one person who did marketing, whether that person would do what Harold Byrd does, Byrd admitted, "Yes, sir. Some of the activities would be in that, and some -- right." Tr. 978. Byrd admitted he is the sole person who deals operationally with marketing matters for the Bank. Tr. 983. Any advertising placed for the Bank would be brought to Byrd's attention "pretty soon." Tr. 985.

31. The Bank's loan committee consists of all directors of the Bank, including Robert and Harold Byrd, except Dennis Campbell. The loan committee membership also includes executive vice president Charles Tucker. The board of directors functions as the loan committee for all extensions of credit to directors and executive officers of the Bank. Bartlett Media Exh. 5, at 4.

32. A document entitled "Credit Write-Up," dated June 6, 1990, which was presented to the board of directors in conjunction with the June 6, 1990 loan commitment letter to Bartlett Media, describes Harold Byrd as "Vice President - Bank of Bartlett." Strong Exh. 5. That document is initialed by seven members of the Bank's board of directors. Tr. 818-19. Harold Byrd testified that the individuals who would type such a credit write-up would be "generally aware" of his functions at the Bank. Tr. 1005. He testified that an effort is made to ensure that a credit write-up is correct, and if a credit write-up appears to be in error, it will later be corrected by Mr. Smith or the board itself. Tr. 1007. Mr. Smith testified that the credit write-up was written by him and he was responsible for it. Tr. 816. He believes his secretary prepared the write-up and she could have come up with information on that document herself, noting "she knows the individuals involved there." Tr. 816-17, 819. Milton Rodgers testified at hearing that he has heard people in the community refer to Harold Byrd as a vice president of the Bank. Tr. 1316.

33. Harold Byrd stated in a June 18, 1990 declaration that he is not now, and has not been at any time since December 1, 1987, a vice president of the Bank or WTB. He is a director, an incorporator of the bank and a shareholder, but not an officer. Mr. Byrd stated in a declaration attached to Bartlett Media's opposition to Belz's supplement to petition to enlarge issues that in reviewing a copy of his May 23, 1990 deposition transcript, he realized he had indicated he was vice president of marketing of the bank and he held the position of vice president in both the Bank of Bartlett and WTB, "however I was mistaken." Belz Exh. 10, at 10; Bartlett Media Exh. 11, at 2.

34. In addition to being a director and incorporator, Harold Byrd owns about 8% of the stock of WTB. Bartlett Media Exh. 16, at 3. He and Robert Byrd share an office and sit next to each other. Tr. 405. They discuss their work with each other. Tr. 407-08. Robert Byrd described his brother's job as public relations head, interacting with the community a lot and acting as a liaison with the community at large. Tr. 416. Byrd testified it is likely that he and Harold Byrd have discussed policy questions outside the board room. Tr. 409-10.

35. Harold Byrd is on the personnel, marketing and loan committees. Tr. 959. The loan committee is a committee of the bank, as opposed to the personnel, special assets and other committees which are committees of the board. The loan committee is made up of all members of the board of directors plus Charles Tucker, the chief operating officer. Tr. 419, 959-60, 965-66. The loan committee has been given authority to pass on loans and make decisions on specific requests. Tr. 962-65. Robert Byrd testified that policies of the Bank are developed through the committee structure. Tr. 409. All committees are advisory except the loan committee. Tr. 622.

36. Bruce Smith reviewed the minutes of all meetings of the board of directors from 1980 to the present and testified that Harold Byrd had never been elected as a vice president or any other officer of the bank or WTB, but is employed by the bank as marketing director. Bartlett Media Exh. 12, at 2. *See also* Bartlett Media Exhs. 14 and 15.

37. B. R. Hester, who has been general counsel of the Bank for the past ten years, submitted an opinion letter that while Robert Byrd is an executive officer of the bank and, therefore, the amount of a bank loan to him would be limited to $100,000, Harold Byrd would not be considered an executive officer. Bartlett Media Exh. 7, at 2-3. Hester, who also is the personal attorney of Harold and Robert Byrd, spends very little time on bank regulations in his legal practice, has never represented a client in a bank regulations dispute, and does no general work under state or Federal banking regulations for other banks. Tr. 759, 1052.

38. Hester's opinion that Harold Byrd is not an executive officer is based upon his review of banking regulations, the December 1987 and June 6, 1990 bank letters, the fact Harold Byrd has not been elected an officer of the Bank or WTB, and that he knows who he deals with at the bank and "its not Harold." Tr. 762, 766-67. Hester was aware, in issuing his opinion, that Harold Byrd shares an office with Robert Byrd. Tr. 762-63. But Harold Byrd's deposition testimony did not enter into Mr. Hester's determination. Tr. 779-80. Hester agreed that the Bank's directors would generally know who the Bank's officers are. Tr. 764. He also agreed that someone who did not actually have the title of vice president but functioned as a vice president could be considered as an executive officer. Tr. 769-70. But he later claimed that even if every director believed Harold Byrd was a vice president, that would not be sufficient to make him an executive officer. Tr. 771.

39. When asked whether a pledge of assets as security for a loan could constitute an instance of being "otherwise indebted" to the Bank under Tennessee state regulations, Hester said he supposed that it could be. Tr. 772. But when asked whether the fact Robert Byrd is a partner of Bartlett Media, which would pledge the partnership's assets as collateral for a loan to Harold Byrd and Milton Rodgers would violate those regulations, Hester said he did not know that it would. Tr. 772-73. Hester admitted that under "certain circumstances" if a bank loan was to be used for partnership business and the loan was made to the partners, that loan could be considered a loan to the partnership. Tr. 782-83.

40. Hester testified that the Bank could not make a $200,000 loan to Robert Byrd. Tr. 783. But he said his opinion letter that a loan to Bartlett Media could not exceed $100,000 was too restrictive, and that the entire loan could be made to the partnership. *See* Bartlett Media Exh. 7, at 2; Tr. 754.

41. Ted M. Hayden, an attorney with Less & Scroggs in Memphis, also provided expert testimony concerning Harold Byrd's status. Hayden has specialized in representing financial institutions in claims under fidelity bonds and director and officer liability insurance policies. Belz Exh. 5, at 1. In his practice he had occasion to consider numerous banking regulations as they relate to losses on loans, including insider loans governed by Federal Regulation O. *Id.*

42. Based upon the regulations, his experience, the deposition testimony of Harold Byrd, and a statement by a Bank employee that Mr. Byrd "called the shots" on charity functions and other marketing decisions, Mr. Hayden came to the conclusion that Mr. Byrd is an "executive officer" of the Bank under the Tennessee Rules. Mr. Hayden based his opinion in part on the fact that Mr. Byrd, through his approval of marketing options for the Bank, is in charge of policy concerning the profile maintained by the Bank in the community, and that he serves on the loan and special assets committees, which interpret and apply internal loan policies. Belz Exh. 5, at 2. Having a policy making function is sufficient, according to Hayden, to classify a bank employee as an executive officer under the Rules. Tr. 924. For example, he noted that a director who acts as a loan officer could be considered an executive officer. Tr. 925. Impact on any policy important to the health and welfare of a financial institution is relevant in determining who is an executive officer. Hayden cited marketing as one of the most important policy areas. Tr. 930.

43. Mr. Hayden's opinion that Harold Byrd is an executive officer of the Bank is reinforced by the initialing, by the members of the Bank's board, of the credit write-up describing Harold Byrd as a vice president. Tr. 904.

44. Hayden believes that being on a loan committee could be considered a policymaking function, particularly if the members of the loan committee also constitute the board of directors and set loan policy (Tr. 917) which is the case at the Bank (Tr. 919, 934).

45. When asked to identify those portions of Harold Byrd's deposition testimony which led to his conclusion that Byrd "called the shots" on marketing, Hayden pointed to Byrd's testimony, "I'm the marketing person, I am the marketing functions of the bank" (Tr. 938), and "I act independently or try to act independently in most things I do," noting this was the reason the Bank was successful (Tr. 939).

46. Hayden testified there also is a significant issue under Federal regulations as to whether Bartlett Media's assets could be pledged to secure loans to Harold Byrd and Milton Rodgers even if Harold Byrd is not an executive officer. Tr. 905. Bruce Smith testified that if Robert Byrd were to provide a personal guarantee on a Bank loan, that guarantee would be limited to $100,000. Tr. 797.

Issue 2: Comparative Proposals

Full-time participation in station operation by owners.

Strong

47. The Strongs represent that they will operate as a general partnership organized under the laws of the State of Tennessee and each partner will hold 50% of the equity and 50% of the voting rights. Strong Exh. 1, at 1. The Strongs' partnership agreement became effective on December 16, 1987. Strong Exh. 2, at 1. The Strongs' April 4, 1990 integration statement represented that the applicant was owned by two individuals who are "husband and wife" each owning 50% of the applicant and having an equal voice in its affairs. Bott Exh. 2, at 1-2. The Strongs represented in their integration statement that there was no written agreement incorporating their arrangments. *Id.*, at 2. However, in response to a document request, the Strongs found a partnership agreement that they had forgotten existed. Strong Exh. 3, at 2.; Tr. 92, 137. When Raymond Strong completed Form 301, his counsel, Stanley Emert, told him to check the "general partnership" box, which he did. But he described his interest on the application as "joint tenant with spouse." Tr. 51.

48. Mr. Emert recommended that the Strongs form a general partnership in a December 23, 1987 letter which enclosed a partnership agreement he had drafted. Tr. 37, 155, 231-32. Mr. Strong did not ask Emert why he recommended a general partnership. Tr. 39. Jean-Marie Strong testified at hearing that she believes she and Raymond discussed the partnership agreement on the telephone with Emert, but at deposition she testified she had not done so. Tr. 232-34. Ms. Strong explained at her deposition that she did not ask questions of Emert because she figured if her spouse had any questions, he would have asked them. Tr. 235-36. Raymond Strong did not recall any significant discussions about the agreement with Emert. Tr. 45-46, 93-95.

49. The Strongs maintain that the partnership agreement will govern the operation of the station. Tr. 152, 334. But Raymond Strong testified that they have not taken any steps required by the agreement. Tr. 95. The agreement provides that a partnership bank account will be established, but none has. Tr. 42-43. They also have not created books of account required by Article Eight, nor have they conducted a general accounting as required by Article Nine. Strong Exh. 2, at 4; Tr. 103. The Strongs demonstrated that they knew almost nothing about the agreement. For example, Article Sixteen provides that no partner may fire an employee without consent of the other partner except in the case of "gross misconduct," but Raymond Strong stated that both he and his spouse had authority individually to hire and fire if the situation warranted. Strong Exh. 2, at 8; Tr. 105. Raymond Strong

also maintained that there was no reason he could not receive a salary from the station, while Article Twelve of the agreement provides that no partner shall receive a salary. Strong Exh. 2, at 6. Tr. 100-01. Raymond Strong does not know whether Tennessee requires the filing of a partnership agreement nor did he ask about that matter. Tr. 42.

50. The Strongs first learned about the availability of the Bartlett allocation in October or November 1987 from Charles Thompson, someone Raymond Strong had met through his involvement with the Mid- South Fair. Strong Exh. 3, at 1; Tr. 174. Raymond Strong had never expressed an interest in broadcasting to Thompson, and he did not ask Thompson, who owned a radio station, why he called him about the Bartlett allocation, or whether Thompson had called other people about the allocation. Tr. 30-31, 68-69. The Strongs agreed to pay Thompson a flat fee for legal, engineering, and filing fees to file the application. Strong Exh. 3, at 2. Part of the fee was retained by Thompson as payment for telling the Strongs about the allocation and for locating legal and engineer assistance. Tr. 35, 76.

51. Raymond Strong does not even know how much was paid for legal or engineering services. Tr. 38. Thompson paid those fees. Thompson recommended the Strongs' legal counsel, Stanley Emert, and he contacted Emert for them. Tr. 32-33. He also recommended Dwight Magnuson as their engineer and contacted him. Tr. 33-34. When Emert wrote to Strong about the application he sent a copy to Thompson. Raymond Strong never inquired about why Thompson received a copy of the letter. Tr. 69-70. Ms. Strong never called Thompson about the application and never spoke with the engineer. Tr. 66, 226, 229. Mr. Strong dealt with Magnuson, Emert and Thompson. Ms. Strong did listen to telephone conversations, once or twice, between Messrs. Strong and Emert. Tr. 231, 237.

52. Ms. Strong was not involved in preparing the budget for the station; she did not participate in the conversation Raymond Strong had with his mother about the availability or cost of the Strongs' transmitter site; she was not involved in obtaining a bank loan letter. Tr. 254, 291-92, 146, 242-44, 67-68, 145-46, 246, 253. Raymond Strong established the public file. Tr. 136, 301. Most of the EEO statement included in the Strongs' application uses the pronoun "I," such as "[w]hen I recruit prospective employees." Tr. 64. There is only one use in the EEO statement of the pronoun "we." Tr. 65. When documents were produced, Raymond Strong gathered them. Tr. 295-96. All mail for the application goes, not to the Strongs' home, but to Raymond Strong's office at National Pressed Steel, a company he owns. All of the partnership records, including checks and materials sent by counsel, are maintained at Raymond Strong's office. Tr. 145, 252-53, 305.

53. In early 1988, after the application had been filed, Thompson recommended to Raymond Strong that he get in touch with Robert Blow to obtain information regarding station costs and radio operation. He claimed that Blow had experience in such matters and could advise Strong. Tr. 71-72, 178. Thompson introduced them and Blow has been advising the Strongs ever since. Tr. 73, 79, 178. Blow operates R. B. Management Company, which does "communications work," although Raymond Strong does not know what that entails. Tr. 180. While Raymond Strong said he knows Blow put applications together before, he did not ask which ones. Tr. 126. He knows that Blow's father once owned a station in Jackson, Tennessee and that Blow worked there either in management or as a disc jockey. Tr. 127, 179, 200.

54. Blow recommended that the Strongs hire James Freeman as counsel. Tr. 71-72. Mr. Freeman also represents a Jackson, Tennessee applicant in which Blow has an interest, although Raymond Strong did not know that at the time. Tr. 80, 205. Raymond Strong met Mr. Freeman in Mr. Blow's office and had a general discussion with them about the Bartlett application. Tr. 86. Soon thereafter, on March 1, 1988, Freeman wrote Raymond Strong about his fees and, although Strong did not ask him, Freeman sent a copy of that retainer letter to Blow. Tr. 79-81, 85, 205. Raymond Strong has discussed every step of his application with Blow, including advice on the hearing, Mr. Freeman's fees, and the financial details of the application. Tr. 203-04. Blow expects to receive a fee of $5,000 for his services. Tr. 82. The payment depends on the amount of time Blow spends, but Raymond Strong does not know what the hourly fee will be. *Id.*

55. Blow also has gotten Raymond Strong to participate as a 37.5% partner in a Jackson, Tennessee FM application in which Blow has an interest. Tr. 72, 86. Blow and his father are also limited partners in that proposal. Tr. 73. Raymond Strong knows only that the general partner is a minority and used to work at Blow's father's station "in the office." He neither knows nor has asked what she did at the station and when she was employed there. Tr. 73-75. He does not know what percentage equity she has, does not know and has never asked whether she has contributed funds to the applicant, does not know whether she has ever been in business for herself and does not know her age or name. Tr. 73, 87-89, 201. Although Strong represented that he joined the Jackson application because Blow told him it would be a good investment, he could not recall any specific information about how much of a return he would receive. Tr. 182-83.

56. Ms. Strong met Mr. Freeman in June 1988, after Raymond Strong first met him. While she has been in on conversations between Mr. Freeman and her spouse, she has not spoken with Mr. Freeman alone. Tr. 338, 341, 343. These conversations involved preparation of the integration and diversification statement and depositions and hearing appearances. Tr. 341. Ms. Strong participated in the hearing, deposition sessions, and listened in on one or two conversations between Mr. Emert and Raymond Strong. But her participation in the Strong's application has been limited to discussions with her spouse. Tr. 301-02. Raymond Strong could not recall one single thing his spouse had done.

The Integration Proposal

Quantitative

57. Raymond Strong proposes to serve as general manager. He represents that he will oversee the station's day-to-day operations, implementing station policies, approving programming, and supervising sales, for 40 hours per week. Strong Exh. 3, at 5. Mr. Strong did say during his deposition that he intends to hire a station manager, someone more skilled in station operation than he is. Tr. 210. Mr. Strong has not worked 40 hours per week since 1985. Tr. 214. He now intends to work 40 hours a week on an average, some weeks more, some

weeks less, depending on what is required. Tr. 121. If he could, he would work less than 40 hours per week at the office. Tr. 122. Mr. Strong has other business interests which he will end if they conflict with his operation of the station. Strong Exh. 3, at 5.

58. Mr. Strong currently is the managing partner and owner with his sister of the Fulenwider Trust Company. Strong Exh. 3, at 2; Tr. 146. Fulenwider is a land owner and sells sand and timber. Strong Exh. 3, at 2-3. Mr. Strong will remain managing partner and spend five to ten hours per month. Strong Exh. 3, at 3; Tr. 146-47. Mr. Strong is 100% owner and president of National Pressed Steel. The company engages in warehousing and selling steel and wire products. Strong Exh. 3, at 3. Raymond Strong's mother, wife, niece, and three other employees are the only people involved in the business. Strong Exh. 3, at 3. Mr. Strong maintains his office there and spends most days there even though he is "not primarily working on plant business." *Id.*, at 3-4. When the office manager left last January, Raymond Strong and his spouse had to fill in. Now that he is training his niece as a replacement, Mr. Strong claims that he spends 5-10 hours per week. *Id.*, at 4. During his deposition he said it was 30 hours per week. Tr. 110. The two statements are consistent, he said, because he does other things for the remaining time, including collecting antiques, building signs for the subdivision, working on Fulenwider business and watching his children. Tr. 110-11, 113. In fact, he says that only six to 12 of the hours are spent working. Tr. 111. Mr. Strong believes that by the end of this year, he will spend only an hour or two per week on Pressed Steel work if Strong receives the Bartlett license. Strong Exh. 3, at 4.

59. The Strongs also own 50% of Windover Galleries, a residential design firm located in Venice, Florida. They are two of the three directors. Raymond Strong represents that he and his spouse do not work there on a regular basis. Strong Exh. 3, at 4; Tr. 116. The Strongs have a home in Sarasota, Florida and combine Windover business with trips to their Sarasota home. Strong Exh. 3, at 4; Tr. 116. Mr. Strong represented that in the last six months he spent, on an average, "two days per quarter" in Florida on Windover business and an additional two to four hours per week on the telephone about the business. Mr. Strong stated that he expects the amount of time to decline in the future. Strong Exh. 3, at 4-5.

60. Mr. Strong spends four to five weeks in Florida during the summer and three to four weeks there at Christmas. Sometimes he goes to Florida in the spring. Tr. 117. Jean-Marie Strong spends six to seven weeks in Florida in the summer, in addition to the three to four weeks at Christmas and occasional spring trips. *Id.* Ms. Strong said that she and her spouse spend two months a year in Florida. Tr. 297. Raymond Strong stated that they would not spend as much time in Florida but that they have no plan to sell their home. Tr. 117-18. The Strongs also have no plans to divest their interests in Fulenwider, Pressed Steel or Windover. Tr. 114.

61. Ms. Strong proposes to work full time as the station's office manager/public affairs director. Strong Exh. 4, at 4. In Article Three of the partnership agreement it is stated that Ms. Strong will be business manager of the partnership and have charge of the office and keep the books. According to the partnership agreement she will have "concurrent charge of all financial details," including collection and receipt of money due and payment of money. Strong Exh. 2, at 2. Mr. Strong said that he and his wife have discussed the duties listed in the partnership agreement and that it is still their intent that Ms. Strong will have those functions. Tr. 98-99. The "concurrent" responsibility for financial details means, he explained, that she will supervise a bookkeeper "if we go that far and expand that much." Tr. 99. Otherwise, Ms. Strong will perform this job without help. *Id.*

62. In the integration and diversification statement filed April 4, 1990, Strong represented that Ms. Strong would serve as office manager/public affairs director. In this position, she would supervise all financial record keeping and develop and implement the station's budget; in addition, she would represent the station in the community, develop information on local needs and interests, establish procedures for and supervision of public service announcements on behalf of local groups and would be in charge of developing and supervising public affairs programming. Bott Exh. 2, at 2-3. The statement represents that the Strongs will jointly set station policies, develop the budget, select persons to fill important staff positions and supervise implementing the EEO program. *Id.*

63. In her written testimony Ms. Strong states that as an office manager she would supervise the financial affairs of the station and work with banks and auditors. With Mr. Strong she will oversee development and implementation of the budget. Strong Exh. 4, at 4. She describes her role initially as one where she would "prepare budget estimates based on historical expenses and revenues by department." With Mr. Strong she will finalize the budget. She will also track the budget. *Id.*

64. When Ms. Strong was asked why the integration statement stated that she alone would oversee development of the budget and its implementation while the written testimony indicates Mr. Strong will also be responsible, she "guessed" that she, Mr. Strong, and Mr. Freeman decided it would be better if both of them were responsible for those duties. Tr. 308. She was also asked why her hearing testimony said she would oversee financial affairs and the integration statement referred to overseeing financial "record keeping." She said the two terms were the same and she believed her counsel, Mr. Freeman, may have changed the language. Tr. 308-09. She could not explain why the integration statement represented she would approve purchases but her written testimony did not. She had not discussed the change with Mr. Strong or Mr. Freeman. Tr. 309-10.

65. Ms. Strong's past jobs have been primarily as a bookkeeper but at the station she proposes to supervise a bookkeeper rather than perform the task herself. Tr. 312. She does not know whose idea that was. The bookkeeper will also have receptionist and secretarial duties. Tr. 322. Mr. Strong said that Ms. Strong's duties at the station will be basically the same as those she had at Pressed Steel, except that "at such time as [they] could add a bookkeeper" she would supervise that bookkeeper. Tr. 120. But until that time, he stated, Ms. Strong would be the station's bookkeeper. Tr. 121. Ms. Strong has never planned or implemented a budget nor done tax returns for Pressed Steel. She just keeps records of income and expenditures. Tr. 133-34, 149.

66. It was Mr. Freeman who recommended to Ms. Strong that she be public affairs director for the station and told her what her duties would be. Tr. 289-90, 317. Ms. Strong sees that job as being one where she would be involved with the community and meeting with community leaders and organizations. Tr. 314-15. She would

report to the station manager or the general manager. Tr. 314. Ms. Strong said at her deposition that she would be involved with the station's EEO program, although she had not thought about it before the application was filed. Tr. 315. But at the hearing she suggested she may have helped her spouse prepare it by suggesting a women's organization to be included as a contact. She admitted her spouse may have thought of the organization by himself. Tr. 316-17.

67. Ms. Strong has worked on and off at Pressed Steel since 1966. Tr. 259. She has not worked 40 hours per week at the office since 1968. Tr. 324. From 1968 until 1975, she worked one or two days per week and "more nearly full time" from 1975 to 1980. Strong Exh. 4, at 1-2; Tr. 323-24. She worked a minimum number of hours from 1980 to 1984 and in 1984 started working two days per week. Strong Exh. 4, at 2. But in January 1990, she returned to full-time bookkeeping because the office manager left. Tr. 251. She has been training a niece and she plans on not working at all, or at least not "on any significant basis" in the future. Strong Exh. 4, at 2; Tr. 303.

68. Ms. Strong said that since her children will be in school full time, she will be free to work full time again. Strong Exh. 4, at 2. But she conceded she could do that now since her children are already in school full time. Tr. 304.

Qualitative

69. Raymond Strong has lived in Memphis, Tennessee, within the proposed service area, for 24 years. He intends to continue residing within the service area if the Strongs' application is granted. Strong Exh. 3, at 1. He has been involved in civic activities in the service area but none in Bartlett. Strong Exh. 3, at 6-7; Tr. 138. Since 1971, Mr. Strong has been a member of the Kiwanis Club. Strong Exh. 3, at 6; Tr. 139. Initially, he attended lunch and dinner meetings but since the early 1970s he has only contributed to a scholarship fund, and most recently, he has been inactive. Tr. 138-40, 186. From 1971 to 1982, Raymond Strong served as president, a board member and held other positions with the Sheltered Occupational Shops, which provides training for retarded persons. Strong Exh. 3, at 6; Tr. 169. From 1971 to the present, he has been an advisor, director and a certificate holder of the Mid-South Fair. Strong Exh. 3, at 6. From 1972-1973, Mr. Strong was treasurer of the West Tennessee Historical Society. Strong Exh. 3, at 6-7. He belonged to a church where he has been a member of the vestry and a lay reader from 1977 to 1980, co-chair of the Dorcus Guild from 1977 to 1978. Strong Exh. 3, at 7; Tr. 140. In 1972-1974, Mr. Strong was House Manager for the Little Theatre. Strong Exh. 3, at 7.

70. Ms. Strong has lived in Memphis, Tennessee for 24 years and she intends to continue living there. Strong Exh. 4, at 1. From 1968 to 1970, according to the integration statement, or 1972 to 1974, according to her written testimony, she was chairperson of the Cotton Carnival Children's Court. Bott Exh. 2, at 4; Strong Exh. 4, at 6; Tr. 222, 318. From 1978 to 1979, she was president of the women's group at her church. Strong Exh. 4, at 6; Tr. 287. From 1968 to the present, she has been a member of the DAR. She is not active and only pays dues. Tr. 287. From 1981 to the present, according to her written testimony, and 1978 to 1988 according to her integration statement, she has been a member of the Lakewood Hills Garden Club, a social club. Strong Exh. 4, at 6; Bott Exh. 2, at 4; Tr. 287. She has held offices in the past but this year she has not been active. Strong Exh. 4, at 6; Tr. 318.

71. From 1988 to the present, she has been a member of the Association for the Preservation of Tennessee Antiquities, although she has not attended any meetings this year. Strong Exh. 4, at 6; Tr. 288. She has been a volunteer instructor at her children's school. During 1989-1990, she spent five hours on this activity. Strong Exh. 4, at 6; Tr. 320.

Bartlett Media

Quantitative Proposal

72. Bartlett Media is a Tennessee general partnership with three partners, Robert C. Byrd, Milton J. Rodgers and Harold W. Byrd. Bartlett Media Exh. 1. Harold and Robert Byrd, who are brothers, each own 40% of the equity in the partnership and Mr. Rodgers owns 20%. *Id.* Each partner proposes to work full time at the station.

73. Robert C. Byrd proposes to work full time as programming and community affairs director. Bartlett Media Exh. 2, at 2. He would spend 40 hours per week during normal business hours. *Id.* Mr. Byrd would "maintain complete discretion and authority" over programming, news, public affairs, music selection, and format. He would supervise employees involved in programming and would be responsible for "community outreach efforts." *Id.* Mr. Byrd represents that he will retain all his current business interests but he will adjust his schedule to work full time at the station. Bartlett Media Exh. 2, at 2. Mr. Byrd has a 10% ownership interest in West Tennessee Bancshares, Inc. which owns the Bank of Bartlett and Bartlett Mortgage Company. Bartlett Media Exh. 16, at 3. Mr. Byrd is chairman of the board of the Bank and mortgage company. Bartlett Media Exh. 2, at 2, 5-7. He is a part owner, director and chairman of the board of Bartlett Travel. *Id.* And a 37.5% owner of Tyler, Rasberry and Byrd. Bartlett Media Exh. 1, at 1. Mr. Byrd will continue to attend board of directors meetings and committee meetings and his marketing efforts for the bank. Tr. 727. He will attend loan committee meetings once a week, for 1 to 1 1/2 hours each (Tr. 633, 725, 726); board of directors meetings once a month for 2 to 2 1/2 hours, including preparation (Tr. 644-45, 648, 725-26); and special assets/executive committee meetings once a month for 1 1/2 hours. Tr. 647, 726. Mr. Byrd will continue to make policy for his other business interests and he believes all his other business activities will take from five to a maximum of twenty hours per week. Bartlett Media Exh. 1, at 2-3. These activities will take place primarily during evening and weekend hours. Occasionally he will attend breakfast meetings. Any activity that affects his ability to perform his responsibilities at the station will be stopped. Bartlett Media Exh. 2, at 3. He also intends to spend more time with his three small children. Tr. 651-52. He explained, when asked whether he would spend more than 40 hours at the station, that he was "not going to spend a lot more than 40 hours a week other than the normal sense of the business day." Tr. 661-62.

74. Mr. Byrd, who has never worked at a broadcast station, could not explain why his small station would need a program director. Tr. 599-601. He stated that people associate him with the success of the bank and consider him more significant than other directors. Tr.

617-18. He has not told everyone that he would be a full-time employee at the station and he never discussed getting out of banking with Milton Rodgers. Tr. 620, 1337. Mr. Byrd is the managing partner and 5% owner of the real estate development project, Summerdale Estates. Bartlett Media Exh. 2, at 7; Tr. 629. He stated that while in May 1980 he worked 16 hours per day on the Summerdale Development (Tr. 630), he claims that the project "should not" require any time commitment from him. Bartlett Media Exh. 2, at 7. His view is based on how long it will take to sell the 30 lots that are left to sell. At the deposition sessions in May he estimated 60 days but at the hearing in July he estimated 90 days. Tr. 730, 741-42. There had been rain, he explained, which resulted in the lots not selling. Tr. 743. He did concede that "a good bit" of his time was spent on Summerdale currently. Tr. 626-27, 630.

75. As chairman of the bank, Robert Byrd does not report to anyone except the board of directors. Tr. 1034. The chief operating officer (or executive vice president and cashier) reports to the chief executive officer, who in turn reports to Mr. Byrd. Tr. 680-81. Mr. Byrd believes his $107,000 base salary at the bank will decrease by $40,000 when he goes to work at the station. Tr. 679-80. He estimates that his salary will then be $60,000 to $70,000. Tr. 735. He received this salary once before when he worked full time at Prudential-Bache and spent about 30 hours per week at the bank. *Id.* On the other hand, his brother, Harold, when he works at the station, will receive no salary except his $12,000 for being a bank director. Tr. 1030-31, 1065, 1072.

76. Milton Rodgers proposes to work full time, 40 hours per week during normal business hours, as the general manager of the station. He would oversee construction and day-to-day operations and management. Bartlett Media Exh. 3, at 1. Mr. Rodgers stated he will have ultimate responsibility and authority for all management decisions and for all departments of the station, as well as be responsible for administration and implementation of the EEO program. Bartlett Media Exh. 3, at 1-2. At the same time, Mr. Rodgers stated that Robert Byrd would select the programs, have community and public affairs duties and, because of his general business experience, help the station with its business. Tr. 1304. Mr. Rodgers said that Robert Byrd's salary would depend on "what roles we have Bobby functioning in. Program director position, occupied by someone like Bobby, could be a wide range of activities." Tr. 1307-08. He conceded that there had been no program director or community affairs director at the stations where he had worked. Tr. 1104-05. He testified about his own ideas for public service programming but he has not discussed them with Robert Byrd. Tr. 1333.

77. Mr. Rodgers currently works for Mid-South Fair and Liberty Land, a Memphis amusement park and fair. He is paid $61,000 per year. When the fair is held in September, he works 70 hours per week. Tr. 1105-07. He stated during discovery that he would maintain a part-time relationship with Mid-South Fair. Tr. 1109, 1131. He agreed that sometimes he could work 50-55 hours per week at the station and other times cut back to 30-35 hours so he could devote time to the fair. Tr. 1119-20. In the integration statement, Rodgers said he would have no other employment and in his written testimony, he indicated that he had "no current plan to continue other employment." He explained that he could engage in other part-time business. Tr. 1109-11. He has not told his employer he would leave if Bartlett Media receives a grant. Tr. 1113. He also said he might engage in real estate part-time. Tr. 1112-13. He believes his salary would be $50,000. Tr. 1128.

78. Harold Byrd proposes to work full time, 40 hours per week, as the general sales manager. He would direct and supervise all sales, marketing and promotional activities and supervise employees who would perform sales and promotion jobs. Bartlett Media Exh. 4, at 1-3. Harold Byrd will retain his other business interests and adjust his schedule. He will attend board and committee meetings of Western Tennessee Bancshares, Bank of Bartlett, Bartlett Mortgage Company, Bartlett Travel and Tyler, Rasberry and Byrd. These activities will take 5-15 hours per week. Additional interests may add five hours to that estimate. Bartlett Media Exh. 4, at 2. He now makes $62,000 at the bank but, unlike Robert Byrd, he will not receive a bank salary at the radio station. Tr. 1031.

Qualitative Proposal

79. Robert Byrd lived in Bartlett from 1961 through 1970 and since then, except for a period during 1970, he has lived within the proposed service area. Bartlett Media Exh. 2, at 1. He is active in Bartlett community activities. Bartlett Media Exh. 2.

80. Milton Rodgers has resided within the proposed service area of the station since 1950, except for the periods 1973 to 1975 and 1980 to 1985. Bartlett Media Exh. 3, at 1. Mr. Rodgers represented in his written testimony that he was general manager of WZXQ(FM), Canton, Mississippi and WXAI(AM), Gluckstadt, Mississippi from July 1982 to August 1985. Bartlett Media Exh. 3, at 4. However, when examined, he stated that WXAI(AM) was not acquired until late 1984 or early 1985. Tr. 1080. In addition, he conceded that from September 1982 to early May 1983, WZXQ was off the air and the station had no employees. Tr. 1080, 1081, 1082-83. He also worked as general manager of the Lamar Theater from September 1982 to the end of 1982. Tr. 1081, 1084, 1086. He resumed his duties as station manager in June 1985 when he returned from a trip. Tr. 1083. The owner of the station was very active in the operation of the station and spent 40 hours per week there. Tr. 1086-87. The owner did his own FCC filings and reviewed program lists, engineering and leases. *Id.* Mr. Rodgers could not recall whether he was station manager or general manager when questioned. It was his first and only broadcast position which he got when his employer at the Lamar Theater purchased the station in 1982. Tr. 1080-81. They had an agreement that he would obtain a percentage of the profit from the sale of the station. Tr. 1088. The station operated at a loss and there was only a small profit when the station was sold. Tr. 1089. When he went to Mid-South Fair from the stations, he got a 50% salary increase. Tr. 1089-90. Mr. Rodgers belongs to a church in the service area and since 1987 he has belonged to various community groups within the service area. Bartlett Media Exh. 3. He also belonged to the board of a drug rehabilitation facility in 1970-71 when he was a college student. Tr. 1317-18.

81. Harold Byrd lived in Bartlett from 1961 to 1972 and since then he has resided in the service area. Bartlett Media Exh. 4, at 1. Harold Byrd has been active in Bartlett community affairs since 1976. Bartlett Media Exh. 4, at 4-9.

Richard P. Bott

Quantitative Proposal

82. Richard P. Bott is an individual applicant. Bott Exh. 1, at 1. Mr. Bott proposes to work full time, 40 hours per week, as the general manager. *Id.* He would oversee the day-to-day operations of the station, including programming, sales, financial and personnel matters. *Id.* Mr. Bott and his spouse own Bott Broadcasting Company, which directly or through other entities holds licenses or permits for seven radio stations. Bott Exh. 1, at 3-5, Attachment A. When Bott Broadcasting Company was granted the permit for KCCV, Overland Park, Kansas, Mr. Bott promised that he would manage the station on a full-time basis. But he has never worked at the station. Tr. 1739. Mr. Bott claims that neither he nor his spouse, who also proposed to work at the station, made good on their promise because after they made it, they experienced a change in lifestyle. "[O]ur lifestyle changed, our thoughts about the future changed, and we simply were not available at that time to do that . . . ." Tr. 1742. Nothing had actually happened, however, that required a change of plans, the Botts simply decided they did not want to manage the station. Tr. 1742.

83. When Mr. Bott was asked to explain the difference in his attitude with respect to the Bartlett facility, he said that he viewed things differently now from what he thought about Overland Park. Tr. 1743. He represented that he and his wife had been thinking about leaving Kansas City for the "sunbelt area of the mid-south." He explained that now is "the time when you want to do more of what you enjoy and less of what you don't enjoy." Tr. 1743. He said he would like to interact with people and become a part of the community. Tr. 1743.

84. Mr. Bott testified that the Commission was notified prior to the grant of the Overland Park construction permit that he and his wife would not be integrated after all. Tr. 1744. The application was granted in January 1986 and the Commission was not advised of Mr. Bott's change of plans until 1 1/2 years later on May 22, 1987. Tr. 1746.

85. Mr. Bott conceded that neither he nor his spouse had worked at the Overland Park station. Tr. 1739-40. They live at the same address, within the service area, that they did when they applied. *Id.* It is about a 20-30 mile drive from their home to the Overland Park station. Tr. 1741. The Overland Park station, which has fewer than five full-time employees, does not currently have a station manager. Tr. 1750.

86. At his deposition, Mr. Bott testified that he had not visited Bott Broadcasting's Oklahoma City station, KQCV, for at least two years. Tr. 1751-52 He stated that he had not visited Bott Broadcasting's Fort Wayne, Indiana station, WFCV, in 1989 or 1990 and he could not recall the last time he had visited the station. Tr. 1753. He spent approximately one month at the station when it was first acquired by Bott Broadcasting. He also spent about one month at KSIV, Clayton, Missouri when Bott Broadcasting acquired that station. He never maintained an office there and was considered general manager of the station only during the start up phase. Tr. 1755. He functioned as general manager of the Fort Wayne station for no more than 120 days. Tr. 1756-57.

87. Mr. Bott and his spouse have lived in the Kansas City, Missouri area for 28 years. Tr. 1719, 1784. It has been the base of operations for his various business interests and has held an attraction for him. He explained tha it "is the city where our home has been located, . . . a area where I have taken a great deal of interest in th community as well as the service the radio station ha rendered . . . ." Tr. 1726. Explaining why he would mov to Bartlett, Mr. Bott said that it "is the type of communit where it would personally be very enjoyable to interact i the total community in a way that has not been done i our corporate structure as it now is." Tr. 1807.

88. Mr. Bott has visited Bott Broadcasting's Moun Bullion, California station, KCIV, probably twice in 1990 Tr. 1760. Mr. Bott considers himself to be in semi-retirement and has since he was 30 years old. He states that h enjoys not being encumbered with the constraints of following a schedule and answering demands although h works more than 40 hours per week. Tr. 1772. He sai his son will assume supervision of the various broadcas stations. Tr. 1772-73, 1776. That son, Richard Bott, ha been serving as vice president and general manager o Bott Broadcasting. The stations' general managers repor to him. Bott claims that his son will now take over hi duties and leave him free and available to move to Bartlett. Tr. 1775-76. However, his son has received a gran for Blackfoot, Idaho where he has promised to move an become full-time general manager. It was on that basi that he was awarded the facility. *Richard P. Bott*, 3 FCC Rcd 7094, 7099 (ALJ 1988); *affirmed* 4 FCC Rcd 492 (Rev. Bd. 1989), *review den.*, 5 FCC Rcd 2508 (1990). Mr Bott now works at least 40 hours a week at Bott Broadcasting. Tr. 1724. He claims he was prevented from being a general manager elsewhere because he performed activities which his son was not previously ready to handle. Tr 1775-76.

89. Mr. Bott does not have an office at Bott Broadcasting. Tr. 1720. He works at home where he has an offic complete with company telephone lines and fax machine He also spends time meeting with clients. Tr. 1722-24 Ordinarily, he does not go to Bott Broadcasting's offices Tr. 1721. His secretary has her office there however. Tr 1721, 1723.

90. In August 1986, one of Bott's companies received construction permit for Goodland, Kansas. The origina construction permit was extended three times. Tr 1794-97.

Qualitative Proposal

91. Richard Bott represents that he will move to Bartlett. Bott Exh. 1. He lived in the same house in Independence, Missouri for at least twelve years. Tr. 1717. H would sell the house. Tr. 1718. Mr. Bott began in broadcasting in 1952 and he worked at stations on a day-to-da basis until the late 1970s. Bott Exh. 1, at 1-2.

Belz

Quantitative Proposal

92. Belz is a Tennessee corporation with on stockholder, Julianne P. Belz. Belz Exh. 1, at 1. She i also the president, treasurer and the only director. *Id.* He spouse, Martin Belz, is vice president and corporate secretary. Ms. Belz proposes to work as the station's genera manager, full time, 40 hours per week. Belz Exh. 1, at 1 She would supervise operation of the station. Belz Exh. 1 at 1.

Qualitative Proposal

93. Ms. Belz lives within the principal city contour of her proposed station. She lived there from 1977 to 1980, except summers, and since 1984, except for six months between July 1986 and February 1987. Belz Exh. 1, at 2. From 1984 to the present, she has been active in civic activities in Memphis. Belz Exh. 1, at 2-4.

Diversification of control of the media of mass communications.

94. Strong and its partners have no media interests. Strong Exh. 3, at 6; Strong Exh. 4, at 6. Bartlett Media and its partners have no media interests. Bartlett Media Exh. 1, at 1-2; Bartlett Media Exh. 2, at 12; Bartlett Media Exh. 3, at 6; and Bartlett Media Exh. 4, at 13. Bott's individual owner, Richard P. Bott, is president, director and joint owner with his spouse of 100% of Bott Broadcasting Company (BBC). He is also president and a director of Bott Communications, Inc. (BCI) and Bott Broadcasting Company/Tennessee, Inc. (BBT). BBC owns 80% of the stock of BCI and 100% of the stock of BBT. Sherley E. Bott serves as secretary/treasurer and director of BBC, BCI and BBT. Bott Exh. 1, at 2-3. BBC has a permit for daytime AM station KOCV, Overland Park, Kansas. Bott Exh. 1. Overland Park is 325 miles from Bartlett. BBC is the licensee of daytime AM station KQCV, Oklahoma City, Oklahoma. The station is 415 miles from Bartlett. BBC is the licensee of daytime AM station, WFCV, Fort Wayne, Indiana; it is located 460 miles from Bartlett. BCI is the licensee of daytime AM station KSIV, Clayton, Missouri, which is 220 miles from Bartlett. BCI was the permittee of FM station KKCI, Goodland, Kansas until June 22, 1990. Goodland is 690 miles from Bartlett. BCI is the permittee of a new FM station at Hastings, Nebraska which is about 565 miles from Bartlett. BBT is the licensee of WCRU, Collierville, Tennessee. Sherley E. Bott, BBC, and Richard P. Bott will end their interest in WCRV and its licensee. Bott Exh. 1, at 3-5 and Attachment A.

95. Belz and its stockholders have no media interests. Belz Exh. 1, at 5. Martin Belz, Julianne Belz's spouse, has an interest in KLAX-TV, Alexandria, Louisiana, which he has promised to divest. Belz Exh. 2, at 1.

Auxiliary Power

96. Strong (Strong Exh. 1, at 1), Bartlett Media (Bartlett Media Exh. 1, at 2), Bott (Bott Exh. 1, at 5 and Attachment B), and Belz (Belz Exh. 3, at 1) propose auxiliary power.

CONCLUSIONS

Bartlett Media Did Not Have Reasonable Assurance For The Funds It Needed To Construct And Operate When Robert C. Byrd Certified; The Testimony of Bartlett Media's Principals On This Issue Is Unreliable and Untrustworthy

97. Bartlett Media partner Robert C. Byrd, who owns a 40% equity interest, certified to the Commission that the applicant was financially qualified. He relied on a letter from the Bank of Bartlett, which purported to assure Bartlett Media that the Bank would provide $200,000 of the $235,000 that it estimated it needed to construct and operate. A loan of that size to Bartlett Media would have been prohibited by Tennessee state banking regulations because of the insider relationship of two Bartlett Media partners to the Bank. Because of that legal prohibition it appears that the letter issued by the Bank was simply an accommodation to Robert Byrd, the Chairman of the Board of Directors of the Bank.

98. The Bank of Bartlett is the only bank owned by the holding company West Tennessee Bancshares. Mr. Byrd is chairman of the board of both entities. He works full time at the Bank and derives a significant amount of income from his work for the Bank. Harold Byrd, Robert's brother, a 40% general partner in Bartlett Media, also works at the Bank full time and he and Robert share the same office at the Bank. Harold and Robert Byrd, three of their brothers, and four friends make up the board of the Bank and control 60% of the stock. Tennessee state banking regulations prohibit state banks, such as the Bank of Bartlett, from lending more than $100,000 to executive officers or to partnerships where executive officers hold a majority interest. Executive officers include officers who participate in major policy making functions of the bank. The chairman of the board, the president, every vice president and a number of other officers of state banks are presumptively executive officers unless specifically excluded from policy-making by the bank's by-laws and actual practice. Persons who have no official title, or if the title is assistant, and persons who may not receive a salary or compensation would be included in the insider prohibition if they have the authority to make policy. There is no dispute that Robert Byrd could not borrow more than $100,000 under these regulations. It is equally apparent that the prohibition applies to Harold Byrd and in turn Bartlett Media, a general partnership that Harold and Robert Byrd control with 80% of the equity.

99. Bartlett Media maintains that Harold Byrd is not an executive officer of the bank and that he does not make policy. Harold Byrd's most reliable testimony, which he gave before this issue arose, does not support Bartlett Media's claim. Once the issue was brought to the Commission's attention, Bartlett Media contradicted that testimony and maintained that Harold Byrd, although a bank director, stockholder, and director of marketing for the bank, is not involved in making policy for the Bank and is not an executive officer and could, therefore, borrow more than $100,000 for Bartlett Media's proposal.

100. Before Harold Byrd's role at the bank became an issue, he testified that he was an incorporator, director, and marketing person at the Bank. He stated that he was vice president of marketing. He also said he was vice president of the Bank and the Bank's holding company. At seven places in his testimony he either referred to himself as a vice president or agreed to the use of that term. He never corrected that testimony and had no explanation for referring to himself as a vice president when he later represented that he was not. He is the only person at the Bank responsible for marketing. Bartlett Media sought a second letter from the Bank on June 6, 1990 for a larger amount, $500,000. The "Credit Write-Up" for that loan, which was prepared under the direction of the Bank's chief executive officer, Bruce Smith, and initialed by seven members of the Bank's board, described Harold Byrd as "Vice President - Bank of Bartlett." Harold Byrd agreed that the person who typed the form would be aware of his functions at the bank. He said that when errors occur, they are corrected by Mr. Smith or the board. In the case of this credit report for the

board, Mr. Smith prepared it and no one sought to change it. Milton Rodgers, the third Bartlett Media partner and 20% equity holder, stated that he had heard people in the community refer to Harold Byrd as a vice president of the Bank.

101. By June 18, 1990, when the Bank letter had been called into question because of insider prohibitions, Harold Byrd said he was "mistaken" when he said he was a vice president in May 1990. While the record evidence overwhelmingly shows that that is unlikely, there is little question that Harold Byrd, as a major stockholder and marketing and business development director of the Bank, makes policy and is an insider even if he is not an officer. He and the Bank's chairman, Robert Byrd, share an office and discuss each other's work. They discuss policy questions. Harold Byrd sits on the loan committee of the bank, which includes the Bank's directors and the chief operating officer, Charles Tucker. The committee passes on loans and makes decisions about specific requests. The policies of the Bank are decided by its committees. Harold Byrd also serves on the personnel and marketing committees. Ted M. Hayden, a Memphis, Tennessee attorney who is experienced in local banking law reviewed Harold Byrd's description of his job and concluded that Mr. Byrd is an executive officer of the Bank because of the authority he exercises. He reached his conclusion based on Harold Byrd's own characterization of his role as being one that approves marketing options for the Bank and develops policy concerning the profile maintained by the Bank in the community. Mr. Hayden also thought it was important that Harold Byrd serves on the loan and special assets committees, which interpret and apply internal loan policies. Mr. Hayden noted that Harold Byrd testified that he "called the shots" on marketing and described himself as being "the marketing functions of the bank." Mr. Hayden also found significant Harold Byrd's explanation that he "act[s] independently" and that that has resulted in the Bank being successful. Harold Byrd's testimony shows that his role at the Bank brings him within Tennessee's prohibitions on banks lending to insiders.

102. It is unlikely that the Bank of Bartlett would violate the Tennessee banking regulations in order to provide money to Bartlett Media. Assuming that is the case, the letter from the Bank could only have been an accommodation to the Byrds. There is no question that the Bank did not treat the issuance of the loan letter to Bartlett Media in an arms-length manner. This is clearly demonstrated by the behavior of the Bank's chief executive officer, Bruce Smith, in issuing the loan letter. Mr. Smith, who prepared the December 14, 1987 loan letter, represented that it was addressed to the individual partners because he did not know the name of the partnership. That representation seems improbable. He could have found out simply by asking any of the partners since they executed the partnership agreement on the very day that Mr. Smith wrote the Bank's letter to them. Mr. Smith also could not remember whether he reviewed the financial statements of the borrowers. (It was his view that their financial statements did not really matter since the assets of the partnership would secure the loan.) Robert Byrd said that the Bank's board members were told about the loan in December 1987 and that the minutes of the loan committee would reflect that they had been told. He made that statement on May 22, 1990. The minutes of the loan committee do not reflect that they were informed. On June 7, 1990, he said that, in December 1987, he told the Bank's board, because the board acts as the loan committee for credit to directors and executives. But there is no reference to that in the board's minutes either. Robert Byrd then said that the minutes did not reflect the loan because it was not a binding commitment. Harold Byrd, who is a director, has no recollection of the Bartlett Media loan being mentioned to the board.

103. Bartlett Media has been unable to provide reliable testimony or substantiate who was going to receive the loan, the individual partners or the partnership. Because Mr. Smith stated that the assets of the partnership would be collateral for the loan, it appeared that the Bank would be lending the money to the partnership. On June 7, 1990, Robert Byrd represented to the Commission that that was the Bank's intention. But when the issue was raised about the legal ability of the Bank to lend to the partnership, Mr. Smith said the bank contemplated loans to the partners as individuals. He and Robert Byrd were then unable to provide a coherent explanation about what the bank contemplated or what the partners intended.

104. Mr. Smith said he knew all along about the bank law prohibitions on the loan and that he intended that the Bank would issue three loans to three individuals in the percentage of each partner's equity interest. That that was his intention is improbable. His testimony demonstrates that the Bank was in no position to make any judgment about whether such a transaction would satisfy state banking laws. He stated that at the time he wrote the letter he did not know what the partnership interests would be; he said that he did not even know that a partnership had been organized. Moreover, he did not prepare three letters for three individuals but instead he wrote one letter addressed to the three partners. Robert Byrd also testified that the loans would be according to equity shares. When he was asked how that could be reconciled with his representation that there was no partnership when he requested the loan, he said he was "pretty sure" he told Smith that there would be different portions of the loan to the Bartlett Media principals although he did not know whether there would be a partnership. He also said the loans need not be separate but could be joint and several, or loans to individuals, or a loan to a partnership.

105. Until the insider prohibitions on lending to the partnership were raised, Bartlett Media repeatedly represented in filings to the Commission that the loan was being made to Bartlett Media by the Bank. It never suggested that loans would be made to the individual partners. When the financial question was originally brought up, it was alleged that the December 14, 1987 bank letter was an accommodation but it was not claimed that it violated state banking law. To overcome that initial accusation, the Bank's board then unanimously approved a loan to Bartlett Media for a greater amount, $500,000. The new letter was described by Mr. Smith as a binding commitment for which each partner would be liable for the full amount. But then when the insider regulations were asserted, Smith said the Bank contemplated loans to individual partners as individuals and that the Bank did not intend to lend money to the partnership. Smith also said the June 6, 1990 $500,000 letter was addressed to the partnership for the Commission's benefit at the request of counsel but that the bank actually intended to lend to the individuals. Robert Byrd represented in different statements, that the board had always been aware that the loan would be to individuals, that the loan would be made to

the partnership, or that it might be both. When asked to reconcile his different testimony, he then said he could not recall whether he told the board that the loan would be to individuals as opposed to the partnership.

106. Robert Byrd also has claimed that the three partners had agreed from the outset that they would provide their personal funds for the station. He even stated that the partners had an agreement to provide the funds. There is no evidence to corroborate that claim and Milton J. Rodgers stated he had no intention of using his personal resources. Harold Byrd said that Bartlett Media relied on only the Bank's letter to finance its proposal when the application was submitted. There is no objective or corroborating evidence that establishes that Bartlett Media had decided where it would obtain the additional $35,000 over the Bank letter when it certified.

107. Bartlett Media has not been able to demonstrate that it had reasonable assurance of financing when it filed its application and certified. The evidence instead reflects that it obtained a letter from the Bank of Bartlett which was an accommodation to the partners. The evidence does not support Bartlett Media's claim that the Bank could or would provide the loan represented by the letter. Instead, the testimony on this issue is so inconsistent that it is unreliable. Bartlett Media has provided conflicting answers to questions about its financing and the Commission cannot rely on the various stories that have been told about what the Bank or the applicant intended. Overall, the partners' testimony is untrustworthy on this issue. Bartlett Media is not qualified to become a Commission licensee and it will not be compared to the other applicants in this proceeding.

Comparison of the Qualified Applicants

108. Three applicants, Strong, Bott and Belz are qualified and entitled to comparison of their proposals. Each of these applicants proposes that those principals exercising 100% control of the applicant will work at the Bartlett station full time, 40 hours per week. All of their pledges or promises cannot be credited, however, because there is "countervailing evidence" which "raises sufficient doubt" that not all of them have met their ultimate burden. *Anchor Broadcasting Limited Partnership*, 5 FCC Rcd 2432, 2435-36 (Rev. Bd. 1990).

109. Strong is a general partnership with two partners, Raymond Strong and his spouse Jean-Marie Strong. They each propose to work full time at the station. Raymond Strong represents that he would be the general manager and Jean-Marie Strong states that she would be the office manager/public affairs director. Both Strongs have promised that their current business and family obligations will not interfere with their full-time operation of the station. The evidence of record does not establish that Raymond Strong perceives himself as having actually promised to manage the station on a day-to-day basis. Mr. Strong said he would average 40 hours per week. Some weeks he would work more and other weeks less. He said he would like to work less. Moreover, he said he would hire a station manager who would provide the actual skill needed to operate the station.

110. Currently, although Mr. Strong goes to his office each day to oversee a number of businesses, he does not work a 40 hour week, and has not since 1985. Originally, Mr. Strong said he spent 30 hours per week at his office. Since Mr. Strong intends to maintain his current business affairs, he was asked how he could do that and manage the station too. He then said he only works 5-10 hours per week. He explained that while he was at the office he spent the remaining time on such activities as collecting antiques, building signs for his subdivision and watching his children. Mr. Strong also owns a residential design firm in Venice, Florida and a home in Sarasota, Florida. He usually spends several months during the year at his Florida home. Mr. Strong appeared uninformed about what his promise entailed. Except for financing his proposal, he had little to do with its preparation or the determination of how the proposal would be made. While Mr. Strong concedes that he knows little about how to operate a station, that may not matter since it is doubtful on this record that he will be engaged in its operation.

111. Initially, Stanley Emert was counsel to Strong. He suggested that the Strongs organize a partnership and, when the Form 301 was completed, he told Mr. Strong to check the general partnership box. Mr. Emert prepared a partnership document in late 1987 and it was duly signed by the Strongs and became effective on December 16, 1987. Despite this legal document, Mr. Strong described his interest to the Commission when he filed the Form 301 as a "joint tenant with spouse." When integration statements were filed in April 1990, Strong had changed lawyers and Mr. Strong then represented that the applicant was two individuals who are "husband and wife." Contrary to the actual fact, he specifically represented in that statement that there was no written agreement incorporating their arrangements. When documents were requested, Strong found the partnership agreement that had been forgotten. The most logical explanation for their contrary representations is that neither one of the Strongs have paid much attention to their proposal. Mr. Strong said he could not remember discussing the agreement with Mr. Emert. Ms. Strong first said she had not discussed the agreement with Mr. Emert because she believed that if there were any questions Mr. Strong would have asked them. She later said she believed that she and Mr. Strong had talked with Mr. Emert about the partnership agreement. Their testimony demonstrates, moreover, that they know almost nothing about the agreement and have not taken any steps to implement it. Mr. Strong said that he and his spouse had individual authority to hire and fire while the partnership agreement provides that hiring and firing of an employee cannot ordinarily be done without the consent of the other partner. Raymond Strong stated that there was no reason why he could not receive a salary despite the fact that the agreement provides that partners cannot receive a salary. Ms. Strong's testimony and integration promise states that she will be the office manager while the partnership agreement provides that Ms. Strong will be the business manager with "concurrent charge of all financial details." The concurrent duties, they explained, means that Ms. Strong will supervise a bookkeeper if there is one, otherwise she will perform the job alone.

112. Raymond Strong's method for pursuing the application resulted in his knowing very little. An acquaintance, Charles Thompson, who owned a radio station, told him about the available channel. Mr. Strong never thought about owning a broadcast station before Mr. Thompson told him about the opportunity. He gave Mr. Thompson a fee and for that fee Thompson arranged for legal and engineering services and filing fees. Mr. Strong has no idea how much the individual services cost. About all he did was arrange to use his mother's land for the

antenna site and provide for financing. Other information has been provided to Strong by Robert Blow who is, like Thompson, a broadcaster and consultant. Mr. Blow has also involved Mr. Strong in a broadcast application for Jackson, Tennessee. Mr. Strong's testimony demonstrates that he knows nothing at all about the Jackson proposal except that he is a 37.5% partner. With this background, it is hard to believe that Mr. Strong will work at the station on a day-to-day basis and that he will develop and implement policies and play an important role in management. The greater likelihood is that someone more experienced will be hired to perform those functions. Because Mr. Strong is uncertain of the amount of time and the role he will play at the station, there is no factual predicate for establishing how much integration credit he should receive. *Progressive Communications, Inc.*, 5 FCC Rcd 7058, 7059 (1990).

113. Ms. Strong's proposal to act as office manager/public affairs director raises doubts about whether she will play an important role in management and have responsibilities that will involve policy functions. In important respects, Ms. Strong's role was assigned to her by counsel and defined by counsel. She simply took his advice. Ms. Strong did not have any understanding of why her duties were defined one way in one document and another way in other documents. In the integration statement Strong represented that Ms. Strong alone would oversee budget development but in the written testimony that function was assigned to both Strongs. She said she could only guess at the reason for the change. She explained that the difference in the description of her duties in the integration statement as financial "record keeping" and in her written testimony as overseeing financial affairs was the decision of her counsel. She also could not explain why she said in the integration statement that she would approve purchases but no mention was made of that role in her written testimony.

114. While Ms. Strong in the past has worked at Mr. Strong's company, Pressed Steel, as a bookkeeper, she represented that at the station she would supervise a bookkeeper. Mr. Strong explained that Ms. Strong would supervise a bookkeeper when the time came that they could have a bookkeeper but in the meantime Ms. Strong would be the bookkeeper and do the same job she did at Pressed Steel. In the December 1987 partnership agreement, Ms. Strong was listed as the business manager and it was represented that she would have concurrent charge of financial details. Mr. Strong said that meant she would supervise the bookkeeper.

115. Ms. Strong's duties were expanded by counsel who said she would be public affairs director; he also told her what her duties would be. Ms. Strong envisions this position involving her with the community such as attending community events. She would report to the station manager or general manager in this job. The only part Ms. Strong played in preparing the proposal was to listen in on conversations. The record does not reflect that she made any suggestions or acted independently in any manner. She has not made a credible showing that she will effectuate and decide policy and manage the station. Her role, according to her spouse, will be that of bookkeeper and insofar as she makes other claims, those were applied like a postage stamp to her testimony by counsel. She has no idea what the jobs assigned will entail; it is hard to believe that someone who has had her jobs assigned by counsel and has been impassive to the proposal will suddenly become an active manager who formulates policy. Strong is not entitled to 100% integration credit. *Progressive Communications, Inc.*, 5 FCC Rcd 7058 (1990).

116. Richard P. Bott is an individual applicant. He has controlling interests in seven broadcast stations and these interests make his promise to integrate comparatively less important than that made by Strong and Belz. Mr. Bott, who promises to manage the Bartlett facility on a full-time, 40 hour per week, basis recently made a similar promise for Overland Park, Kansas. After he settled with the other applicants for Overland Park and was awarded a permit, he said he and his spouse changed their minds about working at the station. Moreover, while Mr. Bott has frequently managed the stations he owned, his day-to-day participation has been only during the initial operation of the stations. In addition, it appears unlikely that Mr. Bott's son, Richard, will oversee the other stations as Mr. Bott represented since he is committed to manage a new station in Blackfoot, Idaho, far from the Kansas City headquarters of the Bott stations. Furthermore, Mr. Bott has spent many years personally overseeing his stations and it is not credible that he will now leave them to be directed by someone else.

117. Bott Broadcasting was granted a construction permit for Overland Park, Kansas on January 6, 1986. *Joanna Glinter*, FCC 86M-074, released January 8, 1986. Mr. Bott promised he would manage the station on a full-time basis. His spouse also promised to manage. Mr. Bott states that his "lifestyle" changed after the grant was made. But after examination of his reasons in this proceeding, it is apparent that Mr. Bott simply changed his mind after the grant. Although Mr. Bott did not tell the Commission immediately about his change of plans, he testified that he did notify the Commission before the grant. Actually, he waited nearly a year and a half after the construction permit was granted. The station still has no manager and there is nothing to prevent Mr. Bott from managing the station now if he has again had a change in lifestyle and wants to manage a station. When he was asked about that possibility, he said he did not want to manage just any station but he wanted to move to the sunbelt area where Bartlett, Tennessee is located. That reasoning is also dubious since Bott already owns a station at Collierville, Tennessee which is also in the Memphis market. (He has promised to divest that interest.) Recently Mr. Bott sought and received a grant for FM station KKCI, Goodland, Kansas. After the grant was made, he extended the permit three times, and then he changed his mind about operating the station; the permit has now been transferred.

118. If past history is any guide, Mr. Bott may manage the Bartlett station for a few months and then return to his home in the Kansas City area where he has lived for 28 years. It is from his home in Independence, Missouri that he oversees his interests; he seldom even visits the stations. Mr. Bott sought to allay any concern about his longtime work habits by pointing out that his son, Richard, was now ready to take over for him. What Mr. Bott failed to point out is that his son has promised the Commission that he will move to Blackfoot, Idaho to manage a new FM station. If past history is any guidance, it is improbable that Mr. Bott will leave Kansas City for Bartlett, Tennessee to manage this channel. Bott's promise to manage the Bartlett facility is not entitled to credit.

119. Belz promises that Julianne Belz, its only stockholder, would manage the station on a full-time basis as the general manager. The opposing parties have alleged

that Ms. Belz will not manage the station or that if she does, she will share the management duties with her spouse, Martin Belz. There is no reliable evidence to support their contentions that Ms. Belz will not manage the station or that her spouse will. Thus far Ms. Belz has been an active owner; she made the decision to apply and she alone prosecuted the application. Ms. Belz learned about the availability of the frequency from *Broadcasting Magazine*. Tr. 1957-58. She initiated the application, selected and hired legal and engineering assistance, and, with counsel, prepared a preliminary budget. Tr. 1457-58, 1460, 1491-93, 1542-43. She secured a transmitter site, decided to form a corporation, hired counsel to prepare the corporate documents, and approved them when they were completed. Tr. 1382-84, 1462-63, 1464-67, 1468. She drafted and reviewed the application, supervised its prosecution, selected a bank for the applicant, arranged for public notice, and paid for prosecution of the application with her own personal funds. Tr. 1491, 1493.[1]

120. There is no evidence that Martin Belz participated in the business of the applicant. He has provided no funds for prosecution and he does not intend to do so. Tr. 1366-69, 1450-51. And he has stated that he will have no involvement in the day-to-day operations of the station when the Belz application is granted. Belz Exh. 1, at 2; Tr. 1396, 1518-23. He currently works 80-100 hours a week as chief operating officer of Belz Enterprises, a company whose primary business is real estate development. Tr. 1354-56. While Mr. Belz has a one-third ownership interest in KLAX-TV, Alexandria, Louisiana, he has pledged to divest that interest. Tr. 1363-64. Mr. Belz explained that he views his interest in KLAX-TV as an investment and that he has no role in the day-to-day operation of the station. Tr. 1360, 1375, 1414. Mr. Belz, of course, has no ownership interest in Belz Broadcasting, while he does in KLAX. He has repeatedly said that he will have no role in the day-to-day affairs of the station. *See* Tr. 1396-97, 1414, 1518-23.

121. The opposing parties have urged that it is unlikely that Ms. Belz will actually operate the station because she has not been employed since she married in 1986. Belz points out that Ms. Belz married in June 1986, that from July 1986 to February 1987 she helped her spouse manage the construction of the Peabody Hotel in Orlando, Florida, and that within a few months of returning home to Memphis she made application for the Bartlett facility. Belz Exh. 1, at 2; Tr. 1438-39. Belz responds that Ms. Belz during her adult life has been either a student, employed, or pursuing this application.

122. The opposing parties have also suggested that Mr. Belz has a more important role in the applicant than Belz has admitted. Mr. Belz is secretary and vice president of the applicant. Belz Exh. 2, at 1. He was a director for a few days before the application was filed in December 1987, but he was removed from that position. Tr. 1387, 1473-75, 1495. He was incorrectly referred to as a director in an amendment. Mr. Belz has not performed any duties as vice president and as secretary he signed the initial incorporation documents and minutes and attended the first meeting of the shareholders and directors. Tr. 1385-87, 1398, 1412-14, 1511. There is no evidence that he prosecuted the application.

123. Belz is entitled to full credit for Ms. Belz's promise to manage the Bartlett facility on a full-time basis. Neither Strong nor Bott have established that their full-time proposals are credible. Bott, moreover, has an interest in seven existing stations. Therefore, on the most important comparative factor of diversification of the ownership of mass media, Belz and Strong, who have no mass media interest, are to be preferred over Bott who has multiple interests. All of the parties propose an auxiliary power system in the event the station's power is interrupted; they are equal on that factor.

124. Bartlett Media is unqualified because its representations about its financial proposal are unreliable and dishonest. On a comparative basis, of the three qualified applicants, Belz is to be preferred for presenting the most credible proposal for full-time integration of ownership into management.

ACCORDINGLY, IT IS ORDERED that the joint motion for extension of time, filed August 28, 1990 by Richard P. Bott, Raymond J. & Jean-Marie Strong; and Robert C. Byrd, Milton J. Rodgers & Harold W. Byrd, A General Partnership d/b/a Bartlett Media IS GRANTED.

IT IS FURTHER ORDERED that the motion to file one day late, filed September 21, 1990 by Richard P. Bott IS GRANTED.

IT IS FURTHER ORDERED that the petition for leave to amend, filed October 26, 1990 by Belz Broadcasting Company IS GRANTED and the amendment IS ACCEPTED.

IT IS FURTHER ORDERED that the applications of Raymond J. Strong & Jean-Marie Strong (File No. BPH-871223MQ), Robert C. Byrd, Milton J. Rodgers & Harold W. Byrd, A General Partnership d/b/a Bartlett Media (File No. BPH-871224MC), Richard P. Bott (File No. BPH-871224ME) ARE DENIED and the application of Belz Broadcasting Co. (File No. BPH-871223MI) for a construction permit for a new commercial FM station on Channel 225A in Bartlett, Tennessee IS GRANTED provided Martin Belz divests his interest in and connection with KLAX-TV, Alexandria, Louisiana.[2]

FEDERAL COMMUNICATIONS COMMISSION

Edward J. Kuhlmann
Administrative Law Judge

FOOTNOTES

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[1] Strong incorrectly claims that Ms. Belz never paid for her stock (*see* Tr. 1467), that Mr. Wood arranged for the engineer (*see* Tr. 1460), that Ms. Belz had an incorrect understanding of Tennessee law (*see* Tr. 1453), that Ms. Belz could not explain why she selected her spouse as secretary (*see* Tr. 1453), and that Ms. Belz "used people from her husband's company to select a site for her" (*see* Tr. 1382-84). Strong also urges that Ms. Belz did not independently select legal counsel. The record reflects that she did. *See* Tr. 1458, 1442-43, 1384, 1412, 1464-65. Contrary to Strong's claim Ms. Belz did not select her accountant because he was her spouse's, she instead chose him because he had been her personal accountant. Tr. 1472-73. Strong also claims that Ms. Belz currently only takes care of her child but the record reflects that Ms. Belz has a housekeeper who helps with childcare two or three days a week. Tr. 1490.

[2] In the event exceptions are not filed within 30 days after the release of this Initial Decision, and the Commission does not review the case on its own motion, this Initial Decision will become effective 50 days after its public release pursuant to Sec. 1.276(d).

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Applications of

CANNON COMMUNICATIONS CORPORATION	**MM Docket No. 83-976** File No. BPH-811102AH
FIRST CLASS COMMUNICATIONS, LTD.	**MM Docket No. 83-982** File No. BPH-820624AX
HEATHER H. STENGEL	**MM Docket No. 83-983** File No. BPH-820624AZ

For a Construction Permit
for a New FM Station in
Chatham, Massachusetts

ORDER

Adopted: January 17, 1991; Released: January 31, 1991

By the Commission:

1. Before the Commission for consideration is a Review Board decision, *Cannon Communications Corporation*, 5 FCC Rcd 2695 (Rev. Bd. 1990), supplementing a previous decision that granted the application of First Class Communications, Ltd. for a new FM station in Chatham, Massachusetts, and denied the mutually exclusive application of Cannon Communications Corporation. *See Cannon Communications Corporation*, 4 FCC Rcd 7514 (S.I.D. 1989).[1] We agree with the Board's resolution of this case. We wish, however, to comment on certain matters. Also, we herein deny Cannon's petition to reopen the record and enlarge issues against First Class Communications, Ltd.

I. APPLICATIONS FOR REVIEW

2. The Review Board, affirming a supplemental initial decision by Administrative Law Judge Joseph Stirmer, rejected allegations that Cannon's principal Lynn Landy abused the Commission's processes by approaching First Class' owner Joseph A. Ryan and threatening to file a derogatory affidavit concerning Ryan[2] with the Commission unless Ryan agreed to Landy's settlement terms. [3] *Cannon Communications Corporation*, 4 FCC Rcd 7514 (S.I.D. 1989), *aff'd*, 5 FCC Rcd 2695 (Rev. Bd. 1990). The Board found that although Landy had approached Ryan, the record evidence did not establish that she had threatened him.[4] In finding that Landy did not abuse the Commission's processes, the Board relied on the decision in *Country-Politan Broadcasting, Inc.*, 60 FCC 2d 361 (Rev. Bd. 1976), *rev. denied*, 68 FCC 2d 640 (1978), in which the Board similarly found that inconclusive, self-serving testimony did not establish the existence of a threat.

3. In urging that Landy did abuse the Commission's processes, Ryan attempts to distinguish the *Country-Politan* case on two grounds. We find Ryan's attempts to distinguish *Country-Politan* unpersuasive. First, it is not significant that Ryan testified that, although Landy did not explicitly threaten him, he inferred a threat from the substance of the conversation and her tone, a circumstance not present in *Country-Politan*. The ALJ found no implied threat based on Landy's testimony concerning the meeting. The record supports the ALJ's finding that Ryan's inference was mistaken, 4 FCC Rcd at 7529 ¶ 94, and thus this case does not differ from *Country-Politan* in that respect. Second, Ryan argues that Cannon's actions are more egregious because, unlike the situation in *Country-Politan*, where a party was confronted with legitimate allegations, the ALJ ultimately found that the Callahan affidavit was not credible. *Id.* at 7527-28 ¶¶ 84-88, 7529 ¶ 94. However, it is immaterial that the Callahan affidavit was eventually discredited. Abuse of process occurs when a threat is made to divulge or withhold information in order to coerce settlement. *See Gulf Coast Communications, Inc.*, 81 FCC 2d 499, 513 ¶ 26 (Rev. Bd. 1980), *recon. denied*, 88 FCC 2d 1033 (Rev. Bd. 1981), *rev. denied*, FCC 82-168 (Apr. 16, 1982). An abuse of process inquiry focuses on whether the information has been used as part of a threat, and not on the substance of the information. *Id.* at 513 ¶ 27. In light of the fact that the record supports a finding that no threat was made, the validity of Callahan's affidavit is of no moment. Accordingly, the Board correctly held that this case resembles *Country-Politan*. Moreover, in finding no abuse of process, the Board properly deferred to the ALJ's credibility findings, crediting Landy's testimony that she intended no threat, which is supported by contemporaneous notes made by Landy's attorney shortly after the meeting with Ryan.

4. In addition to resolving the abuse of process issue, the Board's decision also dismissed Ryan's motion to dismiss Cannon's application. The Board found no *prima facie* merit in Ryan's contention that Cannon's application should be dismissed because Cannon failed to amend its application in a timely manner and failed to comply with a related order by the ALJ, but merely dismissed the motion as moot in view of the Board's disposition of the exceptions to the supplemental initial decision which affirmed the grant of Ryan's application. 5 FCC Rcd at 2704 n.1. Cannon failed to amend its application in a timely manner to report additional broadcast interests acquired by Landy's husband. The ALJ accepted the untimely amendment, which was filed after the case had been remanded for a supplemental hearing, but required Cannon to supplement the amendment by reporting the dates on which the interests were acquired. Cannon did not comply with the ALJ's order during the course of the supplemental hearing. Ryan filed his motion to dismiss Cannon's application with the Board, after the ALJ had issued his decision in the supplemental hearing. Cannon supplied the required information with its opposition to Ryan's motion to dismiss.

5. We agree with the Board that Cannon's failure to amend its application in a timely manner to report additional broadcast interests and to comply with the ALJ's order, which Cannon claims was inadvertent, does not amount to the kind of egregious, disruptive, or prejudicial conduct for which the sanction of dismissal is appropriate. *See Comuni-Centre Broadcasting, Inc. v. FCC*, 856

F.2d 1551, 1554 (D.C. Cir. 1988), *cert. denied*, 109 S. Ct. 1539 (1990); *Mark A. Perry*, 4 FCC Rcd 6500, 6502 ¶ 15 (Rev. Bd. 1989). Moreover, Cannon's noncompliance with the ALJ's order produced no undue administrative burden or prejudice to Ryan, as exemplified by the fact that Ryan did not even raise this matter before the ALJ. The Board correctly found no merit in Ryan's motion; therefore, its dismissal of the motion is harmless error because Cannon cannot prevail over Ryan in any event, since (as indicated in the following paragraphs) we also find no merit in Cannon's request to reopen the record to examine Ryan's financial qualifications.[5]

II. PETITION TO REOPEN THE RECORD

6. Cannon seeks to reopen the record and to enlarge issues against Ryan, alleging that Ryan is financially unqualified and that Ryan lacked candor before the Commission. These allegations are based on Ryan's recent petition for protection from creditors under Chapter 11 of the Bankruptcy Act, 11 U.S.C. § 101 *et seq.* (1976).[6] Cannon argues that the bankruptcy petition discloses that Ryan is insolvent and therefore lacks the financial qualifications to be a Commission licensee. Cannon also asserts that Ryan failed to timely report that a federal tax lien was filed against Ryan on April 5, 1990. According to Cannon, the filing of the tax lien, coupled with the magnitude of Ryan's debts, suggests that Ryan became insolvent well before filing for bankruptcy and that Ryan attempted to conceal his financial condition to avoid Commission scrutiny.

7. Ryan opposes Cannon's petition on both procedural and substantive grounds. Procedurally, Ryan asserts that the petition is untimely because Cannon's petition was filed more than fifteen days after Cannon discovered the fact of Ryan's bankruptcy, whether measured by the date that Ryan's counsel first informed Cannon by letter of the filing of the bankruptcy petition or by the date of Ryan's amendment reporting the bankruptcy filing. Ryan also asserts that the automatic stay provisions of the Bankruptcy Act prohibit further Commission proceedings based on his financial qualifications.[7] As to the merits of Cannon's petition, Ryan argues that there is no basis for reopening the record, because Ryan complied with the Commission's financial standard by constructing and operating the station in Chatham for the past three and one-half years pursuant to program test authority.[8] Ryan contends that there was no duty to report changes in Ryan's financial condition prior to filing for reorganization under Chapter 11. Cannon, in its reply, reasserts its contention that the requested issues are warranted since Ryan's construction and operation of the station at its own risk does not obviate inquiry into Ryan's financial qualifications and candor.

8. We agree with Ryan that the filing of a petition in bankruptcy after constructing and operating the station for more than three years does not raise a substantial and material question of fact as to Ryan's financial qualifications.[9] Further, Cannon's allegations raise no candor or reporting issues for which the record must be reopened.[10] The financial qualifications of an applicant are evaluated on the basis of its ability to construct and operate the station for three months without revenue. *See Revision of Application for Construction Permit for Commercial Broadcast Station*, 4 FCC Rcd 3853, 3858 ¶ 39 (1989). Here, the record indicates that Ryan in fact constructed the Chatham facility and operated it for three years, far longer than the time period relevant to the Commission's financial qualifications standard. The Commission recognizes that being financially qualified initially is no guarantee of ultimate financial success. Thus, there is no basis to conclude in view of the facts of this case that Ryan is not financially qualified under the applicable standard by virtue of his bankruptcy filing. *See Dorothy J. Owens*, 5 FCC Rcd _________, ¶ 14 (1990).[11]

9. Further. Cannon has not raised a substantial and material question of fact with respect to Ryan's candor or compliance with the reporting requirements of 47 C.F.R. § 1.65. As indicated in the preceding paragraph, Cannon has provided no basis to conclude that Ryan's present financial difficulties are relevant to the Commission's financial qualifications standard. Thus, there is no basis to conclude that Ryan had a duty to report these financial difficulties, or the tax lien, prior to filing the bankruptcy petition.[12]

III. ORDERS

10. ACCORDINGLY, IT IS ORDERED, That pursuant to 47 C.F.R. §1.115(g), the Applications for Review filed May 29, 1990 by Cannon Communications Corporation and First Class Communications, Ltd. ARE DENIED.

11. IT IS FURTHER ORDERED, That the Petition to Reopen the Record and Enlarge Issues filed November 19, 1990 by Cannon Communications Corporation IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] Now pending before the Commission are: Applications for Review filed on May 19, 1990 by Cannon Communications Corporation and First Class Communications, Ltd.; an Opposition filed on June 15, 1990 by Cannon; "Comments" filed on June 15, 1990 by First Class Communications; Petition to Reopen the Record and Enlarge Issues Against First Class Communications, Limited, Debtor-In Possession filed November 19, 1990 by Cannon; an Opposition to Petition to Reopen The Record filed December 4, 1990 by First Class; and a Reply to the Opposition filed on December 14, 1990 by Cannon. Cannon and First Class were granted an extension of time, until June 15, 1990, to respond to the applications for review. *See Order*, FCC 90I-62 (Jun. 15, 1990).

[2] The affidavit of Steven Callahan, Ryan's former employee, charged Ryan with making misrepresentations to the Commission.

[3] First Class Communications, Ltd., the current applicant, is a corporation wholly owned by Ryan, to which the construction permit was subsequently assigned. For simplicity, both that corporation and Ryan will henceforth be referred to as Ryan.

[4] The Board found that the conflicting testimony of Ryan and Landy was inconclusive as to whether a threat was made, and thus declined to overturn the ALJ's credibility findings, crediting Landy's testimony that she intended no threat. The cir-

cumstantial factors cited by the Board, namely, Landy's prompt filing of the Callahan affidavit with the Commission and the absence of further approaches to Ryan by Landy, tend to corroborate the Board's finding. However, Landy's subsequent filing of the Callahan affidavit has less weight than it would otherwise, given the fact that Ryan had already filed an affidavit setting forth his version of what had transpired at their meeting.

[5] Cannon has indicated its intention to resume its appeal of the Commission's comparative decision, granting Ryan's application, in the United States Court of Appeals for the D.C. Circuit. *See Cannon Communications Corporation*, 101 FCC 2d 169 (Rev. Bd. 1985), *rev. denied*, FCC 86-244 (May 15, 1986). That decision, not at issue here, assessed a slight diversification demerit against Cannon based on media interests of the husband of Cannon's principal. We therefore wish to note additional media interests reported by Cannon subsequent to the Commission's comparative decision which are relevant to Cannon's appeal: a CATV system in Stowe, Vermont acquired in August, 1984; WDST(FM), Woodstock, New York acquired in July, 1987; a CATV system in Jeffersonville, Vermont acquired in June, 1988; and a 49% interest in WZAD(FM), Wurtsboro, New York acquired in November, 1988.

[6] Ryan filed an amendment to his application on October 22, 1990, reporting the bankruptcy petition. The amendment was accepted by *Order*, FCC 90I-118 (Nov. 8, 1990).

[7] Ryan cites 11 U.S.C. § 362(a)(1), which provides that, absent a specific exception under 11 U.S.C. § 362(b), upon the filing of a bankruptcy petition, no actions, including administrative actions, against the debtor may be commenced, and that pending actions are automatically stayed.

[8] Ryan constructed the Chatham facility even though grant of his application was not yet final due to the pending appeal of the Commission's comparative decision in the Court of Appeals. Ryan pursued this construction at his own risk, and such construction before resolution of all other outstanding issues presently under appeal in this proceeding creates no equities in Ryan's favor as to the outcome of the appeal.

[9] We need not determine whether Cannon's petition to reopen was timely filed because we are denying the petition on the merits. Further, we need not reach Ryan's contention that the automatic stay provisions of Chapter 11 of the Bankruptcy Act, 11 U.S.C. § 362(a), prohibit the Commission from considering Cannon's petition.

[10] In this regard, we note that Ryan is now operating the Chatham station as a debtor-in-possession, consistent with Ryan's attempt to reorganize under the Bankruptcy Act. Consequently, it does not appear that there has been a change in core circumstances with respect to Ryan's application, the grant of which has not yet become final. *See Greater Boston Television corporation v. FCC*, 463 F.2d 268, 283-86 (D.C. Cir. 1971).

[11] *Tri-State Communications*, 5 FCC Rcd 6232 (1990), which Cannon cites in support of the proposition that applicants subject to bankruptcy proceedings are not excused from meeting the financial qualifications requirements, is not applicable here. In *Tri-State*, the Commission declined to permit a bankrupt, financially disqualified applicant to amend its financial showing in order to substitute a financially qualified applicant. The applicant involved was neither a licensee nor a permittee and thus its financial qualifications were still in issue. By contrast, Ryan's financial qualifications were not at issue during the comparative proceeding, and Ryan has since constructed and operated for longer than three months.

[12] *Weyburn Broadcasting Limited Partnership*, 5 FCC Rcd 861 (Rev. Bd. 1986) and *Las Americas Communications, Inc.*, 1 FCC Rcd 786 (Rev. Bd. 1986), cited by Cannon, do not require a different result. The Review Board found that applicants in these proceedings failed to disclose changes in their financial conditions, including the imposition of a tax lien against the applicant in *Las Americas*, that occurred *during the comparative proceedings* which affected or may have affected the applicants' financial qualifications.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-470

In re Applications of

F.E.M. RAY, INC. File No. BPH-870515NL

PLAYA DEL SOL File No. BPH-870515NX
BROADCASTERS

For Construction Permit for a
New FM Station on Channel 281A
Tucson, Arizona

Appearances

David Tillotson on behalf of F.E.M. Ray, Inc. and *Richard Rodin*, *Marissa G. Repp*, and *David W. Karp* on behalf of Playa Del Sol Broadcasters.

INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE EDWARD J. KUHLMANN

Issued: January 24, 1991; Released: January 31, 1991

1. The two remaining applicants and eight other applicants were designated for hearing on October 13, 1989. *NJT Limited Partnership*, 4 FCC Rcd 7969 (1989). The following issues remain to be decided:

> 1. To determine which of the proposals would, on a comparative basis, best serve the public interest.
>
> 2. To determine, in light of the evidence on these issues, which of the applications, if any, should be granted.

2. A prehearing conference was held on January 16, 1990. *Order*, FCC 90M-112, released January 19, 1990. The written testimony was examined at hearing sessions held from June 18, 1990 through June 21, 1990. The record was closed on June 21, 1990. *Order*, FCC 90M-1794, released June 25, 1990. Proposed findings and conclusions were filed by the parties on July 20, 1990 and replies were filed on August 8, 1990.

FINDINGS

Comparison of the Applicants

Full-time participation in station operation by owners

FEM Ray

3. FEM Ray is an Arizona corporation with two classes of common stock, Class A and Class B. FEM Ray Exh. 1. Class A shareholders are entitled to one vote per share on matters submitted to vote of the shareholders and Class B shareholders are entitled to vote on proposals for the sale of all or substantially all of the corporation's assets or for a merger. *Id.* FEM Ray has three voting stockholders who are also officers and directors. *Id.* They each propose to work full time, 40 hours per week, at the Tucson facility. Francine Rienstra owns one-third of the voting shares, is president and a director, and proposes to work full time, 40 hours per week, as general manager. FEM Ray Exh. 3. She will oversee the performance and operation of the station and her duties will include arranging for the construction of the station, hiring, firing, and supervising the sales staff, establishing and maintaining community ties, designing promotions and overseeing the efficiency of the station.

4. Constanza Rodriguez also owns one-third of the voting shares, is secretary/treasurer and director, and proposes to work full time, 40 hours per week, as the station's business manager. FEM Ray Exh. 2. She will direct the business and accounting operation of the station. *Id.* She will prepare income and expense projections, maintain operating budgets, and operating expense accounts, manage receivables and payables, collect delinquent accounts, hire office personnel, develop financial policies, and prepare reports involving the business and accounting operations. *Id.*

5. Mary Beal owns the remaining one-third of the voting shares of FEM Ray, is vice president and a director, and proposes to work full time, 40 hours per week, as the station manager. FEM Ray Exh. 4. She will direct the daily programming and production operations of the station. *Id.* Her duties will include hiring, supervising, and firing production and on-the-air personnel, and other related duties. FEM Ray Exh. 4.

6. Ms. Rienstra is a resident of Tucson. FEM Ray Exh. 3. She has lived there since 1980 and previous to 1980, from 1956 to 1968. *Id.* Ms. Rienstra has been an active participant in Project Graduation since 1986, American Women in Radio and Television since 1987 and her Tucson church since 1982. *Id.* She has been employed at Tucson broadcast stations beginning in 1981 and as a manager from June 1987 to April 1988. *Id.* Ms. Rienstra is female. *Id.*

7. Constanza Rodriguez has lived in Tucson since 1974. FEM Ray Exh. 2. Ms. Rodriguez has been an active member of the Columbian Club of Tucson since 1985, volunteered at the El Pueblo Clinic since 1981, and since 1988 volunteered as an instructor at the Manzo Elementary School. *Id.* Ms. Rodriguez is Hispanic and female.

8. Mary Beal lived in Tucson from 1973 to January 1, 1987. FEM Ray Exh. 4. She will move to Tucson if FEM Ray's application is granted. *Id.* From 1984 to 1985, Ms. Beal was active in the 3 HO Drug and Alcohol Treatment Facility in Tucson. From 1983 to 1984, she was active in Young Arizonans Charting a Healthy Tomorrow; from

1979 to 1984, she was active in the Arizona Theater Company; and from 1975 to 1984 she was on the board of the Fan Kane Research Center for Brain-Injured Children. *Id.* Ms. Beal, from 1983 to 1984, was President of Arizona Fitness Tennis Lincoln Mercury Women's Tennis Classic which benefited charities. *Id.* During the period 1984 to 1985, Ms. Beal was active in the Tucson Tennis classic which raised money for charity. *Id.* Since 1986, she has worked in management at two radio stations. *Id.* Ms. Beal is a woman.

Playa Del Sol

9. Edward R. Stolz is the only principal in Playa Del Sol. Playa Del Sol Exh. 1. He does not propose any integration. Playa Del Sol Exh. 2.

Diversification of the media of mass communications

10. FEM Ray and its officers and directors have no mass media interests. FEM Ray Exh. 1. Playa Del Sol's principal Edward R. Stolz owns Royce International Broadcasting Company which is the licensee of KWOD-FM, Sacramento, California and the permittee of KRCK(AM) Burbank, California. Playa Del Sol Exh. 1. KWOD is a 50 kilowatt station and KRCK is 50 kW daytime and 14 kW nighttime AM station which serves the Los Angeles metropolitan area.

Auxiliary power

11. Both FEM Ray and Playa Del Sol propose emergency power generators at the studio and transmitter site. FEM Ray Exh. 1 and Playa Del Sol Exh. 4.

CONCLUSIONS

Comparison of Playa Del Sol and FEM Ray

12. FEM Ray proposes full-time integration into management by each of its voting stockholders. Playa Del Sol does not propose that Edward Stolz, the sole principal of the applicant, will work at the station. In addition, Mr. Stolz owns two radio stations already. FEM Ray is to be preferred comparatively because it has no media interests and Playa Del Sol's principal does and because it proposes integration and Playa Del Sol does not. Both applicants propose auxiliary power and are equal on that criterion. There is no question that FEM Ray is superior to Playa Del Sol on quantitative integration of owners into management and diversification of the mass media.

ACCORDINGLY, IT IS ORDERED that the application of Playa Del Sol Broadcasters (File No. BPH-870515NX) IS DENIED and the application of F.E.M. Ray, Inc. (File No. BPH-870515NL) for a construction permit for a new FM station on Channel 281A at Tucson, Arizona IS GRANTED.[1]

FEDERAL COMMUNICATIONS COMMISSION

Edward J. Kuhlmann
Administrative Law Judge

FOOTNOTE

[1] In the event exceptions are not filed within 30 days after the release of this Initial Decision, and the Commission does not review the case on its own motion, this Initial Decision will become effective 50 days after its public release pursuant to Sec. 1.276(d).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 87-246

In re Applications of

WARREN PRICE COMMUNICATIONS, INC. File No. BPH-850712GV
Bay Shore, New York

et al.

For a Constuction Permit for a
New FM Station on Channel 276

MEMORANDUM OPINION AND ORDER

Adopted: January 22, 1991; Released: February 1, 1991

By the Review Board: MARINO (Chairman) and BLUMENTHAL.

1. By *Memorandum Opinion and Order*, FCC 90M-3570, released November 8, 1990, Administrative Law Judge Richard L. Sippel terminated this proceeding by approving a comprehensive settlement agreement among the applicants. One of the applicants who agreed to dismiss its application -- Bay Shore Broadcasting Corporation (BSBC) -- now seeks to resurrect the proceeding by way of a December 10, 1990 "Petition for Reconsideration" directed to the Commission (and informally referred to the Board). This pleading generated a motion to strike, filed on December 14, 1990 by Shore Media, Inc. (Shore Media), the surviving entity pursuant to the settlement agreement, which provided for a merger among three applicants: Bay Shore Community Broadcasting Associates, Ltd. (Community), Barbara J. Hughley and Betty D. Fox d/b/a Fire Island Broadcasting (Fire Island), and Susan Lundborg (Lundborg). On December 26, 1990, BSBC filed an opposition to Shore Media's motion to strike. In sum, BSBC complains that it learned on November 30, 1990 that Shore Media has violated a provision of the settlement agreement regarding guarantees by the three merged applicants that BSBC will receive its promised $100,000.

2. BSBC's "Petition for Reconsideration" will be dismissed as procedurally defective for the following reasons. First, BSBC improperly invokes Section 1.106 of the Commission's Rules because, as we clearly explained in *Carroll, Carroll & Rowland*, 4 FCC Rcd 7149, 7150 (Rev. Bd. 1989), *rev. denied*, 5 FCC 2d 2430 (1990), an ALJ's final ruling is not subject to that rule's provisions governing reconsideration. Instead, BSBC's procedural remedy lies in Section 1.302 of the Rules, which governs appeals from final rulings of an ALJ. Second, even treating the instant incorrectly-styled and misdirected pleading as an appeal, BSBC is inexcusably tardy in its requested relief. Section 1.302 requires an aggrieved party to file a notice of appeal within 10 days of the release of the ALJ's ruling, and the appeal itself within 30 days of the release of the ruling. BSBC has missed both deadlines. Nor does good cause exist for waiving the 10-day deadline *Cf. Shirley Marchant*, 4 FCC Rcd 5241 (1989) (10-day deadline can be waived for good cause but 30-day deadline is firm). Finally, BSBC's complaint appears to be limited to a disagreement over the meaning of a contract provision -- a private dispute routinely left to a legal forum other than the Commission. *See Burwood Broadcasting of Memphis, Ltd.*, 4 FCC Rcd 827 (Rev. Bd. 1989); *see also Mc Alister Television Enterprises, Inc.*, 60 RR 2d 1379 (1986).

3. ACCORDINGLY, IT IS ORDERED, That Bay Shore Broadcasting Corporation's petition for reconsideration filed December 10, 1990 IS DISMISSED, and that Shore Media, Inc.'s motion to strike IS DISMISSED as moot.

FEDERAL COMMUNICATIONS COMMISSION

Norman B. Blumenthal
Member, Review Board

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-376

In re Applications of

GAYLA JOY HENDREN File No. BPH-880701MT

KERM, INC. File No. BPH-880712MJ

For Construction Permit for a
New FM Station on Channel 293C2
Bella Vista, Arkansas

MEMORANDUM OPINION AND ORDER

Adopted: January 22, 1991; Released: February 1, 1991

By the Review Board: MARINO (Chairman) and BLUMENTHAL.

1. The Review Board has before it: (a) the "Contingent Appeal," filed on November 16, 1990 by JEM Broadcasting Company, Inc. (JEM); (b) a motion to dismiss the contingent appeal, filed on December 3, 1990, by Gayla Joy Hendren (Hendren); (c) JEM's motion for leave to file a supplement, and the supplement, filed on December 14, 1990, and (d) Hendren's motion to strike the supplement, filed on December 18, 1990. These pleadings concern a series of procedural missteps, the salient facts of which are as follows.

2. By *Hearing Designation Order*, 5 FCC Rcd 5440 (1990) (*HDO*), the Mass Media Bureau designated the applications of Hendren and KERM, Inc. (KERM) for for a comparative hearing. The *HDO* also dismissed the application of JEM because of an engineering deficiency in JEM's application. On October 9, 1990, JEM filed a petition for reconsideration of the *HDO* with the Chief, Mass Media Bureau, pursuant to Section 1.106 of the Commission's Rules, 47 CFR § 1.106.[1] The petition was opposed by Hendren. The Bureau has not yet acted. The Presiding Administrative Law Judge (ALJ), however, ruled on JEM's petition and denied it, stating that "[t]he pleadings were incorrectly directed to the Chief, Mass Media Bureau." *Memorandum Opinion and Order*, FCC 90M-3637, released November 16, 1980.

3. The ALJ's ruling occasioned JEM's filing, on November 19, 1990, of a motion to vacate, in which JEM argued that its petition was correctly addressed to the Bureau. Also, even while recognizing that it is not a party to this proceeding, JEM filed the instant "Contingent Appeal," pursuant to Section 1.301(a)(1) of the Rules, 47 CFR 1.301(a)(1), in the event the ALJ did not vacate his ruling. By *Order*, FCC 90M-3876, released December 10, 1990, the ALJ denied JEM's motion to vacate, reasoning that he had jurisdiction to rule on JEM's petition for reconsideration of the *HDO* because that petition "was treated as a request by JEM to certify to the Commission . . . ." This latest ruling by the ALJ occasioned JEM's instant supplement to its contingent appeal and Hendren's motion to strike the supplement.

4. JEM's contingent appeal will be dismissed. First, JEM does not cite, nor is there any, authority for the filing of a "contingent appeal" with the Board. Second, Section 1.301(a) is very specific as to what matters are appealable as a matter of right and JEM's pleading concerns none of those matters. In this regard, since JEM was not a party to the proceeding, as JEM even recognizes, the ALJ's November 16, 1990 order hardly terminated its right to participate in the hearing under Section 1.301(a)(1). Finally, although the ALJ has not vacated his November 16, 1990 order, any procedural error appertaining to the Bureau's jurisdiction appears to have been corrected by his recent *Memorandum Opinion and Order*, FCC 91M-71, released January 9, 1991, which denied a settlement agreement between Hendren and KERM because the agreement was contingent upon the finality of the dismissal of JEM's application. Therein, the ALJ recognized that JEM's original petition for reconsideration of its dismissal is still pending before the Bureau, which reverses the basis for his November 16, 1990 ruling denying JEM's petition on the merits.

5. ACCORDINGLY, JEM Broadcasting Company, Inc.'s "Contingent Appeal" IS DISMISSED.

FEDERAL COMMUNICATIONS COMMISSION

Norman B. Blumenthal
Member, Review Board

FOOTNOTE

[1] Section 1.106(a)(1) of the Rules, in pertinent part, reads as follows:

> Petitions requesting reconsideration of other final actions taken pursuant to delegated authority will be acted on by the designated authority or referred by such authority to the Commission. A petition for reconsideration of an order designating a case for hearing will be entertained if, and insofar as, the petition relates to an adverse ruling with respect to petitioner's participation in the proceeding.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-627

In re Applications of

Barbara Maiers (hereafter "Maiers")	File No. BPH-890316MC
Ephrata Broadcast Group (hereafter "Ephrata")	File No. BPH-890316MH

For Construction Permit
for a New FM Station on
Channel 230C2 (93.9 MHz)
in Ephrata, Washington

HEARING DESIGNATION ORDER

Adopted: December 11, 1990; Released: January 31, 1991

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.

2. *Ephrata*. Principal Joseph Weinstein ("Weinstein") is the 23.3% stockholder in Ephrata's application. Weinstein indicates in Section II, Item 7 of FCC Form 301 that he had "1/8 interest" in Big Apple Broadcasting, permittee for KSSY(FM), Wenatchee, Washington. Ephrata's proposed site and the KSSY transmitter site are approximately 37 miles apart, and there is a 3.16 mV/m (70 dBu) contour overlap between the two facilities. Therefore, Ephrata is in violation of the multiple ownership/duopoly provision of 47 C.F.R. § 73.3555(a)(2). Accordingly, an appropriate issue will be specified.

3. *Maiers*. The antenna height above average terrain (HAAT) value calculated by averaging the eight radials listed in Section V-B, Item 19 in the June 21, 1989 amendment is 154 meters. However, in Section V-B, Item 7(b)(3) of the amendment, the HAAT is listed as 150 meters. The HAAT determined by averaging the eight radials would exceed the maximum ERP/HAAT combination allowed by 47 C.F.R. § 73.211 for a Class C2 Station. Therefore, acceptance of the amendment would thus cause the dismissal of Maiers' application. The June 21, 1989 filing is therefore a "suicide amendment" and will be returned below pursuant to 47 C.F.R. § 73.3566(a) and *Golden Shores Broadcasting, Inc.*, 2 FCC Rcd. 4743 (1987). Maiers' application will be returned to the *status quo ante* and designated for comparative hearing.[1]

4. Since no determination has been received from the Federal Aviation Administration as to whether the antennas proposed by Maiers and Ephrata would constitute a hazard to air navigation, an issue with respect thereto will be included and the F.A.A. made a party to the proceeding.

5. Data submitted by the applicants indicate there would be significant difference in the size of the areas and populations which would receive service from the proposals. Consequently, the areas and populations which would receive FM service of 1 mV/m or greater intensity, together with the availability of other primary aural services in such areas, will be considered under the standard comparative issue for the purpose of determining whether a comparative preference should accrue to any of the applicants.

6. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

7. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

> 1. To determine with respect to the Ephrata application, (BPH-890316MH) whether the common ownership of the permittee of FM station KSSY(FM), Wenatchee, WA and the proposed station is consistent with Section 73.3555 of the Commission's Rules and, if not, whether a grant of the application would be in the public interest.
>
> 2. To determine whether there is a reasonable possibility that the tower heights and locations proposed by Maiers and Ephrata would constitute a hazard to air navigation.
>
> 3. To determine which of the proposals would, on a comparative basis, best serve the public interest.
>
> 4. To determine, in light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

8. IT IS FURTHER ORDERED, That the June 21, 1989 amendment filed by Maiers IS HEREBY RETURNED.

9. IT IS FURTHER ORDERED, That the Federal Aviation Administration IS MADE A PARTY to this proceeding with respect to the air hazard issue only.

10. IT IS FURTHER ORDERED, That a copy of each document filed in this proceeding subsequent to the date of adoption of this Order shall be served on the counsel of record in the Hearing Branch appearing on behalf of the Chief, Mass Media Bureau. Parties may inquire as to the identity of the counsel of record by calling the Hearing Branch at (202) 632-6402. Such service shall be addressed to the named counsel of record, Hearing Branch, Enforcement Division, Mass Media Bureau, Federal Communications Commission, 2025 M Street, N.W., Suite 7212, Washington, D.C. 20554. Additionally, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall also be served on the Chief, Data Management Staff, Audio Services Di-

vision, Mass Media Bureau, Federal Communications Commission, Room 350, 1919 M Street, N.W., Washington, D.C. 20554.

11. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

12. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

FOOTNOTE

[1] We believe that the return of Maiers' amendment is consistent with the recent opinion by the Court of Appeals for the District of Columbia Circuit in *Alegria I, Inc. v. FCC*, Case No. 89-1096, Decided June 15, 1990. In that case, the court remanded to the Commission the grant of an AM construction permit to Heritage Communications because the agency had failed to articulate the rationale for its tolerance of a succession of "major" amendments which normally would have required dismissal of Heritage's application under 47 C.F.R. § 73.3571(j). The court held that "nowhere in the order under review did the Commission explicitly invoke [the *Golden Shores*] policy, explain why the circumstances of this case justified its invocation or expansion, or spell out the public interest considerations that justified its tolerance of a succession of major amendments. *Id.*, at 7. *Golden Shores*, wrote the court, appears to be "based on the rationale that because the withdrawal of an inadvertently submitted major amendment would not result in the procedural disruptions the rule was designed to avoid, an applicant should be given the opportunity to repair its mistake and return to the *status quo ante*. " *Id.*, at 8. In *Algria*, the court noted that Heritage made no attempt to return to the *status quo ante;* rather, "the Commission permitted Heritage repeatedly to amend its application until it was viable." *Id.*, at 9. Here, we are expressly invoking the *Golden Shores* doctrine, noting that the return of Maiers' amendment neither results in processing delays nor abridges any cognizable rights of other applicants. *Id.*, at 7. Finally, Maiers' application was returned to the *status quo ante* with the return of its amendment.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-626

In re Applications of

PLENN H. PHELPS (hereafter "Phelps")	File No. BPH-880317MG
EMERALD COAST BROADCASTING, INC. (hereafter "ECBI")	File No. BPH-880323MG
NICEVILLE RADIO INVESTORS, INC. (hereafter "NRII")	File No. BPH-880323MH
BAY AREA BROADCASTING, INC. (hereafter "BABI")	File No. BPH-880324MJ
NICEVILLE MINORITY BROADCAST ASSOCIATES (hereafter "NMBA")	File No. BPH-880324MM
ROBERT T. ROWLAND, SR. (hereafter "Rowland")	File No. BPH-880324NA
INTERMART BROADCASTING OF WEST FLORIDA, INC. (hereafter "InterMart")	File No. BPH-880324ND
NICEVILLE RADIO LIMITED, A FLORIDA LIMITED PARTNERSHIP (hereafter "Niceville Radio")	File No. BPH-880324NF
GLENDA RAE JERNIGAN AND JACKSON COBB JERNIGAN (hereafter "Jernigan")	File No. BPH-880324NJ
WESTENBERGER FM, INC. (hereafter "Westenberger")	File No. BPH-880324NR
Lynne Waltz d/b/a L.A.W. BROADCASTING COMPANY (hereafter "L.A.W.")	File No. BPH-889324NV
NICEVILLE FM LIMITED PARTNERSHIP (hereafter "Niceville FM")	File No. BPH-880324OE

For Construction Permit
for a New FM Station on
Channel 262A (100.3 MHz)
in Niceville, Florida

HEARING DESIGNATION ORDER

Adopted: December 11, 1990; Released: January 31, 1991

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.

2. *Westenberger.* Information before the Commission indicates that Westenberger was organized and is affiliated with Sonrise Management Services ("Sonrise"). Sonrise has been the subject of numerous "real party-in-interest" issues added by presiding Administrative Law Judges in a number of mutually exclusive proceedings. For example, issues concerning Sonrise have been designated in each of the following proceedings:

City/State	Docket No.
Solona, Florida	87-464
Rockledge, Florida	87-556
Silver Springs, Florida	88-119
East Ridge, Tennessee	88-122
Des Moines, Iowa	88-238
Nags Head, North Carolina	88-277
Tyler, Texas	88-280
Raleigh, North Carolina	88-306
Sedona, Arizona	88-335
Mableton, Georgia	88-400
Evansville, Indiana	88-403
Swanton, Ohio	88-432
Atlantic City, New Jersey	88-433

Identical issues were specified in each of these proceedings: whether or not Sonrise was a real party-in-interest in the subject applicant, whether or not the applicant's organizational structure was a sham, and the effect thereof on the applicant's qualifications to be a Commission licensee. In each of the proceedings listed above, the

Sonrise-affiliated applicant has dismissed its application rather than resolving these issues. These unresolved issues call into question Westenberger's qualification to be a Commission licensee. Therefore, such issues will be specified and tried against Westenberger in this proceeding.

3. *L.A.W.* In response to Section II, FCC Form 301, as to L.A.W.'s financial qualifications, L.A.W. certified that it did not have sufficient funds available to complete construction and operate the requested facilities for three months without revenues. Subsequently, on September 30, 1988, L.A.W. filed an amendment which certified that it was now financially qualified. L.A.W.'s application was put on *Public Notice* for acceptance for tender on June 6, 1988 and L.A.W. therefore, had until July 7, 1988 to file amendments as a matter of right. After the close of the amendment as of right period, an applicant cannot file a curative amendment to correct a grantability defect. *See Report and Order* in MM Docket 84-750, 50 Fed. Reg. 19936 (1985). To accept amendments after the close of the amendment as of right period would be unfair to the other applicants in this proceeding, who fully complied with our acceptability requirements as of the amendment as of right date. *See PrimeMedia Broadcasting, Inc.*, 3 FCC Rcd 4293 (1988); *See also, Emmy Hahn Limited Partnership*, 4 FCC Rcd 8336 (1989); *Domega Broadcasting Corporation*, 4 FCC Rcd (1989). Accordingly, L.A.W.'s financial certification is untimely and an appropriate issue will be specified as to L.A.W.'s financial qualifications.

4. *NMBA.* Applicants for new broadcast stations are required by 47 C.F.R. § 73.3580 to give local notice of the filing of their applications. NMBA has published the required notice, but the notice is deficient. NMBA gives the geographical coordinates of its proposed transmitter site instead of the street address. To remedy this deficiency, NMBA must republish an amended local notice of the application, if it has not already done so, and so inform the presiding Administrative Law Judge within 30 days of the release of this Order, or an appropriate issue will be specified by the Judge.

5. *NMBA and L.A.W.* NMBA and L.A.W. requested a waiver of 47 C.F.R. § 73.207 because their proposals, as amended on July 8, 1988 and July 6, 1988, respectively, would be short spaced to a then pending petition for rule making proposing to substitute Channel 261C2 for Channel 261A at Panama City Beach, Florida. *See Notice of Proposed Rule Making*, 3 FCC Rcd 1101 (1988). By *Report and Order* in MM Docket 88-52, 4 FCC Rcd 1598 (1989) the Commission denied the petition for rule making. Accordingly, the requests for waiver filed by NMBA and L.A.W. will be dismissed as moot.

6. *ECBI and L.A.W.* The Commission requires that if there will be five or more fulltime station employees, the applicant must complete and file Section VI of Form 301 and supply a statement detailing hiring and promotion policies for women and each minority group whose representation in the available labor force is five percent or greater in the proposed service area. Although ECBI and L.A.W. have filed such a statement, they are deficient. ECBI and L.A.W. have failed to identify specific sources of recruitment specializing in women and minority candidates. Additionally, L.A.W. has failed to identify publications the applicant will utilize in attracting women and minorities. Accordingly, ECBI and L.A.W. will be required to file an amendment with the presiding Administrative Law Judge within 30 days of the release of this Order.

7. *NRII, BABI, InterMart, Niceville Radio and Jernigan.* Section II, Item 4 of FCC Form 301 (October 1986) requires that an applicant specify its address (number, street, city, state) as well as the home address of each of its principals. NRII, BABI, InterMart, Niceville Radio and Jernigan have not completed Item 4 correctly. NRII did not give a street address for its non-voting stockholder, Love Broadcasting Company. BABI did not give a street address for the applicant. InterMart and Niceville Radio list a post office box number as the residence address for the applicant. Jernigan's application, as amended on September 17, 1990, lists a post office box number as the residence address for the applicant. Accordingly, NRII, BABI, InterMart, Niceville Radio and Jernigan must each submit an amendment which gives all the information required by Section II, Item 4 to the presiding Administrative Law Judge within 30 days of the release of this Order.

8. *InterMart.* InterMart's proposal indicates that it is in the process of forming a corporation which will become the applicant. InterMart has not amended its application to indicate that such a corporation has been formed. Accordingly, InterMart will be required to submit an amendment to the presiding Administrative Law Judge, within 30 days of the release of this Order, indicating whether the corporation represented as the applicant for its instant proposal has indeed been formed.

9. Section II, Item 4, Form 301 (October 1986) requires that an applicant list the applicant and, if other than a natural person, its officers, directors, stockholders and partners with attributable interests. InterMart's application, as amended on March 21, 1989, added Harley P. Park as vice president and chief financial and administrative officer of the applicant. However, InterMart did not update the information required by Section II, Item 4 as it pertains to Mr. Harley. Accordingly, InterMart will be required to file an amendment which gives all the information required by Section II, Item 4 to the presiding Administrative Law Judge within 30 days of the release of this Order.

10. *Jernigan.* Jernigan amended its application on September 17, 1990 to report that Jackson Cobb Jernigan, co-owner of the applicant, has accepted employment as the general manager of Radio Station WWAV-FM in Santa Rosa Beach, Florida, thus triggering a potential cross interest problem. *See Reexamination of the Commission's Cross-Interest Policy*, 2 FCC Rcd 3699 (1987). Mr. Jernigan has indicated his intent to terminate his relationship with Station WWAV-FM in the event of a grant of the referenced application. Accordingly, an appropriate condition will be specified below.

11. *Jernigan and Niceville FM.* Jernigan's and Niceville FM's applications, both as amended on October 4, 1988, do not clearly demonstrate that they provide a 3.16 mV/m signal to the entire proposed city of license, as required by Section 73.315(a) of the Commission's Rules. The FM Branch does not require waiver of this requirement unless the proposed 3.16 mV/m coverage falls below 80% of the area of the principal community. *See John R. Hughes*, 50 Fed. Reg. 5679 (Feb. 11, 1985). *See also Southwest Communications, Inc.*, released July 16, 1986 (Letter from the Chief, FM Branch, reference 8920HVT). Engineering study reveals that Jernigan's and Niceville FM's 3.16 mV/m contours are in substantial compliance with this requirement since their contours would cover over 80%

of the community of license. Accordingly, no waiver is required and Jernigan's and Niceville FM's requests for waiver of Section 73.315(a) will be dismissed as moot.

12. Attempts to obtain FAA clearance through the Commission's Antenna Survey Branch and the applicant have been unsuccessful. Accordingly, since no determination has been received as to whether the antenna proposed by NMBA and L.A.W. would constitute a hazard to air navigation, an issue with respect thereto will be included and the FAA made a party to the proceeding.

13. Jernigan proposes to mount its antenna on an existing tower structure. However, the tower data submitted in Section V-B of FCC Form 301 in Jernigan's application is inconsistent with that contained in the Commission's records. Jernigan lists the overall height above ground level (AGL) as 92 meters and the overall height above mean sea level (AMSL) as 106 meters. Commission records indicate heights of 91 meters AGL and 103 meters AMSL. Because Jernigan is clearly proposing to mount its antenna on an existing tower structure that is contained in the Commission's records, this discrepancy is neither a tenderability nor an acceptability defect and may be corrected by amendment. Accordingly, Jernigan must either file an amendment correcting the heights listed in its application or submit documentation to establish that the heights specified are, in fact, correct and the Commission's records are in error. In addition, because of the discrepancies in the heights, an FAA issue will be specified.

14. The Federal Aviation Administration has determined that the antenna proposed by BABI, Niceville Radio and Westenberger would constitute a hazard to air navigation. Accordingly, an issue with respect thereto will be included and the FAA made a party to the proceeding.

15. The applicants below have petitioned for leave to amend their applications after the last day for filing amendments as of right. The subject amendments were accompanied by the good cause showing required by 47 C.F.R. § 73.3522(a)(2); consequently, the amendments are accepted for filing. However, an applicant may not improve its comparative advantage after the time for filing amendments as of right has passed. Therefore, any comparative advantage resulting from the amendments will be disallowed.

APPLICANTS	DATE(S) FILED
Phelps	November 3, 1988, July 24, 1989
NRII	January 30, 1989
Rowland	September 6, 1989
InterMart	August 15, 1988
Jernigan	October 4, 1988
Niceville FM	October 4, 1988

16. The applicants below have petitioned for leave to amend their applications on the dates shown. The accompanying amendments were filed after the last day for filing minor amendments as of right, under 47 C.F.R. § 1.65 the amendments are accepted for filing. However, an applicant may not improve its comparative position after the time for amendments as of right has passed. Therefore, any comparative advantage resulting form the amendments will be disallowed.

APPLICANTS	DATE(S) FILED
NRII	August 10, 1988, August 18, 1988, January 29, 1990, August 22, 1990
Rowland	June 20, 1989, September 6, 1989, February 26, 1990
InterMart	July 15, 1988, September 26, 1988, November 16, 1988, February 1, 1989 March 21, 1989 December 11, 1989 January 25, 1990
Jernigan	September 17, 1990
Westenberger	November 22, 1988, June 16, 1989, June 27, 1989, September 13, 1989
Niceville FM	April 10, 1989, May 31, 1989, September 15, 1989, October 6, 1989

17. Data submitted by the applicants indicate there would be significant difference in the size of the areas and populations which would receive service from the proposals. Consequently, the areas and populations which would receive FM service of 1 mV/m or greater intensity, together with the availability of other primary aural services in such areas, will be considered under the standard comparative issue for the purpose of determining whether a comparative preference should accrue to any of the applicants.

18. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

19. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine whether Sonrise Management Services, Inc. is an undisclosed party to the application of Westenberger.

2. To determine whether Westenberger's organizational structure is a sham.

3. To determine, from the evidence adduced pursuant to Issues 1 and 2 above, whether Westenberger possesses the basic qualifications to be a licensee of the facilities sought herein.

4. To determine with respect to L.A.W., whether the applicant is financially qualified.

5. To determine whether there is a reasonable possibility that the tower height and location proposed by BABI, NMBA, Niceville Radio, Jernigan, Westenberger and L.A.W. would constitute a hazard to air navigation.

6. To determine which of the proposals would, on a comparative basis, best serve the public interest.

> 7. To determine, in light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

20. IT IS FURTHER ORDERED, That within 30 days of the release of this Order, NMBA shall inform the presiding Administrative Law Judge as to whether a corrected local notice of the filing of the application has been republished.

21. IT IS FURTHER ORDERED, That the requests for waiver of § 73.207 filed by NMBA and L.A.W. ARE DISMISSED AS MOOT.

22. IT IS FURTHER ORDERED, That within 30 days of the release of this Order, ECBI and L.A.W. shall submit Section VI information in accordance with the requirement of Section 73.2080(c) of the Commission's Rules to the presiding Administrative Law Judge.

23. IT IS FURTHER ORDERED, That NRII, BABI, InterMart, Niceville Radio and Jernigan shall submit an amendment which contains the information required by Section II, Item 4 of FCC form 301, to the presiding Administrative Law Judge within 30 days of the release of this Order.

24. IT IS FURTHER ORDERED. That InterMart shall submit an amendment in accordance with paragraph 8 hereinabove to the presiding Administrative Law Judge within 30 days of the release of this Order.

25. IT IS FURTHER ORDERED. That InterMart shall submit an amendment which contains the infromation required by Section II, Item 4 of FCC Form 301 to the Presiding Administrative Law Judge within 30 days of the release of this Order.

26. IT IS FURTHER ORDERED. That in the event of a grant of Jernigan's application, the construction permit shall be conditioned as follows:

> Prior to the commencement of program test authorization, the permittee shall certify to the Commission that Jackson Cobb Jernigan has terminated his employment at Station WWAV-FM, Santa Rosa Beach, Florida.

27. IT IS FURTHER ORDERED, That Jernigan's and Niceville FM's requests for waiver of § 73.315(a) ARE DISMISSED AS MOOT.

28. IT IS FURTHER ORDERED, That the Federal Aviation Administration IS MADE A PARTY to this proceeding with respect to the air hazard issue only.

29. IT IS FURTHER ORDERED, That Jernigan shall submit an amendment in accordance with paragraph 13 hereinabove to the presiding Administrative Law Judge within 30 days of the release of this Order.

30. IT IS FURTHER ORDERED, That the petitions for leave to amend filed by Phelps, NRII, Rowland, InterMart, Jernigan, Westenberger and Niceville FM ARE GRANTED, and the corresponding amendments ARE ACCEPTED to the extent indicated herein.

31. IT IS FURTHER ORDERED, That a copy of each document filed in this proceeding subsequent to the date of adoption of this Order shall be served on the counsel of record in the Hearing Branch appearing on behalf of the Chief, Mass Media Bureau. Parties may inquire as to the identity of the counsel of record by calling the Hearing Branch at (202) 632-6402. Such service shall be addressed to the named counsel of record, Hearing Branch, Enforcement Division, Mass Media Bureau, Federal Communications Commission, 2025 M Street, N.W., Suite 7212, Washington, D.C. 20554. Additionally, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall also be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Federal Communications Commission, Room 350, 1919 M Street, N.W., Washington, D.C. 20554.

32. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

33. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-5

In the Matter of

Amendment of Section 73.202(b), RM-7587
Table of Allotments.
FM Broadcast Stations.
(Richwood, Louisiana)

NOTICE OF PROPOSED RULE MAKING

Adopted: January 22, 1991; Released: January 31, 1991

By the Acting Chief, Allocations Branch:

1. The Commission has before it the petition for rule making filed by Robco Communications ("petitioner") requesting the allotment of Channel 265A to Richwood, Louisiana, as the community's first local FM service. Petitioner states that it will apply for the channel, if allotted.

2. We believe the public interest would be served by proposing the allotment of Channel 265A to Richwood, Louisiana, since it could provide the community with its first local FM service. Channel 265A can be allotted to Richwood in compliance with the Commission's minimum distance separation requirements without the imposition of a site restriction.[1]

3. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the community listed below, to read as follows:

	Channel No.	
City	Present	Proposed
Richwood, Louisiana	--	265A

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **March 22, 1991,** and reply comments on or before **April 8, 1991,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Shaun A. Maher
Blair, Joyce & Silva
1825 K Street, N.W.
Suite 510
Washington, D.C. 20006
(Counsel for petitioner)

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202 (b), 73.504 and 73.606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Pamela Blumenthal, Mass Media Bureau, (202) 632-6302. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Andrew J. Rhodes
Acting Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required*. Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment

is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures*. The following procedures will govern the consideration of filings in this proceeding.

> (a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)
>
> (b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.
>
> (c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service*. Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies*. In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings*. All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTE

[1] The coordinates for Channel 265A at Richwood are North Latitude 32-26-24 and West Longitude 92-04-40.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-6

In the Matter of

Amendment of Section 73.202(b), RM-7590
Table of Allotments,
FM Broadcast Stations.
(Oxford, Mississippi)

NOTICE OF PROPOSED RULE MAKING

Adopted: January 22, 1991; Released: January 31, 1991

By the Acting Chief, Allocations Branch:

1. Before the Commission for consideration is a petition filed by Oxford Radio, Inc. ("petitioner"), requesting the substitution of FM Channel 229A for Channel 296A at Oxford, Mississippi. Petitioner also requests the modification of its license for Station WKLJ-FM, Channel 296A, to specify operation on Channel 229A. Petitioner states its intention to file an application for Channel 229A.

2. In support of its request, petitioner states that changing from Channel 296A to Channel 229A would allow Station WKLJ-FM to increase its power to six kilowatts. According to petitioner, operation on Channel 229A at six kilowatts will result in a 36.3% increase in its existing service area so that an additional 12,062 persons will receive WKLJ-FM's increased coverage.

3. We believe the public interest would be served by proposing the substitution of Channel 229A for Channel 296A at Oxford, Mississippi, and modifying the license of Station WKLJ-FM at Oxford to specify operation on Channel 229A, as it would provide Oxford and the surrounding areas with improved service. Channel 229A can be allotted to Oxford in compliance with the minimum distance separation requirements of the Commission's Rules at the petitioner's specified site 10.3 kilometers (6.4 miles) west of the community.[1]

4. Accordingly, we propose to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, as follows:

	Channel No.	
City	Present	Proposed
Oxford, Mississippi	238A, 248C1, 296A	229A, 238A, 248C1

5. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

6. Interested parties may file comments on or before **March 22, 1991,** and reply comments on or before **April 8, 1991,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Vincent J. Curtis, Jr.
Estella Salvatierra
Fletcher, Heald & Hildreth
1225 Connecticut Avenue, N.W.
Suite 400
Washington, D.C. 20036
(Counsel for the petitioner)

7. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202 (b), 73.504 and 73.606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

8. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Andrew J. Rhodes
Acting Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the

Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

> (a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)
>
> (b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.
>
> (c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTE

[1] The coordinates for Channel 229A at Oxford are 34-21-32 and 89-38-04.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-7

In the Matter of

Amendment of Section 73.202(b), RM-7592
Table of Allotments,
FM Broadcast Stations.
(Socorro, New Mexico)

NOTICE OF PROPOSED RULE MAKING

Adopted: January 22, 1991; Released: January 31, 1991

By the Acting Chief, Allocations Branch:

1. The Commission has before it the petition for rule making filed by Don R. Davis and William H. Pace ("petitioners") requesting the allotment of Channel 225A to Socorro, New Mexico, as the community's second local FM service.[1] Petitioners state that they will apply for the channel, if allotted.

2. We believe the public interest would be served by proposing the allotment of Channel 225A at Socorro, New Mexico, since it could provide the community with a second local FM service. Channel 225A can be allotted to Socorro in compliance with the Commission's minimum distance separation requirements without the imposition of a site restriction.[2] We recognize that the allotment of Channel 225A to Socorro conflicts with the presently licensed operation of Station KMXQ on Channel 224A at Socorro. However, the license of Station KMXQ has been modified to specify Channel 284C and the station has been issued a construction permit on the new channel (BPH-890406IF). *See* 3 FCC Rcd 2266 (1988). We will serve a copy of this *Notice* on Station KMXQ. Concurrence by the Mexican government has been requested because Socorro is located within 320 kilometers (199 miles) of the U.S.-Mexican border.

3. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the community listed below, to read as follows:

	Channel No.	
City	Present	Proposed
Socorro, New Mexico	284C	225A, 284C

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **March 22, 1991,** and reply comments on or before **April 8, 1991,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Don R. Davis
3611 Altamonte Avenue NE
Albuquerque, New Mexico
87110
(Petitioner)

William H. Pace
10207 Karen Avenue NE
Albuquerque, New Mexico
87111
(Petitioner)

6. IT IS ORDERED, That the Secretary send a copy of this *Notice of Proposed Rule Making* to the licensee of Station KMXQ, as follows: H&HSB Corporation, P.O. Box 9595, Allentown, Pennsylvania 18105.

7. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202 (b), 73.504 and 73.606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

8. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Andrew J. Rhodes
Acting Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND

the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

> (a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (*See* Section 1.420(d) of the Commission's Rules.)
>
> (b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.
>
> (c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. (*See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTES

[1] H&HSB, licensee of Station KMXQ, Socorro, has pending a request to reallot Channel 284C from Socorro to Bosque Farms, New Mexico, and to modify Station KMXQ's authorization to specify the new community of license. *See* 5 FCC Rcd 4534 (1990), and counterproposal thereto. Should that request be granted, Channel 225A would represent a first local FM service at Socorro.

[2] The coordinates for Channel 225A at Socorro are North Latitude 34-03-42 and West Longitude 106-53-48.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-8

In the Matter of

Amendment of Section 73.202(b), RM-7299
Table of Allotments,
FM Broadcast Stations.
(Appomattox, Virginia)

NOTICE OF PROPOSED RULE MAKING

Adopted: January 22, 1991; Released: January 31, 1991

By the Acting Chief, Allocations Branch:

1. The Commission has before it the petition for rule making filed by LBS Broadcasting, Inc. ("petitioner"), licensee of Station WZST(FM), Channel 274B, Appomattox, Virginia, requesting the substitution of Channel 274C1 for Channel 274B at Appomattox, Virginia, and the modification of Station WZST(FM)'s license to specify operation on the higher powered channel. In order to accommodate the allotment of Channel 274C1 to Appomattox, petitioner also requests the substitution of Channel 238A for Channel 274A at Scotland Neck, North Carolina, and the modification of Station WWRT's construction permit to specify the alternate Class A allotment. Petitioner states that it will apply for Channel 274C1, if allotted to Appomattox.

2. We believe the public interest would be served by proposing the substitution of Channel 274C1 for Channel 274B at Appomattox, Virginia, since it could enable Station WZST(FM) to expand its coverage area. We need not issue an *Order to Show Cause* to WYAL Radio, Inc., permittee of Station WWRT at Scotland Neck, since we have authorized a modification of its construction permit to specify operation on Channel 238A as a component of a proposal filed by Lawrence F. and Margaret A Loesch ("the Loeschs") to substitute Channel 273C2 for Channel 272A at Edenton, North Carolina.[1] However, we note that petitioner has not made the required commitment to reimburse WYAL Radio for the reasonable costs associated with the change in its channel. Commission policy requires a benefitting party to reimburse an authorized facility for the reasonable cost associated with a change in its operating channel. *See Circleville, Ohio*, 8 FCC 2d 159 (1967). Both this petitioner and the Loeschs will benefit from the change in Station WWRT's operating channel. Therefore, petitioner must state its willingness to share the costs associated with the change in WWRT's channel with the Loeschs.

3. Channel 274C1 can be allotted to Appomattox in compliance with the Commission's minimum distance separation requirements with a site restriction of 4 kilometers (2.5 miles) southeast to accommodate petitioner's desired transmitter site.[2] We shall also propose to modify petitioner's license for Station WZST(FM) to specify operation on Channel 274C1. In accordance with Section 1.420(g) of the Commission's Rules, we will not accept competing expressions of interest for use of Channel 274C1 at Appomattox or require the petitioner to demonstrate the availability of an additional equivalent class channel for use by such parties.

4. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the community listed below, to read as follows:

	Channel No.	
City	Present	Proposed
Appomattox, Virginia	274B, 296A	274C1, 296A

5. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

6. Interested parties may file comments on or before **March 22, 1991,** and reply comments on or before **April 8, 1991,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Cary S. Tepper
Putbrese, Hunsaker & Ruddy
6800 Fleetwood Road
P.O. Box 539
McLean, VA 22101
(Counsel to petitioner)

7. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202 (b), 73.504 and 73.606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

8. For further information concerning this proceeding, contact Pamela Blumenthal, Mass Media Bureau, (202) 632-6302. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the

proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Andrew J. Rhodes
Acting Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

> (a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)
>
> (b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.
>
> (c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTES

[1] *See Report and Order,* MM Docket No. 90-473, adopted January 14, 1991.

[2] The coordinates for Channel 274C1 at Appomattox are North Latitude 37-19-55 and West Longitude 78-47-45.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-444

In the Matter of

Amendment of Section 73.202(b),
Table of Allotments,
FM Broadcast Stations.
(Dexter, Maine)

RM-7240

REPORT AND ORDER
(Proceeding Terminated)

Adopted: January 22, 1991; Released: January 31, 1991

By the Acting Chief, Allocations Branch:

1. The Commission has before it for consideration the *Notice of Proposed Rule Making*, 5 FCC Rcd 5942 (1990), issued in response to a petition filed by Daniel F. Priestley ("petitioner"), proposing the substitution of FM Channel 271C2 for Channel 271A at Dexter, Maine. Petitioner also requested modification of his construction permit for Station WGUY, Channel 271A, to specify operation on Channel 271C2. Innovative Advertising Consultants, Inc., assignee of the permit for Station WGUY,[1] filed comments stating its interest in Channel 271C2. No other comments were received.

2. We believe the public interest would be served by the substitution of Channel 271C2 for Channel 271A at Dexter, Maine, since it could provide the community with a wide coverage FM station. The substitution can be made in compliance with the minmum distance separation requirements of Section 73.207 of the Commission's Rules at petitioner's specified site.[2] Since Dexter is located within 320 kilometers (200 miles) of the U.S. - Canadian border, concurrence of the Canadian government has been obtained. The application for Channel 271C2 at Dexter must conform with the technical requirements of Section 73.1030(c)(1)-(5) of the Rules regarding protection to the Commission's monitoring station at Belfast, Maine. In addition, we have authorized a modification of the construction permit for Station WGUY, Channel 271A, Dexter, Maine, to specify operation on Channel 271C2 in accordance with Section 1.420(g) of the Commission's Rules.

3. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **March 15, 1991,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, to read as follows:

Community	Channel No.
Dexter, Maine	271C2

4. IT IS FURTHER ORDERED, pursuant to the authority contained in Section 316 of the Communications Act of 1934, as amended, that the construction permit for Station WGUY, Channel 271A, Dexter, Maine, IS MODIFIED to specify operation on Channel 271C2, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the permittee shall file with the Commission a minor change application for construction permit (Form 301), specifying the new facility.

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620.

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

5. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

6. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Andrew J. Rhodes
Acting Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

FOOTNOTES

[1] An assignment of the construction permit for Station WGUY, Channel 271A, from Daniel F. Priestley to Innovative Advertising Consultants, Inc., was consummated on September 26, 1990. (File No. BAPH-900719HR). Innovative is a corporation wholly owned and controlled by Daniel F. Priestley.

[2] The coordinates for Channel 271C2 are 45-01-00 and 69-00-00.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

TRT/FTC COMMUNICATIONS, INC. — File No. I-T-C-90-135

Application for authority to acquire and operate capacity in the PTAT-1 cable system for the provision of authorized common carrier service between the U.S. and France

ORDER AND AUTHORIZATION

Adopted: January 7, 1991; Released: January 31, 1991

By the Chief, International Facilities Division:

1. The above-captioned application, filed on June 13 and amended on June 14, 1990 by TRT/FTC Communications, Inc. (TRT/FTC), requests authority pursuant to Section 214 of the Communications Act of 1934, as amended, to acquire and operate capacity in the Private Transatlantic Telecommunications Cable System (PTAT-1) for the provision of authorized common carrier services between the U.S. and the France and beyond. The application was placed on public notice on June 27, 1990. No comments were received.

2. The Commission stated in its *Private Submarine Cable decision* [1] that it would require common carriers wishing to acquire capacity in PTAT-1 to file applications pursuant to Section 214 of the Communications Act.[2] TRT/FTC has been previously authorized to acquire and operate facilities in PTAT-1 for service between the U.S., on the one hand, and the United Kingdom, Ireland and Bermuda. [3] TRT/FTC is also authorized to provide service between the U.S. and France using facilities other than PTAT-1. In the instant application, TRT/FTC requests authority to acquire and operate one E-1 (2.048 Mbps) circuit in the PTAT-1 cable between the U.S. and the United Kingdom and to lease and operate connecting facilities to the border of France for the provision, as a dominant carrier under the Commission's rules, of its regularly authorized services between the U.S. and France.[4]

3. In this order, we find that TRT/FTC's application contains all of the information necessary under Section 63.01 of the Commission's rules.[5] Furthermore, we note that no one has raised any issues that would suggest that the TRT/FTC application to use PTAT-1 will result in traffic diversion from existing or planned common carrier facilities.[6] Nevertheless, we remain concerned with the potential implications of the TRT/FTC "exclusive gateway" operating arrangement with France and therefore condition our grant upon TRT/FTC complying fully with any current and future Commission policy and requirements concerning international accounting and settlements and the conditions that the Commission imposed upon US Sprint's authorization for service to Germany.[7]

4. Upon consideration of the application and in view of the foregoing, we find that authorization of the requested facilities and services is required by the public convenience and necessity.

5. Accordingly, IT IS ORDERED that application File No. I-T-C-90-135 IS GRANTED, and TRT/FTC is authorized, subject to the conditions discussed above concerning compliance with the Commission's ISP and other requirements, to:

> a. acquire, on an indefeasible right of user (IRU) basis, a one-half interest in one E-1 circuit in the PTAT-1 cable;
>
> b. acquire a 15-year Droit De Passage (DDP) interest in one E-1 half-circuit in landline facilities between the PTAT-1 cablehead at Brean and UK-France No. 3 cablehead at Brighton;
>
> c. acquire, on an IRU basis, one E-1 half circuit in the U.K.-France No. 3 cable system;
>
> d. lease and operate any necessary domestic connecting facilities; and
>
> e. use said facilities to provide TRT/FTC's regularly authorized services between the U.S. and France and beyond.

6. IT IS FURTHER ORDERED that TRT/FTC shall file a copy of any operating agreement for France entered into within 30 days of its execution.

7. IT IS FURTHER ORDERED that TRT/FTC shall file quarterly reports of revenue, number of messages, and number of minutes of both originating and terminating traffic for all international services between the U.S. and France within 90 days from the end of each calendar quarter.

8. IT IS FURTHER ORDERED that the applicant shall file a tariff pursuant to Section 203 of the Communications Act, 47 U.S.C. Section 203, and Part 61 of the Commission's Rules, 47 C.F.R. Part 61, for the services authorized in this Order.

9. IT IS FURTHER ORDERED that the applicant SHALL FILE the annual reports of overseas telecommunications traffic required by Section 43.61 of the Commission's Rules, 47 C.F.R. Section 43.61.

10. IT IS FURTHER ORDERED that TRT/FTC shall file annual traffic and revenue reports as provided in the Section 43.81 of the Commission's Rules 47 C.F.R. Section 43.81 concerning traffic originating or terminating within the United States.

11. IT IS FURTHER ORDERED that TRT/FTC shall file semi-annual circuit addition reports pursuant to Section 63.10(b) of the Commission's Rules, 47 C.F.R. Section 63.10(b).

12. IT IS FURTHER ORDERED that TRT/FTC shall file additional Section 214 applications to supplement existing facilities to France.

13. IT IS FURTHER ORDERED that this authorization is issued subject to the terms and conditions of any license issued to Private Transatlantic Telecommunications

Systems, Inc. under the act entitled "An Act relating to the landing and operation of submarine cables in the United States" (47 U.S.C. §§34-49).

14. This order is issued under Section 0.291 of the Commission's Rules and is effective on adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of public notice of this order (*See* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

FOOTNOTES

[1] *Tel-Optik, Ltd.*, 100 FCC 2d 1033 (1985).

[2] In *International Competitive Carrier*, the Commission determined that it would require non-dominant carriers to file applications to acquire capacity from any future private cable sources. *International Competitive Carrier*, 102 FCC 2d at 845.

[3] *See* AT&T Co., 98 FCC 2d 440 (1984) and American Telephone and Telegraph Company, 4 FCC Rcd 1129 (Com. Car. Bur. 1988). We also note that FTCC, which has been merged into TRT/FTC, previously has been authorized to acquire circuits in the PTAT-1 cable system. *See* CICI, Inc., 4 FCC Rcd 6622 (Com. Car. Bur. 1989), FTC Communications, Inc., 5 FCC Rcd 3328 (Com. Car Bur. 1990), TRT/FTC, 5 FCC Rcd 3853 (Com. Car. Bur. 1990), TRT/FTC, 5 FCC Rcd 6668 (Com. Car. Bur. 1990), and TRT/FTC Communications, Inc., DA 90-1863, released December 28, 1990, File No. I-T-C-90-179.

[4] TRT/FTC recently merged with FTC Communications, Inc. (FTCC) with TRT/FTC being the surviving company. *See* letter to Pacific Telecom, Inc. dated June 20, 1990, File Nos. CSG-90-027-(5)AL and I-T-C-90-067-TC, from the Chief, International Facilities Division. In FTC Communications, Inc., 4 FCC Rcd 5633 (Com. Car. Bur. 1989) (hereinafter *FTCC Ruling)*, because of changes in its ownership structure, FTCC was reclassified as non-dominant under the provisions of International Competitive Carrier Policies, 102 FCC 2d 812 (1985), *recon. denied*, 60 R.R. 2d 1435 (1986) (*International Competitive Carrier)*. However, FTCC was determined to be a dominant carrier for the provision of all services between the U.S. and France because of an exclusive "gateway" arrangement with France Telecom for switched voice services. As a result of the merger, TRT/FTC is now deemed to be a dominant carrier for the provision of all services between the U.S. and France.

[5] The Commission places no special burden on any carrier making an application for private cable capacity. *See Pacific Telecom Cable, Inc., Request for Clarification of Policies Concerning Use of Independent International Cables*, File No. ISP-89-002, 4 FCC Rcd 4454 (1989) (*Independent Cable Policies)*.

[6] The Commission stated in *Independent Cable Policies*, 4 FCC Rcd at 4456, that it has authority under its public interest mandate under Section 214 to consider *sua sponte* any economic impact issues, including traffic diversion issues, that may be raised in an application by a common carrier to acquire private cable capacity or to consider such issues when raised by third parties filing comments in response to an application. However, the Commission has stated that it does not anticipate that common carrier acquisition of private cable capacity will normally give rise to such issues. Even if an applicant seeks to acquire a substantial amount of private cable capacity and to offload capacity on a common carrier cable or change a prior commitment for use of capacity in planned common carrier facilities, the Commission stated that the presence of these factors would not be conclusive evidence of economic harm. The Commission further stated that the "[r]esolution of any economic impact issues that may arise, and a determination of whether grant of the application would serve the public interest, would be dictated by the circumstances of the particular case before us." *Id.*

[7] This includes, for example, TRT/FTC following principles of nondiscrimination or equal treatment, including routing of a proportionate share of inbound traffic to the domestic network of its carrier competitors. *See e.g.*, FTC Communications, Inc., Petition for Declaratory Ruling, File No. I-S-P-89-003, 4 FCC Rcd 5633 (1989). *See also* US Sprint, Memorandum Opinion, Order, Authorization and Certificate, 3 FCC 1484 (1988).

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 78-72
Phase I

In the Matter of

MTS and WATS Market Structure

REQUEST FOR INFORMATION TO SUPPLEMENT THE RECORD

Adopted: January 14, 1991; Released: January 16, 1991

By the Chief. Common Carrier Bureau:

I. INTRODUCTION

1. In 1984. the Commission adopted a Notice of Proposed Rule Making (*Notice)* to consider issues relating to the waiver of the Commission's Rules prescribing a rate structure for recovering the costs of providing transport access facilities.[1] Since that *Notice* was adopted. there have been numerous changes in the structure of the telephone industry and in Commission regulations affecting that industry. Therefore, we request that interested parties file comments to update the record.

II. BACKGROUND

2. In the *Access Charge Order*.[2] the Commission adopted rules for recovering costs of local exchange carrier (LEC) transmission and switching facilities used by interexchange carriers (IXCs) to originate and terminate interstate traffic. [3] A LEC can transport this traffic through facilities dedicated to the use of one interexchange carrier. or by combining dedicated facilities with facilities used in common by several interexchange carriers. The *Access Charge Order* directed carriers to allocate transport costs between two access rate elements: "dedicated transport" and "common transport."[4] The dedicated transport element would have included the costs of voice grade transmission facilities dedicated to an IXC's use. the costs of conditioning those facilities, and the costs of any additional central office equipment used to provide interface arrangements.[5] The common transport element would have included the costs of trunks used by more than one IXC and access tandems used to transmit interstate switched traffic between IXC facilities and the LEC end office.[6] The Commission established a rate structure for each element that reflected the nature of the costs associated with the transport facilities provided to the IXC. The *Access Charge Order* prescribed a usage-sensitive rate structure for the common transport element[7] but a flat, per-line rate structure for the dedicated transport element.[8]

3. In 1982. the United States District Court for the District of Columbia adopted the Modification of Final Judgment (MFJ) in *United States v. AT&T*.[9] The MFJ. like the transport rules prescribed in Part 69 of the Commission's Rules, required that the BOCs file cost-based tariffs for access services.[10] For transport charges. however, the MFJ delayed the effective date of this requirement, and required that until September 1, 1991:

> Charges for delivery or receipt of traffic of the same type between end offices and facilities of interexchange carriers within an exchange area. shall be equal, per unit of traffic delivered or received, for all interexchange carriers.[11]

4. On March 17, 1983, AT&T and the Bell Operating Companies filed a petition requesting that the Commission waive the Part 69 transport rules to the extent that these rules conflicted with the MFJ equal charge per unit requirement.[12] The Commission granted a waiver of those rules. and permitted LECs to impose charges for transport that did not comply with Sections 69.111 and 69.112 of the Commission's Rules, 47 C.F.R. §§ 69.111 and 69.112.[13] The Commission provided that the waiver would expire December 31, 1984. The Commission subsequently extended the waiver through May 31, 1985.[14]

5. On December 28, 1984, the Commission issued a Notice of Proposed Rule Making in this docket to reexamine issues related to the transport waiver. The *Notice* invited comment on whether to extend. modify or restrict in scope the waiver of the Commission's transport rules. The Commission also sought comment on whether to modify the access charge rules for dedicated or common transport, and whether to impose cost-based pricing requirements for dedicated and common transport upon IXCs prior to the expiration date of the MFJ provision.[15] Finally, the *Notice* requested comment on whether some combination of waiver provisions and transport rule modifications would achieve the objectives of the access charge proceeding and the MFJ.[16] Subsequently. the Commission indefinitely extended the waiver of the transport rules to provide additional time for Commission staff to study and analyze transport issues.[17]

III. DISCUSSION

6. In the six years following adoption of the *Notice*, there have been changes in the telecommunications industry that may affect the way the Commission will analyze the issues raised in this proceeding. We briefly list a few of these changes below. and request that interested parties describe what. if any, relevance such changes may have for the resolution of issues raised in this proceeding.

7. As the Commission noted in the *Interexchange Proceeding*, the extent and nature of interexchange competition have changed significantly.[18] Alternative access providers have begun to compete with LECs in the provision of interstate access service, and have requested expanded interconnection to the BOC networks.[19] In addition, the physical network is changing with the development of new technologies such as Signaling System 7 and Integrated Services Digital Network. The Commission has also undertaken a variety of regulatory initiatives. With the implementation of the Commission's Subscriber Line Charge program. interstate switched access charges have decreased substantially.[20] The Commission's Open Network Architecture program[21] and the recent implementation of price cap regulation for the LECs[22] are two other examples of significant regulatory changes in the past six years. Parties have not had an opportunity in this

proceeding to comment upon these and other changes. Therefore, we request that interested parties update the record by addressing what, if any, relevance recent developments may have for the resolution of the issues raised in the Commission's Notice of Proposed Rule Making.

IV. ORDERING CLAUSE

8. Accordingly, IT IS ORDERED, pursuant to Sections 0.91 and 0.291 of the Commission's Rules, 47 C.F.R. §§ 0.91 and 0.291 that COMMENT IS INVITED in this proceeding.

9. IT IS FURTHER ORDERED that pursuant to applicable procedures set forth in Sections 1.415 and 1.419 of the Commission's Rules, 47 C.F.R. §§ 1.415 and 1.419, comments SHALL BE FILED with the Secretary, Federal Communications Commission, Washington, D.C. 20554 on or before February 22, 1991, and reply comments SHALL BE FILED with the Secretary on or before March 22, 1991. To file formally in this proceeding, participants must file an original and four copies of all comments, reply comments, and supporting comments. If participants want each Commissioner to receive a personal copy of their comments, an original plus nine copies must be filed. In addition, parties should file two copies of any such pleadings with the Policy and Program Planning Division, Common Carrier Bureau, Room 544, 1919 M Street, N.W., Washington, D.C. Parties should also file one copy of any documents filed in this docket with this Commission's copy contractor, International Transcription Services, Inc., Suite 140, 2100 M Street, N.W., Washington, D.C. Comments and reply comments will be available for public inspection during regular business hours in the Docket Reference, Room 239, 1919 M Street, N.W., Washington, D.C. 20554.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Firestone
Chief, Common Carrier Bureau

FOOTNOTES

[1] MTS and WATS Market Structure, Notice of Proposed Rule Making, CC Docket No. 78-72, Phase I, FCC 84-604, 49 Fed. Reg. 50,413 (1984); 47 C.F.R. §§ 69.111-69.112

[2] MTS and WATS Market Structure, CC Docket No. 78-72, Phase I, *Third Report and Order*, 93 FCC 2d 241 (1983) (*Access Charge Order*), *modified on reconsideration*, 97 FCC 2d 682 (1983), *modified on further reconsideration*, 97 FCC 2d 834 (1984) (*Second Reconsideration Order*), *affirmed in principal part and remanded in part*, National Association of Regulatory Utility Commissioners v. FCC, 737 F.2d 1095 (D.C. Cir. 1984), *cert. denied*, 469 U.S. 1227 (1985), *modified on further reconsideration*, 99 FCC 2d 708 (1984), 101 FCC 2d 1222 (1985), *affirmed on further reconsideration*, 102 FCC 2d 849 (1985).

[3] *Access Charge Order*, 93 FCC 2d at 309, para. 230.

[4] *See* American Telephone and Telegraph Company, Petition for Waiver of Sections 69.1(b), 69.3(e), 69.4(b)(7) and (8), 69.101, 69.111 and 69.112 of the Commission's Rules and Regulations, 94 FCC 2d 545, 546, para. 2 (1983) (*Waiver Order*).

[5] *Access Charge Order*, 93 FCC 2d at 310, para. 233.

[6] *Id.* at 313, para. 241; *see also Waiver Order*, 94 FCC 2d at 546, para. 2.

[7] *Waiver Order*, 94 FCC 2d at 546, para. 2; *see* 47 C.F.R. § 69.111.

[8] *Waiver Order*, 94 FCC 2d at 546, para. 2; *see* 47 C.F.R. § 69.112.

[9] 552 F.Supp. 131 (D.D.C. 1982), *affirmed sub. nom.*, Maryland v. United States, 103 S.Ct. 1240 (1983).

[10] *See* MFJ, Appendix B, Section B.

[11] MFJ, Appendix B at para. B(3).

[12] *See Waiver Order*, 94 FCC 2d at 547, para. 4.

[13] *Waiver Order*, 94 FCC 2d 545 (1983).

[14] *Second Reconsideration Order*, 97 FCC 2d at 862, para. 88.

[15] MTS and WATS Market Structure, Notice of Proposed Rule Making, CC Docket No. 78-72, Phase I, FCC 84-604, 49 Fed. Reg. 50,413, para. 13 (1984).

[16] *Id.*

[17] MTS and WATS Market Structure, Memorandum Opinion and Order, CC Docket No. 78-72, Phase I, FCC 85-87, 50 Fed. Reg. 9633, para. 7 (1985).

[18] Competition in the Interstate Interexchange Marketplace, Notice of Proposed Rule Making, 5 FCC Rcd 2627 (1990).

[19] *See* MFS Petition for Rule Making, Pleading Cycle Established on Metropolitan Fiber Systems' Petition on Interconnection of Competitive Carrier Access Facilities, 5 FCC Rcd 726 (1990).

[20] *See, e.g.*, MTS and WATS Market Structure, Amendment of Part 67 of the Commission's Rules and Establishment of a Joint Board, Report and Order, CC Docket Nos. 78-72 and 80-286, 2 FCC Rcd 2953 (1987), *NTS Recovery Reconsideration*, Memorandum Opinion and Order on Reconsideration and Order Inviting Comments, 3 FCC Rcd 4543 (1988).

[21] Filing and Review of Open Network Architecture Plans, Memorandum Opinion and Order, CC Docket No. 88-2, Phase I, 4 FCC Rcd 1 (1988) (*BOC ONA Plans Order*), *recon.*, 5 FCC Rcd 3084 (1990) (*BOC ONA Reconsideration Order*), Memorandum Opinion and Order 5 FCC Rcd 3103 (1990) (*BOC ONA Amended Plans Order*).

[22] Policy and Rules Concerning Rates for Dominant Carriers, Second Report and Order, CC Docket No. 87-313, 5 FCC Rcd 6786 (1990).

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Application of

PROGRESSIVE CELLULAR III B-3 File No. 10570-CL-P-599-A-89

For facilities in the Domestic Public
Cellular Telecommunications Radio
Service on Frequency Block A, in Market
No. 599, Oklahoma 4 - Nowata

MEMORANDUM OPINION AND ORDER

Adopted: January 24, 1991; Released: January 31, 1991

By the Chief, Mobile Services Division:

1. Jackson Cellular Partnership (Jackson) filed a Petition to Dismiss or Deny the application of Progressive Cellular III B-3 (Progressive), the tentative selectee in the above-captioned rural service area (RSA). Progressive's Frequency Block A (non-wireline) application was selected first in a lottery held on August 9, 1989. *See Public Notice*, Rpt. No. CL-89-246, Mimeo No. 3992 (released Aug. 10, 1989). Progressive filed an opposition to Jackson's petition. For the reasons set forth below, we are dismissing Progressive's application.

I. CONTENTIONS OF THE PARTIES

2. Jackson asserts that Progressive's application should be dismissed for violating Section 22.921(b)(1) of the Commission's rules, which prohibits any ownership interest in more than one application for the non-wireline block for the same RSA.[1] Jackson states that the ownership exhibit of Progressive's application reflects that Dennis E. Thomas, who is Progressive's Managing General Partner and its signatory, and Jack N. Thomas (collectively, the Thomases)[2] each own 28 percent of Progressive. Jackson further states that the ownership exhibit of Rubana Cellular Co. South Central (Rubana), another applicant in the same RSA, reflects that the Thomases each own a 3.22481 percent partnership interest in Advanced Cellular Company (Advanced), which is a 30.340 percent partner in Rubana. Jackson further contends that Progressive's failure to report the Thomases' multiple ownership constitutes a lack of candor and a misrepresentation before the Commission. According to Jackson, Progressive and Dennis E. Thomas must have known when Progressive's application was certified that the Thomases were already parties to the Rubana application, but did not disclose this information. Jackson points out that while Progressive timely amended its application on September 11, 1989, its amendment did not contain any disclosure pertaining to the Thomases' multiple ownership interests, in violation of Section 1.65 of the Commission's rules. Jackson contends Progressive chose to omit from its amendment decisionally significant but adverse information.

3. In opposition, Progressive asserts that neither of the Thomases knew of the inclusion of their names in Rubana's application. Progressive states that when the Thomases entered into the Advanced partnership agreement, they understood that Advanced's cellular involvement would be limited solely to entry into various Metropolitan Statistical Area (MSA) lotteries for markets 121 through 150 and were never advised that Advanced would participate in any subsequent RSA lotteries. According to Progressive, Advanced's participation in RSA lotteries as a Rubana partner was outside Advanced's authorized scope of business and could not have been reasonably anticipated by the Thomases. Progressive asserts that when the Thomases found out about their inclusion in the Rubana RSA applications on December 27, 1988, they withdrew from the Advanced partnership retroactive to May 23, 1988. Finally, Progressive asserts that the Thomases could not be made parties to the Rubana applications absent their knowledge and assent and the Thomases were not real parties in interest to the Rubana application for the Oklahoma 4 RSA. Moreover, Progressive asserts that, under the circumstances, it is not appropriate to dismiss Progressive's application.

4. Progressive argues that, contrary to Jackson's assertions, Progressive has complied fully with its obligations of candor to the Commission. It states that the statements contained in Progressive's application certified by Dennis E. Thomas were true, based on his knowledge of facts at the time of the certification. Thus, Progressive asserts, there was no misrepresentation, lack of candor, or a knowing intent to deceive. Progressive further contends that it has complied fully with all Commission reporting obligations, and that because the Thomases had no interest in the Rubana application they had no duty to disclose. Progressive contends that as of the August 9, 1989 lottery for the Oklahoma 4 RSA all actions relating to the severance of the Thomases from the Advanced partnership and the conveyance to them individually of their *pro-rata* MSA equivalent partnership interests had been accomplished. Thus, Progressive concludes, there was nothing concerning this matter appropriate for reporting to the Commission by the Thomases or Progressive.

II. DISCUSSION

5. Section 22.921 prohibits any party from holding *any* interest in two applications for the same RSA market. It is uncontroverted that the Thomases had interests in both the Progressive and Rubana applications. No corrective action by the Thomases can alter the fact that Progressive's application, at the time it was filed, was defective. In the *Third Report and Order*, 4 FCC Rcd 2440 (1988), the Commission amended Section 22.921 to forbid any ownership in more than one application for the non-wireline block for the same RSA market, specifically superseding the earlier prohibition against multiple ownership interests exceeding one percent for MSA markets. This action indicates the importance the Commission has placed on not permitting any multiple ownership interests by non-wireline applicants. Section 22.20 of the Commission's rules provides that an application will be returned to the applicant as unacceptable for filing if the applicant fails to comply with the Commission's rules. [3] Progressive's application violated the prohibition against a party having ownership interests in more than one application in a market. Progressive's explanations for its violations do not

overcome the Commission's strict policy embodied by Section 22.921 of the rules. Partnership law generally holds that the actions of one partner bind all other partners in the partnership. In that the Thomases were partners in Advanced, and Advanced was a partner in Rubana, Advanced's actions bound the Thomases through the Rubana filing.[4] The Thomases' actions retroactively withdrawing from the Advanced partnership do not cure the defect in the application as filed with the Commission. "Being unacceptable for filing, an application may not be amended after the filing date or after the lottery to bring it into compliance with the rules." *Rem Communication*, 3 FCC Rcd 3705 (1988). Because we have found Progressive's application defective for violating Section 22.921, we need not address Jackson's other arguments.

6. In sum, there are no compelling factual or public interest reasons warranting an exception to compliance with Section 22.921 by Progressive or the Thomases. Accordingly, Progressive's application will be returned as defective. Similarly, the Rubana application, owned in part by the Thomases, was defective at the time it was filed and will also be returned.

III. ORDERING PARAGRAPHS

7. Accordingly, IT IS ORDERED that the Petition to Dismiss or Deny filed by Jackson Cellular Partnership IS GRANTED.

8. IT IS FURTHER ORDERED that the application of Progressive Cellular III B-3, File No. 10570-CL-P-599-A-89, IS DISMISSED.

9. IT IS FURTHER ORDERED that the application of Rubana Cellular Co. South Central for RSA Market No. 599, Fee No. 9187787, IS DISMISSED.

FEDERAL COMMUNICATIONS COMMISSION

Gregory J. Vogt
Chief, Mobile Services Division
Common Carrier Bureau

FOOTNOTES

[1] Section 22.921(b)(1) provides in pertinent part:

> For Rural Service Areas, no party to a non-wireline application shall have an ownership interest, direct or indirect, in more than one application for the same Rural Service Area, including an interest of less than one percent.

[2] Jack N. Thomas is the father of Dennis E. Thomas.

[3] Section 22.20 states in pertinent part:

> (a) Unless the Commission shall otherwise permit, an application will be unacceptable for filing and will be returned to the applicant . . . if:
>
> (2) The application does not comply with the Commission's rules, regulations, specific requirements for additional information or other requirements.

[4] Claims involving breach of contract, violations of fiduciar duties or delegated authority memorialized in a partnershi agreement, and monetary harm are considered private dispute that are more properly resolved in a local, judicial forum. *Se Sonderling Broadcasting Co.*, 46 Rad. Reg. 2d (P&F) 890, 89 (1979); *John R. Kingsbery*, 71 FCC 2d 1173, 1174 (1979); *Rodne A. McDaniel*, 4 FCC Rcd 1736 (1989).

Before the
Federal Communications Commission
Washington, D.C. 20554

CORRECTED
PUBLIC NOTICE

Released: January 14, 1991

PLEADING CYCLE ESTABLISHED FOR COMMENTS ON CONAP'S PETITION FOR INVESTIGATION OF ADVANCED INTELLIGENT NETWORK

On November 16, 1990, the Coalition of Open Network Architecture Parties (CONAP) filed a petition requesting that the Commission initiate an investigation pursuant to Section 218 of the Communications Act. CONAP specifically requests that the Commission investigate: (1) the architecture that the Regional Bell Operating Companies (RBOCs) intend to use in implementing the Advanced Intelligent Network (AIN); (2) the architecture of the switches that the RBOCs have purchased or intend to purchase in 1990-93; and (3) the RBOCs' intentions with respect to implementation of a modular and transparent network architecture. CONAP proposes a set of questions that it believes will assist the Commission in framing an investigation.

Interested parties should file comments on this petition by **February 28, 1991,** and reply comments by **March 18, 1991,** with the Secretary, FCC, 1919 M Street, N.W., Washington, D.C. 20554. A copy should also be sent to Peggy Reitzel, Common Carrier Bureau, FCC, Room 544, 1919 M Street, N.W., Washington, D.C. 20554, and to the Commission's contractor for public service records duplication: Downtown Copy Center, 1114 21st Street, N.W., Suite 140, Washington, D.C. 20037. Copies of CONAP's petition can be obtained from Downtown Copy Center at (202) 452-1422.

For further information contact Peggy Reitzel, Policy and Program Planning Division of the Common Carrier Bureau, at (202) 632-4047.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: January 25, 1991

PLEADING CYCLE ESTABLISHED FOR COMMENTS ON PETITIONS FOR WAIVER OF COMMISSION'S EQUAL ACCESS IMPLEMENTATION REQUIREMENTS FOR INDEPENDENT TELEPHONE COMPANIES

On January 7, 1991, the Commission received a petition for waiver filed by Scandinavia Telephone Company (Scandinavia); Badger Telecom, Inc. (Badger); Midway Telephone Company (Midway); Mt. Vernon Telephone Company (Mt. Vernon); and Eastcoast Telecom, Inc. (Eastcoast). The petitioners seek waivers of the Commission's equal access implementation requirements for independent telephone companies.

The petitioners state that on March 15, 1988, they received a letter from MCI Telecommunications Corporation (MCI) requesting that they convert their facilities to equal access. Pursuant to Commission order, the companies are required to complete the equal access conversion within three years of the request date. *See MTS and WATS Market Structure*, CC Docket No. 78-72, Phase III, (Report and Order), 100 FCC 2d 860 (1985). The three-year time period will end March 15, 1991.

Three companies -- Scandinavia, Badger, and Midway -- request an additional five and one-half months, until September 1, 1991, to complete the equal access conversion. Eastcoast requests an additional two and one-half months, until May 1, 1991, to complete its equal access conversion. Mt. Vernon requests an additional twelve and one-half months, until April 1, 1992, to complete its equal access conversion. The petition states that, in each case, the additional time is necessary because the software required to implement equal access will not be delivered in time to implement equal access by the March 1991 deadline. The companies propose new dates, based on their scheduled software delivery dates, and state that they anticipate that the equal access conversions will be completed by the proposed dates. The petition adds that MCI does not object to the proposed new dates for equal access implementation.

Interested parties should file comments on the petition by **February 11, 1991,** and reply comments by **February 21, 1991,** with the Secretary, FCC, 1919 M Street, N.W., Washington, D.C. 20554. A copy should also be sent to Peggy Reitzel, Common Carrier Bureau, FCC, Room 544, 1919 M Street, N.W., Washington, D.C. 20554, and to the Commission's contractor for public service records duplication: Downtown Copy Center, 1114 21st Street, N.W., Washington, D.C. 20037. Copies of the petition can be obtained from Downtown Copy Center at (202) 452-1422.

For further information contact Peggy Reitzel, Policy and Program Planning Division of the Common Carrier Bureau, at (202) 632-4047.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

GEN Docket No. 89-44

In the Matter of

Procedure for measuring
electromagnetic emissions
from digital devices.

FURTHER NOTICE OF PROPOSED RULE MAKING

Adopted: January 2, 1991; Released: February 1, 1991

By the Commission:

INTRODUCTION

1. In the *Notice of Proposed Rule Making* (*NPRM*) in this proceeding, the Commission proposed to replace MP-4, the test procedure currently used by the Commission to determine compliance of digital devices with the Rules, with a new procedure designated TP-5.[1] Based upon comments received on this proposal and recent efforts by industry and the Commission staff, the Commission is now proposing to adopt the American National Standards Institute's (ANSI) measurement procedure C63.4-1991 as its test procedure for digital devices rather than TP5.[2] The C63.4-1991 test procedure, which incorporates much of the technical framework and initiatives set forth in TP-5, was developed in a joint effort by the Commission staff, the ANSI C63 Committee, and industry representatives.[3] It represents a consensus agreement among these parties to resolve the many technical issues that were raised in response to the *NPRM*.

BACKGROUND

2. MP-4, which was adopted by the Commission in 1983, specifies uniform methods for measurement of radiated and line conducted emissions from both large and small digital devices.[4] It describes in detail the environment, the instrumentation, and other test conditions to be used in such testing. In March of 1989, the Commission initiated this proceeding to undertake a comprehensive review and revision of its measurement procedure for digital devices. In the *NPRM,* the Commission proposed to replace MP-4 with a new procedure TP-5. The new procedure was designed to provide clearer guidance on how to perform the measurements based on the FCC's experience and suggestions made by the computer industry and measurement experts.

3. A total of 41 parties, consisting of individuals, trade associations, computer manufacturers, and test firms, filed comments in this proceeding. Sixteen parties filed reply comments. A list of the parties filing comments and reply comments is contained in Appendix A. The comments filed in response to the *NPRM* suggest numerous changes to the proposed test procedure. In many cases, the commenting parties disagree on the appropriate approach for specific aspects of the test procedure. Many commenting parties do, however, agree with the proposal in the *NPRM* that the FCC procedure for measuring emissions from digital devices be generally harmonized with the international test procedures set forth in CISPR Publication 22.[5] In addition, several parties recommend that the Commission adopt ANSI test procedure C63.4-1988 as the standard for testing digital devices. C63.4-1988 is a nationally recognized test procedure for measuring radio-noise emissions from all types of low-voltage electrical and electronic equipment in the range of 9 kHz to 1 GHz.[6] The ANSI Accredited Standards Committee on Electromagnetic Compatibility, C63, filed reply comments stating that it would revise C63.4-1988 to address many of the issues raised by the Commission and commenting parties in this proceeding.

DISCUSSION

4. The development of test procedures for measuring radio-noise emissions is an area that typically involves state-of-the-art techniques and, because of this, there is often considerable disagreement among measurement experts as to the best approach to specific points in the process. Upon examining the comments, we concluded that, despite the improvements incorporated into TP-5, there were still many reasonable differing viewpoints on the best way to test digital devices and that it would be difficult to obtain a test procedure that would best represent a consensus of industry viewpoints.

5. In considering this problem, we observed that the process of revising ANSI test procedures, such as C63.4-1988, utilized by the C63 Committee could provide the means to obtain a consensus agreement among the concerned industry parties. Our staff, therefore, approached the C63 Committee with a request to expeditiously modify ANSI C63.4-1988.[7] Subsequently, a joint effort between the Commission staff and the ANSI C63 Committee, which includes many concerned industry parties, was initiated to revise and modify C63.4-1988 for use in testing digital devices. The staff made numerous technical contributions to this work and helped lead the activity. The resulting test procedure, C63.41991, basically follows the technical framework and initiatives set forth in the TP-5 proposal.

6. In light of the above developments, we now believe the public interest would be best served by employing ANSI C63.4-1991 as the procedure for performing radio-noise emissions measurements for digital devices. C63.4-1991 represents a substantial advance over both the earlier C63.4-1988 and the Commission's proposed TP-5. For example, an entire section is devoted to measurement of digital devices. Further, an Appendix provides step-by-step guidance for testing personal computers and associated peripherals. In addition, C63.4 provides for validation of test sites. We also note that the C63 Committee, with guidance from the Commission's staff, took into account all of the various technical viewpoints and issues raised by the commenters in this proceeding. The final document resolves these matters in a technically competent and balanced manner. We believe that ANSI C63.4-1991 represents the current, state-of-the-art standard with respect to measurement of radiated and conducted emissions from digital and other similar electronic devices.

7. We also believe that employing ANSI C63.4-1991 will advance U. S. international interests. There is a growing trend towards international standardization of measurement procedures and emissions limits for computer equipment. This trend is a result of several factors: 1) the desire to avoid expensive, multiple compliance tests necessitated by differing national technical standards, 2) the need to reduce marketing delays related to these differing technical requirements, and 3) most importantly, the unification of the European Community (EC) to one ITE technical standard.[8] The EC is expected to base its standards for computer equipment on CISPR Publication 22 in January of 1992. Other countries such as Japan, Canada, and Australia have either implemented, or are moving towards implementation, of the CISPR 22 standard.[9] ANSI C63.41991 is generally consistent with the test procedures contained in CISPR 22 and, therefore, will make the U.S. test procedures essentially equivalent to those of other countries using CISPR 22. The principal difference between ANSI C63.41991 and CISPR 22 is that ANSI C63.4-1991 provides additional detail that will help to ensure repeatable results. Accordingly, we believe that ANSI C63.4-1991 would satisfy the Commission's need to have clearly specified measurement procedures while at the same time promoting international harmonization of measurement standards. Use of a measurement procedure that is consistent with an internationally recognized and accepted standard would also encourage international trade. We note that ANSI, the U.S. representative to the CISPR, is planning to propose to CISPR an expansion of the CISPR Publication 22 measurement procedures to be more compatible with the revised ANSI C63.4-1991.

8. In view of these considerations, we are proposing to amend Part 15 of the Rules to incorporate by reference ANSI C63.4-1991 as the procedure to be used by the Commission for performing radio-noise emission measurements on digital devices. This action is consistent with the intent of Office of Management and Budget (OMB) Circular A-119, which urges government agencies to use industry developed standards rather than develop their own. Notwithstanding this proposal, there are three sections of ANSI C63.4-1991 that we would not permit to be used in determining compliance of a digital device with the FCC Rules. We would not permit the use of Section 5.7, which specifies the use of an artificial hand when measuring hand-held equipment. The procedure in this section can yield lower measured emission levels. We believe that the use of an artificial hand is inappropriate because hand-held equipment is not always held in the hand while in operation. We also would not accept absorbing clamp measurements as a substitute for measuring radiated emissions as provided in Section 9. The Commissions limits are based on measurements of radiated emissions. There is insufficient evidence to show that the results obtained with an absorbing clamp can be correlated with radiated emissions from digital electronic equipment. Finally, we would not allow the relaxation of the limits for "click" or short duration emissions as provided in Section 15. Short duration emissions can produce as much nuisance to radio communications as continuous emissions.

9. Currently, the Commission requires the filing of a test site description pursuant to Section 2.948 of the Rules, including measurements showing compliance with the horizontal test site attenuation values specified in FCC Office of Engineering and Technology Bulletin 55 (OET 55). The TP-5 *NPRM* proposed no changes in this area. Many of the commenters state that OET 55 is not adequate for determining test site acceptability because of the following: 1) it does not permit the use of broadband antennas; 2) it does not use a current theoretical site attenuation model; and 3) it does not include vertical site attenuation measurements. They argue that the Commission could not achieve the objective of ensuring reliable and repeatable measurements without first addressing these issues. They strongly favor implementation of the test site performance criteria in ANSI C63.4-1988. We agree with the commenters who state that test site performance is critical to obtaining repeatable results and that the procedures in OET 55 could be improved by incorporating the changes in the ANSI document. Accordingly, we are proposing to amend Section 2.948 to require submission of both horizontal and vertical site attenuation data that meets the performance criteria in ANSI C63.4-1991 for test sites used to perform measurements on digital devices.

10. We recognize that a time period for transition to the new measurement procedure and test site requirements is necessary. Therefore, we propose to implement the use of C63.4-1991 for equipment authorization applications filed on or after June 23, 1992. This date coincides with the transition provisions in Section 15.37 of the Rules, 47 CFR § 15.37. After C63.4 is adopted, but before June 24, 1992, either MP-4 (1987) or C63.4-1991 would be permitted to be used for testing a digital device to determine compliance with Subpart J of Part 15 of the Rules.

PROCEDURAL MATTERS

11. Pursuant to the applicable procedures set forth in Sections 1.415 and 1.419 of the Commission's Rules, interested parties may file comments on or before *(75 days after publication in the Federal Register)*, and reply comments on or before *(105 days after publication in the Federal Register)*. All relevant and timely comments will be considered by the Commission before final action is taken in this proceeding. To file formally in this proceeding, participants must file an original and four copies of all comments, reply comments, and supporting comments. If participants want each Commissioner to receive a personal copy of their comments, an original plus nine copies must be filed. Comments and reply comments should be sent to Office of the Secretary, Federal Communications Commission, Washington, DC 20554. Comments and reply comments will be available for inspection during regular business hours in the Dockets Reference Room (Room 239) of the Federal Communications Commission, 1919 M Street, N.W., Washington, DC 20554. A copy of C63.4-1991 has been placed in the docket binder for this proceeding and is available for inspection with the comments and reply comments. Additional copies of ANSI C63.4-1991 may be obtained from:

IEEE Standards Department
445 Hoes Lane
P. O. Box 1331
Piscataway, NJ 08855-1331
Phone: (201) 562-3800

12. For purposes of this non-restricted notice and comment rule making proceeding, members of the public are advised that *ex parte* presentations are permitted except during the Sunshine Agenda period. *See generally* Section 1.1206(a). The Sunshine Agenda period is the period of time which commences with the release of a public notice that a matter has been placed on the Sunshine Agenda and terminates when the Commission (1) releases the text of a decision or order in the matter; (2) issues a public notice stating that the matter has been deleted from the Sunshine Agenda; or, (3) issues a public notice stating that the matter has been returned to the staff for further consideration, whichever occurs first. Section 1.1202(f). During the Sunshine Agenda period, no presentations, *ex parte* or otherwise, are permitted unless specifically requested by the Commission or staff for clarification or adduction of evidence or the resolution of issues in the proceeding. Section 1.1203.

13. In general, an *ex parte* presentation is any presentation directed to the merits or outcome of the proceeding made to decision-making personnel which (1) if written, is not served on the parties to the proceeding, or (2) if oral, is made without advance notice to the parties to the proceeding and without opportunity for them to be present. Section 1.12.2(b). Any person who makes or submits a written *ex parte* presentation shall provide on the same day it is submitted two copies of same under separate cover to the Commission's Secretary for inclusion in the public record. The presentation (as well as any transmittal letter) must clearly indicate on its face the docket number of the particular proceeding(s) to which it relates and the fact that two copies of it have been submitted to the Secretary, and must be labeled or captioned as an *ex parte* presentation.

14. Any person who in making an oral *ex parte* presentation presents data or arguments not already reflected in that person's written comments, memoranda, or other previous filings in that proceeding shall provide on the day of the oral presentation an original and one copy of a written memorandum to the Secretary (with a copy to the Commissioner or staff member involved) which summarizes the data and arguments. The memorandum (as well as any transmittal letter) must clearly indicate on its face the docket number of the particular proceeding and the fact that an original and one copy of it have been submitted to the Secretary, and must be labeled or captioned as an *ex parte* presentation. Section 1.1206.

INITIAL REGULATORY FLEXIBILITY ANALYSIS

15. Pursuant to the Regulatory Flexibility Act of 1980, 5 U.S.C. Section 603, the Commission's initial analysis is as follows:

I. Need and purpose of this action:

In the course of performing testing on digital devices at the Commission's Laboratory, a significant percentage have been found to be non-compliant with the radio frequency (RF) emission limits in the Rules. Revisions to the procedure are believed necessary in order to provide more specific information on how the Commission is testing such devices. We believe it is necessary to incorporate the test procedure into the Rules by reference to provide adequate notice to the public on how digital devices are actually tested by the Commission.

II. The objectives:

Our objectives in proposing these changes are to clarify, and where possible, simplify the test procedures for digital devices. By providing additional guidance on how the Commission tests digital devices, it is hoped that the compliance rate for these devices will be increased. Also, we wish to provide an opportunity for industry to comment on the proposed changes.

III. Legal basis:

The actions proposed herein are taken pursuant to the authority contained in Sections 4(i), 301, 302 and 303 of the Communications Act of 1934, as amended.

IV. Description, potential impact and number of small entities affected:

The proposed changes will potentially affect all manufacturers of digital devices, and laboratories performing certification and verification tests on such devices, but the exact number of small entities affected is not known. It is believed that clarification and simplification of the test procedure will benefit manufacturers and test laboratories by speeding testing and reducing compliance costs. Additionally, increasing the compliance rate for devices tested at the Commission's Laboratory will allow manufacturers to obtain approval for new products more quickly, and therefore to market them more quickly.

V. Reporting, record keeping and other compliance requirements:

Parties performing measurements for certification of digital devices will be subject to a new requirement to file horizontal and vertical site attenuation data of their measurement facility which shows conformance with the criteria of ANSI C63.4-1991. The information that must be submitted is similar to the current information requirement to submit only horizontal site attenuation data taken pursuant to Office of Engineering and Technology Bulletin 55 (OET 55) using tuned dipole antennas. Although twice the originally-required information will be collected, the new procedure simplifies the collection process so the new information can be collected in the same time as the originally-required information. The new information is needed to provide additional information on test site performance to ensure repeatable test results. No other changes in reporting or record keeping requirements are proposed.

The proposal contained herein has been analyzed with respect to the Paperwork Reduction Act of 1980 and found to impose a new information collection requirement on businesses using open field test sites to test RF emissions from digital devices. Implementation of any new or modified requirements will be subject to approval by the Office of Management and Budget as prescribed by the Act.

VI. Federal rules which overlap, duplicate or conflict with this rule:

None.

VII. Any significant alternatives minimizing impact on small entities and consistent with the stated objectives:

None.

16. For further information on this proceeding, contact Richard F. Fabina or Art Wall, FCC Laboratory, 7435 Oakland Mills Road, Columbia, MD 21046, (301) 725-1585.

PROPOSED CHANGES TO THE REGULATIONS

A. Title 47 of the Code of Federal Regulations, Part 2, is proposed to be amended as follows:

1. The authority citation for Part 2 would continue to read as follows:

Authority: Sec. 4, 302, 303 and 307 of the Communications Act of 1934, as amended, 47 U.S.C. Sections 154, 302, 303, and 307, unless otherwise noted.

2. Section 2.948, would be amended by revising paragraph (b) (8) to read as follows:

Section 2.948 Description of measurement facilities.

*****

(b)* * *

(8) A plot of site attenuation data.

(i) For a measurement facility that will be used for testing radiated emissions from digital devices, the site attenuation data shall be taken pursuant to ANSI C63.4-1991.

(ii) For a measurement facility that will be used for testing radiated emissions from devices other than digital devices, the site attenuation data shall be taken pursuant to either ANSI C63.4-1991 or FCC Bulletin OET 55.

*****

B. Title 47 of the Code of Federal Regulations, Part 15, is proposed to be amended as follows:

1. The authority citation for Part 15 would continue to read as follows:

Authority: Sec. 4, 302, 303, 304, and 307 of the Communications Act of 1934, as amended, 47 U.S.C. 154, 302, 303, 304, and 307.

2. Section 15.31 would be amended by revising paragraph (a) to read as follows:

Section 15.31 Measurement standards.

(a) The following measurement procedures are used by the Commission to determine compliance with the technical requirements. Except where noted, copies of these procedures are available from the National Technical Information Service (NTIS), 5285 Port Royal Road, Springfield, VA 22161 or from the Commission's current duplicating contractor whose name and address are available from the Commission's Consumer Assistance Office.

(1)FCC/OET MP-1: FCC Methods of Measurements for Determining Compliance of Radio Control and Security Alarm Devices and Associated Receivers.

(2)FCC/OET MP-2: Measurement of UHF Noise Figures of TV Receivers.

(3)FCC/OET MP-3: FCC Methods of Measurements of Output Signal Level, Output Terminal Conducted Spurious Emissions, Transfer Switch Characteristics and Radio Noise Emissions from TV Interface Devices.

(4)FCC/OET MP-9: FCC Procedures for Measuring Cable Television Switch Isolation.

(5)American National Standards Institute (ANSI) measurement procedure C63.41991 is incorporated by reference as the procedure the FCC will employ for making radio-noise emissions measurements of digital devices, excluding Sections 5.7, 9 and 15 of that document. ANSI C63.4-1991 is available from IEEE Standards Department, 455 Hoes Lane, P. O. Box 1331, Piscataway, NJ 08855-1331, Telephone (201) 562-3800.

*****

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX A - PARTIES FILING COMMENTS TO TP-5 PROPOSAL

Accredited Standards Committee on Electromagnetic Compatibility, C63
Amador Corporation
American Council of Independent Laboratories, Inc.
American Telephone and Telegraph Company
Apple Computer, Inc.
Bronaugh, Mr. Edwin L.
Cardinal Technologies, Inc.
Carl T. Jones Corporation
Communication Certification Laboratory
Compaq Computer Corporation
Computer and Business Equipment Manufacturers Association
Cray Research, Incorporated
Dash, Straus & Goodhue
Digital Equipment Corporation
DLS Electronic Systems, Inc.
Electro-Metrics Company, Inc.
Electronic Industries Association
Elite Electronic Engineering Company
GTE Service Corporation
Hewlett-Packard Company
Hilliard, Mr. David E.
Honeywell Testing Services
Intel Personal Computer Enhancement Operation
International Business Machines Corporation
International Compliance Corp.
Japan Business Machine Makers Association

Japan Electronic Industry Development Association
Kansai Electronic Industry Development Center
Litton Systems, Incorporated
Motorola, Inc.
National Association of Broadcasters
NBI Incorporated
NCR Corporation
Racal-Milgo
Retlif Testing Laboratories
Seiko Epson Corp.
Spectrum Measurement Corporation
STB Systems, Incorporated
Tandem Computers, Inc.
Tandy Corporation
Unisys Corporation

APPENDIX A - PARTIES FILING REPLY COMMENTS TO TP-5 PROPOSAL

Accredited Standards Committee on Electromagnetic Compatibility, C63
Amador Corporation
American Council of Independent Laboratories, Inc.
American Telephone and Telegraph Company
Association of Maximum Service Telecasters
Communication Certification Laboratory
Compaq Computer Corporation
Computer and Business Equipment Manufacturers Association
Cray Research, Incorporated
Digital Equipment Corporation
GTE Service Corporation
Hewlett-Packard Company
Motorola, Inc.
NCR Corporation
Racal-Milgo
Tandy Corporation

FOOTNOTES

[1] *See Notice of Proposed Rule Making* in General Docket No. 89-44, 4 FCC Rcd 2113 (1989).

[2] ANSI C63.4-1991 is entitled "Methods of Measurement of Radio-Noise Emissions from Low-Voltage Electrical and Electronic Equipment in the Range of 9 kHz to 40 GHz."

[3] The C63 Committee, an Accredited Standards Committee on Electromagnetic Compatibility (EMC), is a voluntary standards making organization accredited by the American National Standards Institute (ANSI) with the Institute of Electrical and Electronic Engineers, Inc. (IEEE) as its secretariat. C63 consists of representatives from a wide variety of concerned industry, trade, government and professional organizations that are responsible for developing standards for measuring the interference potential of low voltage electronic devices, such as computers.

[4] *See Report and Order* in General Docket No. 80-284, 46 FR 23240 (1981) and *Memorandum Opinion and Order* in General Docket No. 80-284, 48 FR 34748 (1983).

[5] CISPR is the French acronym for the International Special Committee on Radio Interference. This Committee is a voluntary standards making organization under the auspices of the International Electrotechnical Commission which develops international recommendations for controlling the interference of various electrical and electronic devices. These recommendations are often adopted by foreign administrations as the national law for controlling interference to radio communications. For example, the European Community countries are proposing or have adopted many of the CISPR recommendations. Many non-European countries are also adopting CISPR recommendations. CISPR Publication 22-1985, "Limits and methods of measurement of radio interference characteristics of information technology equipment" may be obtained in the United States from: American National Standards Institute, 1430 Broadway, New York, NY 10018, Telephone 212642-4995. Information technology equipment (ITE) is defined as equipment designed for the purpose of: 1) receiving data from an external source, 2) performing some processing functions on the received data, or 3) providing a data output.

[6] ANSI C63.4-1988 is consistent with international standards, specifically CISPR Publication 22, but provides significantly more detail than the CISPR document.

[7] When we first considered revisions to our digital device test procedures, we were aware of C63.4-1988, but did not consider it a candidate for the new test procedure. While C63.4-1988 contains much useful information, it does not address a number of areas that are important in the testing of digital devices. For example, it does not provide adequate guidance on how to configure computer systems for emissions measurements or how to manipulate the equipment and cables during testing. Instructions on these subjects are essential in order to ensure that the results obtained in testing are repeatable. We also noted that C63.41988 does not provide for measurements above 1 GHz.

[8] The European Community (EC) or European Common Market is an group of 12 individual countries that are about to harmonize their digital device limits in accordance with EC Directives. Rather than test a device for 12 separate limits, an equipment manufacturer will only have to test a device once before marketing the product in the EC. The EC market is approximately the same size as the U.S. market.

[9] We note that several commenters suggest that the Commission harmonize not only the measurement procedures, but also the U.S. digital device emission limits with those contained in CISPR 22. The issue of harmonization of emission limits is outside the scope of the present proceeding, but we intend to take up this issue in the future.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Application of

CINCINNATI SMSA LIMITED PARTNERSHIP — File No. 10936-CL-P-B-89

For facilities in the Domestic
Public Cellular Telecommunications
Radio Service on Frequency Block B in
Market 592 B. Ohio RSA 8 - Clinton

MEMORANDUM OPINION AND ORDER

Adopted: January 25, 1991; Released: January 31, 1991

By the Chief, Mobile Services Division:

1. Before us is a Petition to Deny (Petition) the captioned application filed by Telephone and Data Systems, Inc. (TDS). Ameritech Mobile Communications, Inc. (Ameritech Mobile), the general partner of Cincinnati SMSA Limited Partnership[1] (Cincinnati Partnership), has filed a responsive pleading on behalf of the partnership. For the reasons set forth below, we deny the Petition.

I. BACKGROUND

2. The Commission accepted applications for Ohio 8 - Clinton from January 4 - 6. 1989. *Public Notice*, Report No. CL-88-172. (released September 30, 1988). Six wireline applicants filed for the Block B frequencies, including TDS, Ameritech Mobile, and the Chillicothe Telephone Company (Chillicothe). Chillicothe was, until January 4, 1989, partly owned (19.8%) by Ohio Bell Telephone Company (Ohio Bell), a sister company of Ameritech Mobile. Both Ohio Bell and Ameritech Mobile are wholly-owned subsidiaries of American Information Technologies Corporation (AITC). Thus, Chillicothe was an affiliate of Ameritech Mobile pursuant to 47 C.F.R. § 22.13(a)(1)(ii).

3. The lottery for this market was held December 13, 1989. Ameritech Mobile was the lottery winner. Pursuant to a settlement agreement, Ameritech Mobile then transferred its application to Cincinnati Partnership. On April 30, 1990, Cincinnati Partnership was designated the tentative selectee. *Public Notice*. Report No. CL-90-165 (released April 30, 1990).

II. CONTENTIONS

4. According to TDS, Ameritech Mobile's application, signed on December 8, 1988 and filed on January 4, 1989, did not report the existence of an Ohio Bell interest in Chillicothe, or disclose any interest in another application as required by Section 22.921(b) of the Rules.[2] TDS argues, therefore, that Ameritech Mobile's application must be dismissed because it had a cross interest in another application filed for the same market.

5. In addition, TDS argues that Ameritech Mobile and Chillicothe have violated Section 1.65 of the Commission's rules [3] because they did not report the alleged cross interest each had in the other's application. TDS argues that Ameritech Mobile omitted a matter of decisional significance and this constitutes an additional ground to dismiss the captioned application.

6. In reply, Cincinnati Partnership argues that Ameritech Mobile and Ohio Bell recognized "that before [Ameritech Mobile] filed its application . . . Ohio Bell would have to divest itself of its 19.8% interest in Chillicothe if Chillicothe intended to file an application." Response at 3. However, because the application had to be microfiched prior to January 4, 1989, Ameritech Mobile's application was signed earlier, *viz*., on December 8, 1988. Because Ameritech Mobile planned to have Ohio Bell divest its interest in Chillicothe prior to the filing deadline, Ameritech Mobile's application reflected the prospective ownership structure as of the filing deadline, not the signature date.

7. Cincinnati Partnership further states that "[a]fter ascertaining Chillicothe intended to file an application and prior to January 3, 1989, Ohio Bell and the Greater Cleveland Foundation [a charitable organization, (hereinafter Foundation)], negotiated and entered into an agreement to transfer unconditionally Ohio Bell's entire interest in Chillicothe to the Foundation." *Id*. On January 3, 1989, the Executive Committee of Ohio Bell voted to transfer Ohio Bell's interest in Chillicothe to the Foundation. On January 4, 1989, Ohio Bell completed the transfer of its shares in Chillicothe to the Foundation. An Ameritech Mobile representative, Lois J. Reed, states by affidavit that Ameritech Mobile's application was filed between 1:30 p.m. and 2:30 p.m. on January 4, 1989.

8. Cincinnati Partnership argues that Ohio Bell had no legal or equitable interest in Chillicothe at the time Ameritech Mobile's application was filed. It argues further that Section 1.65 of the Rules "cannot be read to require an applicant to disclose every interest it ever owned in another wireline, regardless of when that interest was divested." *Response* at 5. Accordingly, Cincinnati Partnership argues, there is no violation of Sections 22.291(b)(1) or §1.65 of the Commission's rules.[4]

III. DISCUSSION

9. *Section 22. 921(b)*. Applicants for a wireline cellular license are prohibited from having an interest of more than 5% in more than one publicly-traded wireline applicant in the same market. In this case, Ameritech Mobile has not violated this rule because Ohio Bell's interest in Chillicothe had been transferred to the Foundation by the time Chillicothe's and Ameritech Mobile's applications were filed. At the time Ameritech Mobile filed, it had no interest in Chillicothe's application. Therefore, Ameritech Mobile did not violate Section 22.921(b) because Chillicothe (or for that matter Ameritech Mobile) was not yet an applicant.

10. *Section 1.65*, upon which TDS relies, applies to changes after an application has been filed. Accordingly, TDS' reliance on Section 1.65 is inapposite. Ameritech Mobile's failure to report its affiliation with Chillicothe prior to filing is of no decisional significance, particularly

because the parties, as intended, executed the termination of that affiliation prior to filing the application. The primary purposes of the disclosure requirements are to ensure that no applicant has more than its fair share of a chance to be chosen through the random selection procedure, and to ensure control remains vested in the actual applicant. The purposes are met in this case because Ameritech Mobile's sister company, Ohio Bell, did not have an interest in more than one application for this market on the date of application submission, and because control of the application and licensee has never been concealed.

11. In sum, we find that TDS has failed to provide sufficient reasons to deny the captioned application. We also find that Cincinnati SSA Limited Partnership is legally, technically financially and otherwise qualified to be a Commission licensee. Furthermore, we find that grant of the pending application for Ohio 8 - Clinton would be in the public interest and promote the efficient provision of cellular services to the public.

IV. ORDERING PARAGRAPHS

12. Accordingly, IT IS ORDERED, That the application filed by Cincinnati SMSA Limited Partnership, File No. 10936-CL-P-B-89, IS GRANTED. Construction is not authorized to commence at any location for which a final Federal Aviation Administration determination has not been submitted and any required marking and lighting specifications have not been issued by the Commission. The authorization does not include the right to interference protection in any areas outside the Ohio 8 - Clinton RSA. The authorization is conditioned upon coordination with the current and future co-channel licensees in the areas outside the RSA. Cincinnati is on notice that in the event current or future MSA/RSA licensees encounter interference from any subsequent service extensions, Cincinnati will have to change frequencies in those cells or reduce 39Bu contours to eliminate any intereference.

13. IT IS FURTHER ORDERED, That the petition to deny filed by TDS, Inc. IS DENIED.

14. IT IS FURTHER ORDERED, That all other wireline cellular applications in the Ohio RSA 8 - Clinton market ARE HEREBY DISMISSED.

FEDERAL COMMUNICATIONS COMMISSION

Gregory J. Vogt
Chief, Mobile Services Division
Common Carrier Bureau

FOOTNOTES

[1] The Cincinnati SMSA Limited Partnership is comprised of the following partners: Ameritech Mobile, 52.723% (General Partner); Cincinnati Bell Telephone Company, 45.0089%; Telespectrum, Inc. (a wholly-owned subsidiary of Centel), 1.20%; The Germantown Telephone Company, 0.825%; and Champaign Telephone Company, 0.244%.

[2] Section 22.921(b) states in pertinent part:

> (2) *Ownership interests in publicly-traded corporate applicants*. . . No party may have an ownership interest, direct or indirect, in mutually exclusive applications filed by publicly-traded corporations for a . . . Rural Service Area, except that interests of less than five percent will not be considered.

[3] Section 1.65 states in pertinent part:

> (a) Each applicant is responsible for the continuing accuracy and completeness of information furnished in a pending application. . . .

[4] Ameritech Mobile further argues that Chillicothe's application, which reflected the Ohio Bell interest, has no bearing or relevance to Cincinnati Partnership's application.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re

RICHMOND CELLULAR TELEPHONE COMPANY File No. 63500-90-19-SB

Notice of Apparent Liability for
Forfeiture Penalty for Station KNKA350
in the Domestic Public Cellular
Telecommunications Radio Service on
Frequency Block A, in Market No. 59,
Richmond, Virginia

ORDER

Adopted: January 25, 1991; Released: January 31, 1991

By the Chief, Mobile Services Division:

1. Richmond Cellular Telephone Company (Richmond) has filed a letter requesting recission or reduction of the $9,900.00 forfeiture imposed by the Mobile Services Division (MSD) in a "Notice of Apparent Liability for Forfeiture" (*NALF*) issued July 3, 1990.

I. BACKGROUND

2. On February 9, 1990, the Commission issued an Official Notice of Violation citing Richmond for violating Section 17.48(a) of the Commission's rules for failing to report immediately to the Federal Aviation Administration (FAA) the extinguishment of the flashing top beacon on Richmond's tower in Hanover County, Virginia, on January 25, 1990, at 6:30 p.m.

3. On July 3, 1990, the MSD issued the *NALF*, finding that an apparent violation of Section 17.48(a) of the Commission's rules had occurred for not reporting immediately to the FAA any extinguishment or improper function of any top obstruction light not corrected within 30 minutes, as observed by an FCC engineer on January 25, 1990, at 6:30 p.m. As a result, the MSD imposed a forfeiture of $9,900.00.

II. RICHMOND'S CONTENTIONS

4. Richmond admits that it violated Section 17.48(a) because it did not notify the FAA within 30 minutes that the top tower light was out. It disputes, however, that the violation was willful and repeated or that a forfeiture is justified in this situation. Richmond claims it did not consciously or deliberately fail to inform the FAA that the light was not functioning properly. According to Richmond, it reasonably assumed that the alarm indication received that day was false because false indications had been received daily for almost a month. Richmond further adds that there was no reason to believe that the tower light was not functioning properly because it relamped the tower on October 10, 1989, and the useful life was in excess of one year based upon the manufacturer's information. Additionally, Richmond states tha the quarterly inspections of its towers conducted Augus 21 and November 20, 1989, showed the tower lighting system functioning properly. Thus, it asserts that the January 25, 1990 failure was an isolated incident. Moreover Richmond argues that even assuming a willful violation the circumstances were unusual and not likely to reoccu thus, no forfeiture should be assessed or, alternatively, the forfeiture should be reduced to less than $500.00.

5. Richmond argues that the Section 17.48(a) violation was not repeated because following the January 25, 199 telephone call it received from the FCC engineer abou the outage it immediately corrected the problem. Consequently, Richmond contends the outage was remedied the day of detection and therefore can not considered a repeated violation.

III. DISCUSSION

6. After carefully reviewing the facts and Richmond' assertions, we decline to grant its request for remission o reduction of the forfeiture. A licensee is responsible fo complying with Commission rules and is responsible fo its own acts and omissions. *See, e.g., Lorain Communit Broadcasting Co.*, 18 FCC 2d 686 (1969). By Richmond' own admission: (1) it violated Section 17.48(a) and (2) i was error for Richmond to mistakenly assume the January 25, 1990 alarm to be false. Richmond's failure t properly respond to the alarm is evidence of willfulness Furthermore, we have previously noted that

> [t]he fact that the applicant's violation occurred through inadvertence does not prevent it from being willful. It is not necessary that the violation be intentional. All that is necessary is that the licensee knew he was doing the act in question . . . .

Mobile Radio Telephone & Paging Service, Inc., Mime No. 2397 (Com. Car. Bur., released Feb. 16, 1983). *Se also* Section 312(f) of the Communications Act of 1934, a amended (the Act) which defines "willful." Richmon knew it was ignoring the alarm when it sounded. This i sufficient under the law to constitute willful violation.

7. Moreover, Richmond's statements indicate a unacceptable policy in response to tower light failur alarms. The FAA should be notified immediately whenever a top beacon alarm is received. *See* Section 17.48(a) The record indicates that the cell site at issue in thi proceeding is usually unmanned at night. Thus, any technical failure probably could not be corrected within th 30 minutes allowed by the Commission's Part 17 rules Under such circumstances, it is prudent that a license should assume that any lighting alarm is real, immediatel check the site, and notify the FAA within 30 minutes o the failure. "The antenna lighting rules and licensee regulations set minimum standards which licensees are required to observe." *Athens Broadcasting Co.*, 27 FCC 2d 7 12 (Rev. Bd. 1971). The purpose of the Commission' rules regarding lighting and marking of antenna structure is to prescribe standards for the illumination and markin of those antenna structures which might constitute a ris to air navigation and safety. *See* Section 17.1 of the Commission's rules. Commission records indicate that th Hanover tower in the proceeding before us is only 4.1 miles from Hanover County Municipal Airport (addres

604 Park Road, Ashland, Virginia 23005) and, therefore, constitutes danger to air navigation and safety. Under these circumstances, Richmond's disregard for Commission rules by ignoring the alarm was both a serious violation of the Commission's rules and willful.

8. Richmond's assertion that its violation was not repeated is immaterial. Section 503(b) of the Act, in pertinent part, refers to "[a]ny person determined by the Commission . to have willfully *or* repeatedly failed to comply substantially with the terms and conditions of any license shall be liable . . . for a forfeiture." (Emphasis supplied.) Because this language is set forth in the disjunctive, the fact that Richmond remedied the situation on the day it was detected and did not repeat it does not negate the willfulness of the violation.

9. The nature, circumstances, extent, and gravity of the prohibited violation were taken into account in setting the proposed forfeiture. *See* Section 503(b)(2)(B) of the Act. As a result, we conclude that Richmond's asserted mitigating factors are insufficient to justify remission or reduction of the forfeiture. Therefore, we uphold the $9,900.00 forfeiture.

IV. ORDERING PARAGRAPHS

10. Accordingly, pursuant to Section 503(b) of the Act, 47 U.S.C. § 503(b), and Section 1.80(f)(4) of the Commission's rules, 47 C.F.R. § 1.80(f)(4), IT IS ORDERED that Richmond Cellular Telephone Company Inc. FORFEIT to the United States the sum of Nine Thousand Nine Hundred Dollars ($9,900.00) for the violation of Section 17.48(a) of the Commission's rules. Payment of the forfeiture may be made by mailing a check or similar instrument to the Commission payable to the order of the Federal Communications Commission within thirty (30) days from the date of this Order to: Federal Communications Commission, Fee Section, Finance Branch, P. O. Box 10209, Washington, DC 20036.

11. IT IS FURTHER ORDERED that if said forfeiture is not paid within the period specified, the case will be referred to the Department of Justice for collection pursuant to Section 504(a) of the Act, 47 U.S.C. § 504(a).

12. IT IS FURTHER ORDERED that a copy of this Order BE SENT to Richmond Cellular Telephone Company by Certified Mail, Return Receipt Requested.

FEDERAL COMMUNICATIONS COMMISSION

Gregory J. Vogt
Chief, Mobile Services Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-488

In the Matter of

Amendment of Section 73.202(b), Table of Allotments, FM Broadcast Stations. (Woodsville, New Hampshire)	RM-7395

REPORT AND ORDER
(Proceeding Terminated)

Adopted: January 22, 1991; Released: January 31, 1991

By the Acting Chief, Allocations Branch:

1. Before the Commission is the *Notice of Proposed Rule Making*, 5 FCC Rcd 6491 (1990), issued at the request of Harvest Broadcasting Services ("petitioner"), proposing the allotment of Channel 249A to Woodsville, New Hampshire, as the community's first local FM service. Comments and reply comments opposing the allotment were filed by Puffer Broadcasting, Inc., licensee of Station WYKR-AM, Wells River, Vermont, and permittee of Station WYKR-FM, Haverhill, New Hampshire. Informal comments in opposition to the allotment were also filed by Douglass P. Teschner, State Representative, New Hampshire House of Representatives. No comments were filed by the petitioner or any other party expressing a continuing interest in the proposed Woodsville allotment.

2. As stated in the *Notice*, a showing of continuing interest is required before a channel will be allotted. It is the Commission's policy to refrain from making an allotment to a community absent an expression of interest. Therefore, since no such interest has been expressed, we shall dismiss the proposal to allot Channel 249A to Woodsville, New Hampshire. *See, e.g., Joshua Tree, California*, 54 FR 18557, May 1, 1989, *Senatobia, Mississippi*, 3 FCC Rcd 4000 (1988), and paragraph 2 of the Appendix to the *Notice*. In light of this action, we need not discuss the comments of Puffer Broadcasting, Inc. or Mr. Teschner.

3. Accordingly, IT IS ORDERED, That the petition of Harvest Broadcasting Services (RM-7395), requesting the allotment of Channel 249A to Woodsville, New Hampshire, IS HEREBY DISMISSED.

4. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

5. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Andrew J. Rhodes
Acting Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

LETTER
January 24, 1991

Released: January 25, 1991

Mr. Peter Branton
1007 Scenic Highway
Lookout Mountain, TN 37350

8310-HTS
C11-515

Dear Mr. Branton:

This letter concerns your November 17, 1989, Petition for Reconsideration of the Mass Media Bureau's October 26, 1989, dismissal of your complaint against National Public Radio. That request is being treated as an Application for Review pursuant to Section 1.115 of the Commission's Rules, given your expressed desire for eventual full Commission review. Your complaint alleged that a segment about John Gotti, a reputed organized crime figure, broadcast February 8, 1989, at 6:25 p.m. on the National Public Radio program "All Things Considered," was indecent. Specifically, the recording you supplied included, as part of a news segment about organized crime, a wiretap of a telephone conversation in which Gotti repeatedly used variations of the expletive "fuck" (transcript attached). In your Petition, you claim that it is difficult to understand how the language in the broadcast can be considered less than in violation of any standards of "obscene or indecent material." You also state the broadcast contained a preliminary admission that the language is "extremely profane" and note that an "obscene word" was repeated numerous times in the broadcast.

"Indecent programming" is defined as programming "that describes in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities or organs." *Infinity Broadcasting Corp.*, 3 FCC Rcd 930 (1987), *aff'd in part and remanded in part sub nom. Action for Children's Television v. FCC*, 852 F.2d 1332 (D.C. Cir. 1988). When analyzing whether particular material meets this definition, the Commission looks first and foremost to the context in which the language was presented -- a review that encompasses a host of variables, including, among other things, an assessment of whether the language was used in a "shocking" or "vulgar" fashion or was without merit. *Id.* at 932. No terms are *per se* indecent, and words or phrases that may be patently offensive in one context may not rise to the level of actionable indecency if used in other, less objectionable circumstances. *Id.* at 932 and n.28; *see also* Letter from James C. McKinney to William J. Byrnes (June 5, 1987), *aff'd Memorandum Opinion and Order*, FCC 87-215 (June 16, 1987).

We recognize that the repetitious use of coarse words is objectionable to many persons, and understand that you personally may have been offended by the use of expletives during the Gotti segment. Nonetheless, we do not find the use of such words in a legitimate news report to have been gratuitous, pandering, titillating or otherwise "patently offensive," as that term is used in our indecency definition. In reaching this determination, we note that the program segment, when considered in context, was an integral part of a *bona fide* news story concerning organized crime, and that the material prompting your complaint was evidence used in a widely reported trial. *See Infinity Broadcasting*, 3 FCC Rcd at n.31. These surrounding circumstances persuade us that the use of expletives during the Gotti segment does not meet our definition of broadcast indecency. In reaching this conclusion, we note that we traditionally have been reluctant to intervene in the editorial judgments of broadcast licensees on how best to present serious public affairs programming to their listeners. *See, e.g., Syracuse Peace Council*, 2 FCC Rcd 5043, 5051 (1987), *recon. denied*, 3 FCC Rcd 2035 (1988), *aff'd sub nom. Syracuse Peace Council v. FCC*, 867 F.2d 654 (D.C. Cir. 1989), *cert. denied*, 107 L. Ed. 2d 737 (1990).

Based on the foregoing, we affirm the Mass Media Bureau's conclusion that the material in question was not indecent. Accordingly, pursuant to Section 1.115 of the Commission's Rules (47 C.F.R. Section 1.115) your Request for Reconsideration of the October 26, 1989, determination, which the Bureau has referred to the Commission to be treated as an Application for Review, IS DENIED.

This letter was adopted by the Commission on January 24, 1991.

BY DIRECTION OF THE COMMISSION

Donna R. Searcy
Secretary

ATTACHMENT

February 8, 1989, 6:25 p.m.
"All Things Considered" #890208 "GOTTI"

MV: Male Voice
MS: Mike Schuster
JG: John Gotti
OV: Other Voice

MV: He is known in New York as the dapper Don and the book published last year labeled him a Mob Star. John Gotti has become the nation's most notorious gangster. In recent years he's been acquitted in two celebrated trials and now he's facing new charges in connection with an attempted killing of a labor official. Through it all, John Gotti has become a familiar face on television and a feared presence on the streets of New York. NPR's Mike Schuster has a report and a warning, the following story contains some very rough language.

* * * * *

MS: This is an excerpt from a wiretap. One conversation Gotti had with an associate some years ago before heading the Gambino family. The tape has been played in court. Gotti is browbeating the associate for not returning his phone calls. The other man claims his wife didn't pass along Gotti's messages. Gotti's threats are extremely profane.

JG: (Unintelligible) fucking (unintelligible) you understand me?

OV: (Unintelligible)

JG: Listen. I called your fucking house five times yesterday. Now if you want (unintelligible) fuck (unintelligible) Now if you want to disregard my fucking phone calls I'll blow you and the fucking house up.

OV: I never disregarded anything.

JG: Are you, call your fucking wife or will you tell her.

OV: All right.

JG: This is not a fucking game I (unintelligible) how to reach me days and nights here, my fucking time is valuable.

OV: I know that.

JG: Now you get your fucking ass (unintelligible) and see me tomorrow.

OV: I'm going to be here all day tomorrow.

JG: Never mind all day tomorrow (unintelligible) if I hear anybody else calling you (unintelligible) I'll fucking kill you.

MS: As head of the Gambino family, Gotti controlled vast crime activities including gambling, loan sharking, labor racketeering and gasoline bootlegging. Author Gene Mustane says Gotti has worked hard during the past three years to consolidate his control and defend the mob from the onslaught of federal and state prosecutions that the Mafia suffered.

DISSENTING STATEMENT
OF
COMMISSIONER ERVIN S. DUGGAN

In Re: Application for Review of Bureau's Dismissal of Indecency Complaint Filed Against National Public Radio's "All Things Considered".

Between 1975 and 1987, the Commission took a somewhat limited approach to enforcing its prohibition against indecent broadcasts. It took no action unless the material involved the repeated use, for shock value, of words similar or identical to the so-called "Seven Dirty Words" satirized in George Carlin's "Filthy Words" monologue---a performance involved in the Supreme Court's *Pacifica* decision. *See FCC v. Pacifica Foundation*, 438 U.S. 726 (1978).

Four years ago, the Commission found that this standard was unduly narrow. It concluded that the definition of indecent material set forth in *Pacifica* appropriately includes a broader range of material than the seven specific words at issue in that case. As we noted in *Pacifica Foundation, Inc.*, 2 FCC Rcd 2698, 2699 (1987), "[t]hose particular words are more correctly treated as examples of, rather than a definitive list of the kinds of words that, when used in a patently offensive manner as measured by contemporary community standards applicable for the broadcast medium, constitute indecency." The D.C. Circuit upheld this Commission action, finding that the FCC had "rationally determined that its former policy could yield anomalous, even arbitrary results." *Action for Children's Television v. FCC*, 852 F.2d 1332, 1338 (D.C. Cir. 1988). In broadening its definition of indecency, however, the Commission never abandoned its earlier standard. The seven dirty words remained a key determinant of what the Commission would find unacceptable. The Commission, by its 1987 clarification, merely expanded the standard to include a wider range of indecent material.

In this case, however, it appears that the Commission is veering away from its former standard. Bending over backwards, perhaps--- because the broadcast in question was by National Public Radio, and because it was a newscast--- the Commission suddenly appears willing to ignore the standard that in the past has guided its decisions on indecency. One stark fact remains, however: the broadcast featured, in the course of a few seconds, ten repetitions of the dirtiest of "the seven dirty words". The word in question is the one expletive that has traditionally been considered the most objectionable, the most forbidden, and the most patently offensive to civilized and cultivated people: the famous F-word. That word, in the past---and especially its deliberate, repeated, gratuitous use--- has almost always been sufficient to justify a ruling of indecency by the FCC.

Can its use in the NPR broadcast now before us be defended as necessary to inform the audience and to establish the character of John Gotti, the man who spoke it? Perhaps. Just one airing of the word, however, would be sufficient to accomplish that purpose. Although I recognize the importance of context to indecency determinations, I consider that the deliberate and repeated use of this word fits precisely the meaning of the word gratuitous: unnecessary and unwarranted. And such deliberate and repeated use, in my judgment, however noble the intent of the broadcaster, seems to me to fit the definition of pandering: catering to low tastes.

In the sensitive and controverted field of indecency enforcement, every Commission decision, however small or close, has precedential value. I am concerned that the Commission's departure here from its usual standard, though well-intentioned, could open the floodgates to the repeated, gratuitous use of language that has historically and legally been considered indecent or obscene. By such decisions as this, the Commission may unwittingly encourage a plethora of "newscasts" that purvey patently objectionable material under the cover of journalistic legitimacy. Such a development would not only be a misfortune for our national culture; it would also contravene the intentions of Congress and the courts, who have never suggested that broadcasters be given *carte blanche* to incorporate indecent material into news or public affairs programming.[1] Although the Commission has twice declined to adopt an express "news exemption" for indecency enforcement, it may have implicitly created such an exemption here.

The Supreme Court has held that government can constitutionally regulate indecent broadcasts in the interest of protecting children. I interpret this as including the protection of children from the gratuitous use of patently offensive language even in *bona fide* news stories. And so dissent, in this case, from the Commission's decision hat the broadcast in question was not indecent.

FOOTNOTE FOR STATEMENT

[1] *See Citizen's Complaint Against Pacifica Foundation,* 59 FCC 2d 892 (1976); *Infinity Broadcasting Corp. of Pa.,* 3 FCC Rcd 930, 937 n.31 (1987).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

CABLE AND WIRELESS COMMUNICATIONS, INC. File Nos. I-T-C-90-194
I-T-C-91-025

Applications for authority to resell the services of other common carriers to provide switched voice service to specific international points.

ORDER, AUTHORIZATION AND CERTIFICATE

Adopted: January 25, 1991; Released: February 1, 1991

By the Chief, International Facilities Division:

1. The captioned applications, filed on September 24 and November 6, 1990, and amended on January 22, 1991, by Cable and Wireless Communications, Inc. (C&W), request authority pursuant to Section 214 of the Communications Act of 1934, as amended, to resell the switched voice services set forth in AT&T's Tariff FCC No. 1, MCI's Tariff FCC No. 1 and US Sprint's Tariffs FCC Nos. 1 and 2 for the provision of international switched voice service between the U.S. and 15 additional points. The applications were placed on public notice on October 4 and November 15, 1990, respectively. No comments were received.

2. C&W is a common carrier authorized to provide switched voice services on a resale basis to numerous international points. C&W is a wholly-owned subsidiary of Cable and Wireless PLC, a public limited company organized under the laws of the United Kingdom that provides telecommunications services throughout the world. As a result, C&W is a foreign-owned carrier under the Commission's decision in *International Competitive Carrier* policies, 102 F.C.C. 2d 812, 842 (1985), *recon. denied*, 60 Rad. Reg. 2d (P&F) 1435 (1986), and is dominant in its provision of international common carrier services between U.S. and international points.

3. As a dominant carrier in its provision of international common carrier services, C&W remains subject to traditional entry and rate regulation. Our Section 214 authorizations to dominant carriers specify the facilities they may acquire or lease to provide a particular service to the authorized international points. In the case of resale carriers, these orders authorize carriers to provide an identified resale service, such as international switched voice, by reselling the services set forth in a particular underlying carrier tariff to specified international points. Dominant carriers seeking to supplement or modify their existing authorization must do so by formal application. Such applications are required where the dominant carrier seeks to provide a new service, resell an additional offering not specified in its existing Section 214 authorizations, or, as here, serve additional points set forth in the underlying carriers' tariffs but not specified in the reseller's existing Section 214 authorizations.

4. Upon consideration of the application and in view of the foregoing, IT IS HEREBY CERTIFIED that the present and future convenience and necessity require the provision of resale of international switched voice service by C&W between the United States and the points listed in Appendix A to this decision.

5. Accordingly, IT IS ORDERED that applications File Nos. I-T-C-90-194 and I-T-C-91-025 ARE GRANTED, and C&W is authorized to provide international switched voice services by the resale of the international switched voice services set forth in AT&T's Tariff F.C.C. No. 1, MCI's Tariff F.C.C. No. 1 and US Sprint's Tariffs FCC Nos. 1 and 2 between the U.S. and the points listed in the Appendix A.

6. IT IS FURTHER ORDERED that C&W shall file copies of any operating agreements entered into by itself or its parent/affiliate with its correspondents within 30 days of their execution.

7. IT IS FURTHER ORDERED that C&W shall file quarterly reports of revenue, number of messages, and number of minutes of both originating and terminating traffic for all international services between the U.S. and all countries C&W is authorized to serve within 90 days from the end of each calendar quarter.

8. IT IS FURTHER ORDERED that the applicant shall file tariff provisions pursuant to Section 203 of the Communications Act, 47 U.S.C. Section 203, and Part 61 of the Commission's Rules, 47 C.F.R. Part 61, for the services authorized in this Order.

9. IT IS FURTHER ORDERED that the applicant shall file the annual reports of overseas telecommunications traffic required by Section 43.61 of the Commission's Rules, 47 C.F.R. Section 43.61.

10. IT IS FURTHER ORDERED that C&W shall file annual traffic and revenue reports as provided in Section 43.81 of the Commission's Rules, 47 C.F.R. Section 43.81 concerning traffic originating or terminating within the United States.

11. This order is issued under Section 0.291 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of the date of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

APPENDIX A

Albania
Bhutan
Burkina Faso
Congo
Cook Islands
Djibouti
Mali Republic
Mauritania
Mayotte
Mozambique
Reunion Island
Sierra Leone
Solomon Islands
Syria
Western Samoa

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

ACCESS LONG
DISTANCE CORPORATION,
Complainant,

v. File No. E-89-358

THE MOUNTAIN
STATES TELEPHONE AND
TELEGRAPH COMPANY,
Defendant.

ORDER

Adopted: January 25, 1991; Released: February 1, 1991

By the Chief, Enforcement Division, Common Carrier Bureau:

1. On September 19, 1989, Access Long Distance Corporation, (hereinafter "Access") filed the above-captioned formal complaint against The Mountain States Telephone & Telegraph Company (hereinafter the "Defendant") seeking recovery of damages for Defendant's alleged overearnings on interstate access charges for the period January 1, 1987 through December 31, 1987. On November 27, 1989, however, Access filed a motion for leave to withdraw the complaint without prejudice because the complaint is based on a one-year monitoring period.

2. We are satisfied that dismissal of the complaint will serve the public interest by eliminating the need for further litigation and the expenditure of further time and resources of the parties and of this Commission.

3. Accordingly, IT IS ORDERED, pursuant to the authority delegated by Section 0.291 of the Commission's Rules, 47 C.F.R. § 0.291, that Access' Motion for Leave to Withdraw Complaint IS GRANTED and that the above captioned proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Mary Beth Richards
Chief, Enforcement Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 87-110

In re Applications of

EMPIRE STATE BROADCASTING CORPORATION (WWKB) Buffalo, New York	File No. BR-840201WQ
For Renewal of License	
BURSAM COMMUNICATIONS CORPORATION (WTHE) Mineola, New York	File No. BP-840430AC

ERRATUM

Released: February 1, 1991

Memorandum Opinion and Order, FCC 91-19, released January 25, 1991 in the above captioned proceeding is corrected to reflect the proper adoption date as January 10, 1991.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-4

In the Matter of

Reexamination of the Effective
Competition Standard for the
Regulation of Cable Television
Basic Service Rates

ORDER GRANTING MOTION FOR EXTENSION OF TIME TO FILE COMMENTS

Adopted: January 25, 1991; Released: January 25, 1991

By the Chief, Mass Media Bureau:

1. On December 13, 1990, the Commission adopted a *Further Notice of Proposed Rule Making* (*Further Notice)* in this proceeding, 56 FR 406 (January 4, 1991), proposing to revise its rules for determining whether a cable system is subject to effective competition and thus exempt from rate regulation of basic cable service by its local franchising authority. The *Further Notice* also seeks comment on proposals regarding the standards for rate regulation in situations where effective competition does not exist. Comments are currently due on January 31, 1991, and reply comments are due on February 15, 1991.

2. On January 18, 1991, the National Association of Broadcasters (NAB) and the Association of Independent Television Stations, Inc. (INTV), submitted a joint motion to extend the date for filing comments to February 14, 1991 and the date for filing reply comments to March 1, 1991. NAB and INTV state that the *Further Notice* includes several new proposals for determining when cable systems can be deemed to face effective competition, such as a penetration factor and a behavioral test. They also observe that the *Further Notice* seeks comment on the relationship of must carry rules to the balance Congress sought to establish in the Cable Communications Policy Act of 1984, an issue not previously raised in this proceeding. Moreover, NAB notes that its position on these issues cannot be finalized until the conclusion of its Television Board's winter meeting, which will be one day before the present due date for comments. For these reasons, NAB and INTV seek an extension of time to ensure fully considered responses to the proposals.

3. The *Further Notice* comment filing dates reflect the Commission's interest in resolving the matters raised in a prompt fashion. However, we recognize the significance of our rules in this area for cable subscribers, cable system operators, and other participants in the market and that new and important issues relating to matters of interest to broadcasters have been raised. Accordingly, in view of the interest in developing a complete record in this proceeding, and the likelihood that a brief delay in filing comments may ultimately expedite a sound resolution of this proceeding, the filing dates for comments and reply comments will be extended as requested.

4. Accordingly, IT IS ORDERED that the dates for filing comments and reply comments in response to the above referenced *Further Notice of Proposed Rule Making* ARE EXTENDED to February 14, 1991, and March 1, 1991, respectively. This action is taken pursuant to authority provided in Section 4(i) of the Communications Act of 1934, as amended, and Section 0.283 of the Commission's rules.

5. For further information concerning this proceeding, contact Marcia Glauberman, Mass Media Bureau, (202) 632-6302.

FEDERAL COMMUNICATIONS COMMISSION

Roy J. Stewart
Chief, Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-513

In the Matter of

Amendment of Section 73.202(b), RM-7388
Table of Allotments,
FM Broadcast Stations.
(Campbell, Missouri)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: January 24, 1991; Released: February 1, 1991

By the Acting Chief, Allocations Branch:

1. The Commission has before it for consideration the *Notice of Proposed Rule Making*, 5 FCC Rcd 6547 (1990), proposing the substitution of FM Channel 298C3 for Channel 298A at Campbell, Missouri, and modification of the construction permit for Station KKJJ, Channel 298A, accordingly. The *Notice* was issued in response to a petition filed by Jack G. Hunt ("petitioner"). Petitioner filed comments restating his interest in Channel 298C3. No other comments were received.

2. We believe the public interest would be served by substituting Channel 298C3 for Channel 298A at Campbell in order to provide the community with a wide area FM broadcast service. As indicated in the *Notice*, Channel 298C3 can be allotted to Campbell consistent with the Commission's spacing requirements at petitioner's specified site.[1] We will authorize a modification of petitioner's construction permit for Station KKJJ, Channel 298A, Campbell, to specify operation on Channel 298C3 in accordance with Section 1.420(g) of the Commission's Rules.

3. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **March 18, 1991,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, to read as follows:

Community	Channel No.
Campbell, Missouri	298C3

4. IT IS FURTHER ORDERED, pursuant to the authority contained in Section 316 of the Communications Act of 1934, as amended, that the construction permit for Station KKJJ, Channel 298A, Campbell, Missouri, IS MODIFIED to specify operation on Channel 298C3, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the permittee shall file with the Commission a minor change application for construction permit (Form 301), specifying the new facility.

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620.

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

5. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

6. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Andrew J. Rhodes
Acting Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

FOOTNOTE

[1] The coordinates for Channel 298C3 at Campbell are 36-29-42 and 89-51-17.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-470

In the Matter of

Amendment of Section 73.202(b), RM-7374
Table of Allotments,
FM Broadcast Stations,
(Laurel, Montana)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: January 22, 1991; Released: February 1, 1991

By the Acting Chief, Allocations Branch:

1. The Commission has before it for consideration the *Notice of Proposed Rule Making*, 5 FCC Rcd 6276 (1990), issued in response to a petition filed by Jubilee Radio Network of Montana ("petitioner"). The *Notice* proposed the allotment of FM Channel 269C to Laurel, Montana, as that community's first FM broadcast service. Petitioner filed comments in support of the *Notice* and stated its intention to apply for the channel. No other comments were received.

2. We believe the public interest would be served by the allotment of Channel 269C to Laurel, Montana, since it could provide the community with its first FM broadcast service. Channel 269C can be allotted to Laurel in compliance with the minimum distance separation requirements of the Commission's Rules without a site restriction.[1]

3. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **March 18, 1991,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, to read as follows:

Community	Channel No.
Laurel, Montana	269C

4. The window period for filing applications for Channel 269C at Laurel will open on **March 19, 1991,** and close on **April 18, 1991.**

5. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

6. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Andrew J. Rhodes
Acting Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

FOOTNOTE

[1] The coordinates for Channel 269C are 45-40-24 and 108-46-18.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-487

In the Matter of

Amendment of Section 73.202(b), RM-7390
Table of Allotments,
FM Broadcast Stations.
(Tishomingo, Oklahoma)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: January 22, 1991; Released: February 1, 1991

By the Acting Chief, Allocations Branch:

1. At the request of Ballard Broadcasting Company of Oklahoma, Inc. ("petitioner"), the Commission has before it the *Notice of Proposed Rule Making*, 5 FCC Rcd 6449 (1990), proposing the substitution of Channel 259C3 for Channel 292A at Tishomingo, Oklahoma, and the modification of its construction permit for Station KTSH-FM to specify operation on the higher powered channel. Petitioner filed comments reiterating its intention to apply for the channel, if allotted. No other comments were received.

2. We believe the public interest would be served by substituting Channel 259C3 for Channel 292A at Tishomingo, Oklahoma, since it could provide the community with a wider coverage area FM service. No other party expressed an interest in use of the channel at Tishomingo. Therefore, in accordance with Section 1.420(g) of the Commission's Rules, we will modify petitioner's construction permit for Station KTSH-FM to specify operation on non-adjacent Channel 259C3. Channel 259C3 can be allotted to Tishomingo in compliance with the Commission's minimum distance separation requirements and can be used at the transmitter site specified in Station KTSH-FM's construction permit.[1]

3. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **March 18, 1991,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the community listed below, to read as follows:

City	Channel No.
Tishomingo, Oklahoma	259C3

4. IT IS FURTHER ORDERED, pursuant to Section 316(a) of the Communications Act of 1934, as amended, that the construction permit of Ballard Broadcasting Company of Oklahoma, Inc., for Station KTSH-FM, Tishomingo, Oklahoma, IS MODIFIED to specify operation on Channel 259C3, in lieu of Channel 292A, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the permittee shall submit to the Commission a minor change application for a construction permit (Form 301).

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620.

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

5. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

6. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Andrew J. Rhodes
Acting Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

FOOTNOTE

[1] The coordinates for Channel 259C3 at Tishomingo are North Latitude 34-11-15 and West Longitude 96-43-28.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-441

In the Matter of

Amendment of Section 73.202(b), RM-7210
Table of Allotments,
FM Broadcast Stations.
(Grand Rapids, Michigan)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: January 24, 1991; Released: February 1, 1991

By the Acting Chief, Allocations Branch:

1. The Commission has before it for consideration the *Notice of Proposed Rule Making*, 5 FCC Rcd 5921 (1990), issued in response to a petition filed by Haith Broadcasting Corporation ("petitioner"), proposing the substitution of Channel 254A for Channel 255A at Grand Rapids, Michigan. Petitioner also requests modification of its construction permit for Station WXJI, Channel 255A, to specify operation on the new channel. Petitioner filed supporting comments in which it reaffirms its interest in the channel. No other comments were received.

2. We believe the public interest would be served by the substitution of Channel 254A for Channel 255A at Grand Rapids, Michigan, since it would allow Station WXJI to increase its operation from three to six kilowatts.[1] The substitution can be made in compliance with the minimum distance separation requirements of Section 73.207 of the Commission's Rules at petitioner's specified site.[2] In addition, we are modifying petitioner's construction permit for Station WXJI, Channel 255A, Grand Rapids, Michigan, to specify operation on Channel 254A. Since Grand Rapids is located within 320 kilometers (200 miles) of the U.S. - Canadian border, concurrence of the Canadian government has been obtained.

3. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **March 18, 1991**, the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, to read as follows:

Community	Channel No.
Grand Rapids, Michigan	229B, 239B, 245B, 250B, 254A, 267B, 275B, 281B, 289B

4. IT IS FURTHER ORDERED, pursuant to the authority contained in Section 316 of the Communications Act of 1934, as amended, that the construction permit of Station WXJI, Grand Rapids, Michigan, IS MODIFIED to specify operation on Channel 254A in lieu of Channel 255A, subject to the following conditions:

> (a) Nothing contained herein shall be construed as authorizing any change in Station WXJI's construction permit, BPH-860507PT, except the channel as specified above. Any other changes, except those so specified under Section 73.1620 of the Rules, require prior authorization pursuant to an application for construction permit (FCC Form 301).
>
> (b) Program tests may be conducted in accordance with the provisions of Section 73.1620 of the Rules, PROVIDED the transmission facilities comply in all respects with construction permit BPH-860507PT, except for the channel as specified above and a license application (FCC Form 302) is filed within 10 days of commencement of program tests.

5. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

6. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Andrew J. Rhodes
Acting Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

FOOTNOTES

[1] *See* MM Docket No. 88-375, 4 FCC Rcd 6375 (1989).

[2] The coordinates for Channel 254A are 43-01-36 and 85-41-28.

Before the
Federal Communications Commission
Washington, D.C. 20554

GEN Docket No. 88-566

In the Matter of

Amendment of Parts 2 and 90 of the Commission's Rules to Provide for Stolen Vehicle Recovery Systems — RM-6362

MEMORANDUM OPINION AND ORDER
(Proceeding Terminated)

Adopted: December 20, 1990; Released: February 4, 1991

By the Commission:

1. By this action, the Commission clarifies certain aspects of its *Report and Order* in the above-captioned proceeding in response to two petitions for reconsideration and clarification.[1] The Commission declines to develop or adopt compatibility and protocol standards at this time. Further, it concludes that tracking of suspected stolen vehicles prior to the filing of the stolen vehicle report is not general purpose vehicle tracking or monitoring and, therefore, is permitted. Additionally, the Commission prohibits mobile transmitters installed in vehicles from automatically activating as part of an "anti-jamming" feature.

BACKGROUND

2. On September 29, 1989, the Commission adopted the *Report and Order* in this proceeding, which allocated the frequency 173.075 MHz nationwide on a Government/non-Government shared primary basis for stolen vehicle recovery systems (SVRSs). The Commission specifically limited SVRSs to recovering stolen vehicles and prohibited general purpose vehicle tracking or monitoring. The Commission declined to establish a joint Government/industry committee that would develop compatibility and protocol standards for SVRSs. The *Report and Order* noted that public safety interests had not expressed a need for such standards and that the development of standards could stifle this relatively new technology. The Commission also expressed concern that the process of establishing standards would significantly delay the introduction of this service.

3. On November 24, 1989, the Commission received petitions for reconsideration of the *Report and Order* from Vehicle Security Electronics, Inc. (VSE) and METS, Inc. (METS). Both VSE and METS request that the Commission reconsider establishing a joint Government/industry committee that would develop compatibility and protocol standards for SVRSs. METS also seeks clarification of whether our rules would permit a feature of its system which allows tracking of a subscriber's vehicle that is suspected of being stolen prior to the filing of the stolen vehicle report. Finally, VSE requests that the Commission prohibit an "anti-jamming" feature for mobile units which provides for their activation when they fail to receive a periodic polling signal from the licensee's base station during any 24-hour period. The Commission received an opposition to the petitions for reconsideration from Lo-Jack and a statement from the Association of Maximum Service Telecasters (MST) supporting VSE's concerns regarding the "anti-jamming" feature. METS replied to Lo-Jack's opposition.

DISCUSSION AND DECISION

Compatibility and Protocol Standards

4. Both VSE and METS ask that the Commission reconsider its decision not to establish compatibility and protocol standards. VSE requests that the Commission develop a uniform transmission protocol (based on the Lo-Jack system, if applicable) that would mandate compatibility between SVRSs.[2] METS states that a joint Government/industry committee charged with developing inter-system standards is required to prevent a monopoly from developing. Also, it claims that the operation of multiple, incompatible SVRSs is beyond the means of most Police Radio Service licensees. METS advocates the adoption of an "open-architecture" environment in which competing vendors' systems are interoperable in order to permit smooth inter-system and inter-jurisdictional functioning. METS believes that the SVRS vendors could arrive at a basic set of standards that would result in little, if any, delay in the deployment of SVRSs. [3]

5. Lo-Jack opposes the establishment of a joint committee for the establishment of SVRS standards if it means that the service must revert to experimental status in the meantime. With respect to the monopoly issue, Lo-Jack assures the Commission that all of its agreements with licensees are non-exclusive and permit the law enforcement agencies to contract with other SVRS providers.

6. *Decision*. In the *Report and Order*, we concluded that mandated standards were unnecessary. The petitioners have not presented us with sufficient reason for altering this conclusion. We continue to believe that, if the Commission were to develop standards, there would be a significant delay before SVRSs could be implemented and during that time the public would be denied this service. Past experience shows that developing such standards generally requires several years. Further, any standards ultimately established could limit future technological improvements. Moreover, we note that public safety interests, the only entities permitted to hold SVRS licenses, have expressed very little interest in standards. Nevertheless, if they now believe some voluntary standards are needed, then we invite the public safety community and industry to develop industry standards.

7. We further find that no evidence exists to demonstrate that Lo-Jack is establishing, or is likely to establish, a monopoly in this service because of a lack of standards. The SVRS rules permit multiple systems to be established in any given area, and the petitioners have not demonstrated that local law enforcement officials are unwilling to consider systems other than Lo-Jack's or even multiple systems. Indeed, the City of Los Angeles has indicated that it will consider using multiple systems.[4] Moreover, there are alternative systems to those that operate pursuant to this part of the Commission's Rules. North American Teletrac and Location Technology, Inc.,

doing business as PACTEL Teletrac, Joint Venture, is manufacturing and selling a SVRS that operates in the 902-928 MHz band; in fact, one of its systems is being used in Los Angeles where a system using Lo-Jack technology is also operating. In addition, future satellite systems may be able to perform similar functions.[5] In view of the foregoing, we continue to believe that mandated standards are unnecessary. We note, however, that we would be prepared to revisit this issue if experience demonstrates that the absence of uniform standards is seriously impeding competition in this industry or is impairing the effectiveness of stolen vehicle recovery systems.

Tracking Mobiles

8. METS requests clarification on whether a feature of its system that permits a subscriber's vehicle to be tracked prior to the filing of a stolen vehicle report is permissible under Section 90.19(f)(7) of the rules.[6] It explains that the transmitting unit installed in the vehicle of a METS system subscriber automatically begins signaling within 30 seconds from the moment that the vehicle has been entered and the transmitting unit has not been disarmed. The police are alerted after METS has verified with the subscriber that the vehicle is stolen. This feature, according to METS, provides a chronology of the vehicle's whereabouts from the moment of unauthorized entry. Due to the early activation of the system, METS believes that there is a better chance of apprehending the thief and a reduced risk of property damage to the stolen vehicle.

9. Lo-Jack opposes the idea of initial activation and tracking by a private system as espoused by METS. Lo-Jack believes that SVRSs should be activated only by the law enforcement agency with responsibility for the system. Lo-Jack considers the METS system to be of a general tracking nature and, thus, not within the rules.

10. *Decision*. The Commission specifically prohibited SVRSs from general tracking and monitoring in the *Report and Order*.[7] As METS' system is activated upon the reasonable likelihood of a theft, the Commission does not consider this to be general tracking. The Commission recognizes that such systems could provide for a number of false alarms and that the police may be concerned, if that should indeed occur. However, the police, as the licensee of the system, are responsible for its operation and can preclude such activity if problems arise. We find that the tracking of an alleged stolen vehicle prior to the police being notified of the theft is permitted under our interpretation of Section 90.19(f)(7) of the rules. However, we emphasize that this does not permit general tracking and that there must be some reasonable belief that a theft has likely occurred.

Activation of Mobile Units When Out of Base Station Range

11. VSE is concerned with the interference caused by mobile transmitters from one system when they self-activate in the service area of another system. Of particular concern to VSE is the Lo-Jack system where a transponder hidden in the vehicle automatically begins transmitting whenever the mobile unit has not received a signal from its Sector Activation System within 24 hours. VSE argues that the interference from these self-activated transmitters would cause serious system failure or performance degradation in areas served by other systems. Further, it argues that situations could arise where innocent commuters and vacationers are stopped by the police or where a flood of false alarms could disrupt law enforcement activities. Furthermore, VSE is concerned that interference to other systems on these frequencies may result in public safety agencies choosing the Lo-Jack system regardless of the price or performance of other competitive systems. Specifically, VSE asks that the rules prohibit the transmission of mobile transmitter signals not activated by a base station. MST also expresses concern that the automatic activation feature might interfere with the reception of a nearby television channel seven signal.

12. Lo-Jack replies that VSE raises an unrealistic concern regarding self-activation as the rules limit a mobile's transmitter output to 2.5 watts. Also, self-activation occurs only after the mobile transmitter has not received a signal from a base station in 24 hours. This "anti-jamming" feature prevents the thief from transmitting a blocking signal that would prevent the mobile transmitter from answering a polling query. Finally, Lo-Jack believes that the number of vehicles that are likely to leave their service area for an extended period of time is insufficient to cause significant problems for other SVRSs. In any event, Lo-Jack indicates that it can easily terminate this feature of its system by a simple signal from the base station(s) to the mobile units.[8]

13. *Decision*. We believe that this "anti-jamming" feature may cause interference to non-Lo-Jack systems. In today's mobile society, it is very likely that a substantial number of vehicles may leave their home service areas and potentially cause interference to neighboring systems. As an example, Los Angeles and Las Vegas police may choose different vendors and many residents from Los Angeles frequently visit Las Vegas. Moreover, the local police will have no control over mobile units from outside their jurisdiction, and they will not be able to easily correct such problems. The potential for interference to other systems from mobile units automatically activated outside of their own jurisdiction is of great concern to the Commission. Specifically, we find that the benefits of the Lo-Jack "anti-jamming" feature are outweighed by the threat of interference and we are prohibiting such activity. Further, the rules adopted in the *Report and Order* do not envision the activation of mobile units outside of their service area(s). By this action, we are not banning "anti-jamming" features in general--just the automatic activation of mobile units outside the SVRS's jurisdiction.

ADMINISTRATIVE

14. Accordingly, IT IS ORDERED that, pursuant to the authority of Sections 4(i), 301, and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. 154(i), 301, and 303(r), the petitions for reconsideration and clarification filed by METS, Inc. and Vehicle Security Electronics, Inc. ARE GRANTED to the extent indicated herein, and otherwise ARE DENIED. IT IS FURTHER ORDERED THAT this proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] *See Report and Order,* GEN Docket No. 88-566, 4 FCC Rcd 558 (1989).

[2] *See Petition for Reconsideration* filed by VSE on November 4, 1989, p 5.

[3] *See Petition for Partial Reconsideration and for Clarification* iled by METS on November 24, 1989, pp 2-11.

[4] *See* letter, dated February 24, 1989, to President of METS rom Chairman of SVRN Evaluation Panel of Los Angeles Po- ice Department.

[5] Both Geostar Corporation and QUALCOMM, Inc. are au- horized to provide this service. STARSYS, Inc. and Orbital ommunications Corporation have also asked for such author- ty. *See Petition for Rule Making* filed by STARSYS, Inc., re- eived on May 4, 1990. *See Petition for Rulemaking* filed by rbital Communications Corporation, received on February 28, 990.

[6] 47 CFR Section 90.19(f)(7).

[7] The allocation was limited to SVRS activities to provide a requency that would be free of interference from other police perations including general tracking and monitoring of ve- icles.

[8] *See Opposition to Motions for Reconsideration* filed by Lo- ack, received on January 9, 1990.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 85-396

In re Applications of:

KQED, INC.
San Francisco, California

For renewal of licenses of
noncommercial stations

KQED-FM — File Nos. BRED-237, BRED-800801ZS and BRED-830801WD

KQED-TV, and — File Nos. BRET-25, BRET-800801LQ and BRET-830801LK

KQEC(TV) — File Nos. BRET-203 and BRET-800801LV

KQED, INC.
San Francisco,
California
MM DOCKET NO. 84-567
File No. BRET-830801LJ

For renewal of license of
noncommercial educational
station KQEC(TV), Channel 32,
San Francisco, California

MINORITY
TELEVISION
PROJECT
San Francisco,
California
MM DOCKET NO. 84-568
File No. BPET-831101KI

For a construction permit for a
new noncommercial educational
television station on Channel 32,
San Francisco, California

MEMORANDUM OPINION AND ORDER

Adopted: January 4, 1991; Released: February 1, 1991

By the Commission:

1. The Commission has before it an order upholding a Review Board decision, which (1) denied KQED, Inc. renewal of station KQEC(TV), channel 32, San Francisco, California; (2) renewed KQED's licenses for KQED-TV, channel 9, San Francisco, California, and KQED-FM, San Francisco, California; and (3) granted Minority Television Project Inc.'s (MTP) application for a construction permit for the facilities of KQEC(TV). *KQED, Inc.*, 5 FCC Rcd 1784 (1990). The Commission agreed with the Board that KQED committed serious misconduct by lacking candor about and misrepresenting the reasons for deactivating KQEC(TV) beginning in January 1980. The Commission found that KQED's board of directors adopted a resolution authorizing the deactivation of channel 32 as a means of alleviating KQED's financial problems. However, KQED's notifications to the Commission about the status of the station did not mention the board's budgetary action. Instead, KQED stated that the station had been shut down for technical reasons associated with the replacement of switcher equipment. KQED followed this approach knowing that the Commission had previously expressed disapproval of prior action by KQED deactivating channel 32 for budgetary reasons. 5 FCC Rcd at 1784-85 ¶¶ 3-4. Because the Commission found that KQED committed serous misconduct, it denied renewal of KQEC(TV). However, the Commission renewed the licenses of co-owned stations KQED-TV and KQED-FM because it considered the loss of a single station an appropriate sanction on the record presented and an adequate deterrent of future misconduct. *Id.* at 1785 ¶ 7. The Commission also agreed with the Board that MTP should not be required at this time to make a further showing that it is financially qualified to construct and operate its proposed station. *Id.* at 1785 ¶ 10.

2. The California Public Broadcasting Forum et al. (Forum), which filed a petition to deny against KQED, and MTP seek reconsideration of the Commission's order.[1] Each asserts that new circumstances warrant different action by the Commission. We conclude that both petitions are without merit, and we deny them.

I. FORUM'S PETITION

3. Forum asserts that the Commission should have denied renewal of all three of KQED's stations, rather than only of KQEC(TV). Forum observes that KQED's management recently approved a plan to use channel 32 to establish a 24 hour a day news channel to be carried on Bay Area cable systems, in collaboration with a commercial broadcaster. According to Forum, KQED intends that this plan should impose no cost on KQED and would be effectuated (on cable) even if its license for channel 32 were ultimately denied.

4. In Forum's view, this plan confirms that channel 32 has no real economic value to KQED. Forum contends that KQED does not use channel 32 for fundraising and that channel 32 is a burden rather than a source of revenue. Forum asserts that KQED's budget has no separate line item for KQEC(TV). Thus, Forum contends that the loss of channel 32 -- KQED's least important station -- will not have a significant deterrent impact of KQED.

5. Additionally, Forum contends that because KQED's lack of candor and misrepresentations reflect on KQED's trustworthiness, the Commission cannot rely on KQED to be the licensee of other stations, especially when they are co-located and co-managed. Forum maintains that KQED's serious misrepresentations were pervasive and continuing and were made by top management. Forum asserts that KQED's misconduct cannot be mitigated by evidence of meritorious programming.

6. KQED responds that KQEC(TV) is a valuable broadast property in which KQED has made substantial inestments to further its public broadcasting mission. KQED also submits that the loss of KQEC(TV) has had a sychological impact on its personnel and has tarnished KQED's reputation with the public and the public broadasting community. Hence, KQED contends that the loss f KQEC(TV) has already had substantial deterrent imact. KQED pledges to make every effort to avoid "any ircumstances that might make it vulnerable to even the uggestion of untruthfulness in its relationship with the CC." Opposition at 8. According to KQED, the loss of urther licenses would harm the public by depriving it of valuable service, and Forum's efforts to this end repreent mere vindictiveness. Additionally, KQED points out hat, in several past cases, the Commission has denied enewal of only one of a multiple owner's licenses.

7. The Mass Media Bureau agrees with KQED that KQED's apparent willingness to convert KQEC(TV) to an ll-news format does not support the argument that its oss has no detrimental effect. The Bureau contends that he loss of channel 32 sends a clear message to broadasters, including KQED. The Bureau also agrees that the ecision to deny only a single station is a valid exercise of he Commission's discretion.

8. Forum replies that KQED's investment in channel 2 has been minimal and that KQED's main concern has een to relieve itself of the operating costs of KQEC(TV). orum asserts that KQED remains unrepentant and ntrustworthy. According to Forum, KQED is the subject f much local criticism and only by totally disqualifying KQED will San Francisco have the opportunity to be erved by a noncommercial broadcaster operating in the ublic interest.

9. We adhere to our judgment that the loss of KQEC(TV) represents a substantial deterrent. The record ndicates that over the years KQED has used channel 32 o complement the programming presented on channel 9, specially with regard to instructional and minority-orinted programming to provide unique service to the Bay Area. *See KQED, Inc.*, 2 FCC Rcd 352, 364-67 ¶¶ 120-40 (I.D. 1987). This performance illustrates that channel 32 as value to KQED, although, as the record also shows, KQED has not always given high priority to channel 32's perations. KQED's apparent intention to install an allews format on KQEC(TV) does not on its face undercut he inference that the station is an important outlet for rogramming. Moreover, it is highly likely that the loss of broadcast license will be seen by both the licensee and thers as a serious matter.

10. In view of this deterrent impact, we continue to elieve that the loss of KQEC(TV) alone represents an ppropriate sanction in this case. Although KQED's misonduct was serious, it was limited in its context and did ot pervade the operation of the three stations. Hence, his case differs from those egregious cases in which perasive and continuing misconduct renders a licensee cateorically unfit to hold any license. *See Faulkner Radio, nc.*, 88 FCC 2d 612, 616-17 ¶¶ 12-13 (1981), and cases ited therein. It is, rather, a case in which the loss of a ingle station can be expected to deter KQED and other icensees from further misconduct. *See Character Qualiications*, 102 FCC 2d 1179, 1228 ¶ 103 (1986), *recon. enied*, 1 FCC Rcd 421 (1986). Nonetheless, as we preiously stated, although the denial of KQED's other lienses is unwarranted on this record, we expect KQED to take whatever steps are necessary to ensure that no further misconduct occurs. 5 FCC Rcd at 1785 ¶ 7. In this regard, we will carefully scrutinize any indication that further misconduct has occurred in the operation of those stations.

II. MTP'S PETITION

11. MTP reports (without providing a sworn statement or details) that KQED refuses to turn over assets related to KQEC(TV) to MTP. MTP requests the Commission to require KQED to relinquish the transmitter system, programming rights, subscriber lists, pledges, underwriting agreements, accounts receivable, and cash associated with channel 32. MTP asserts that the Commission has the authority to compel KQED to turn over its assets based on the Commission's authority to regulate noncommercial broadcasting. In MTP's view, KQED has no right to retain these assets -- which MTP claims were obtained through public funds -- after the loss of the license for channel 32. Additionally, MTP maintains that KQED should not be allowed to retaliate against MTP by withholding these assets, thereby disrupting the institution of new service on channel 32, contrary to the public interest. Relying on *Alabama Citizens for Responsive Public Television, Inc.*, 69 FCC 2d 1061, 1070-71 ¶ 24 (1978), MTP contends that a licensee's willful attempts to obstruct the institution of new service by a challenger reflects adversely on the licensee's basic qualifications.

12. KQED and the Bureau respond that the Commission has no policy of requiring an incumbent to relinquish its assets to a challenger and that KQED has no obligation to do so. KQED explains that it will use the assets in question in connection with its continuing service on its remaining stations. KQED denies that it has attempted to obstruct MTP's efforts to obtain a transmitter site. In KQED's view, MTP's request merely confirms the inadequacy of MTP's own resources for constructing and initially operating the station.

13. We agree with KQED and the Bureau that MTP's request has no basis in Commission policy. We have disclaimed authority to require an incumbent even to sell or lease its facilities to a challenger, let alone to give its facilities away. *George E. Cameron Jr. Communications*, 71 FCC 2d 460, 467 ¶ 15 (1979). A station's equipment and program-related assets represent a vested property interest, which can be mortgaged or otherwise disposed of by the station's owner. *See Stephens Industries, Inc. v. McClung*, 789 F.2d 386, 390-91 (6th Cir. 1986); *Kirk Merkley*, 94 FCC 2d 829, 830-31 ¶ 3 (1983). To the extent that MTP argues that KQED's status as a nonprofit corporation creates an obligation for KQED to dispose of its assets in the manner MTP suggests, MTP raises a question of property law more appropriately within the jurisdiction of the civil courts. *Cf. Listener's Guild, Inc. v. FCC*, 813 F.2d 465, 469 (D.C. Cir. 1987) (the Commission defers to the courts with respect to private law disputes).[2]

III. ORDERS

14. ACCORDINGLY, IT IS ORDERED, That, good cause having been shown, Forum's Motion for Acceptance of Superseding pleading filed April 23, 1990, and Forum's Motion for Acceptance of Table of Contents and Summary filed May 18, 1990 ARE GRANTED.

15. IT IS FURTHER ORDERED, That the Petition for Reconsideration of California Public Broadcasting forum et al. filed April 23, 1990, and the Petition for Reconsideration filed April 23, 1990 by Minority Television Project, Inc. ARE DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] Before the Commission are: (1) a Petition for Reconsideration filed April 23, 1990 by Forum, an opposition filed May 8, 1990 by KQED, and a reply filed May 18, 1990 by Forum; and (2) a Petition for Reconsideration filed April 23, 1990 by MTP, and an opposition filed May 8, 1990 by KQED. The Mass Media Bureau filed a consolidated opposition to both petitions for reconsideration on May 3, 1990. Forum also filed two procedural pleadings, which cure defects in its petition: (1) a Motion for Acceptance of Superseding Pleading; and (2) a Motion for Acceptance of Table of Contents and Summary.

[2] Additionally, MTP has not documented its allegation that KQED has unreasonably interfered with MTP's efforts to obtain a transmitter site or otherwise made any showing warranting Commission action. *Compare with Alabama Citizens for Responsive Public Television, Inc.*, 69 FCC 2d at 1070-71 ¶ 24.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-639

In re Applications of

TEXAS EDUCATIONAL BROADCASTING CO-OPERATIVE, INCORPORATED (hereafter "Broadcasting") Hornsby, Texas	File No. BPED-880401MG
THE UNIVERSITY OF TEXAS AT AUSTIN ON BEHALF OF TEXAS STUDENT PUBLICATIONS (hereafter "University") Austin, Texas	File No. BPED-880722MA

For Construction Permit
for a New Noncommercial
Educational FM Station on Channel 219A

HEARING DESIGNATION ORDER

Adopted: December 27, 1990; Released: February 5, 1991

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new noncommercial, educational FM station.

2. *Pending Matters*. In response to Item 3, Section II of Form 340, University has indicated in Exhibit 2A that it s a party in the pending court or administrative proceedngs, involving matters of discrimination, below:

> Murphy Hamilton, staff member, EEOC Charge No. 36B 880006, filed 10/20/87, race discrimination in termination.
>
> Carl A. Rubino, faculty member, EEOC Charge No. 31C 880020, filed 9/28/87, retaliation alleged.
>
> Oscar Saenz, staff member, EEOC Charge No. 310 87 0226, filed 3/18/87, national origin discrimination in promotion; EEOC Charge No. 360 88 0550, filed 1/26/88, retaliation in application.
>
> Tagi Sagafi-Nejad, faculty member, EEOC Charge No. 065 83 0867, filed 2/23/83, national origin discrimination in failure to reappoint; EEOC Charge No. 065 85 0384, filed 5/11/84, age discrimination in faculty application.
>
> Eddie J. Wallace, applicant, EEOC Charged No. 31C 88 0292, filed 4/21/88, race discrimination in hiring, retaliation.
>
> Douglas R. Williams, staff member, EEOC Charge No. 310 87 0437, filed 8/21/87, race discrimination in termination.
>
> *Dr. Barbara Gold v. U. T. Austin, et al*, Cause No. A86CA318, U.S. Dist. Ct. W. Dist. Tex., filed 6/3/86; Plaintiff alleges she was denied tenure in Classics Department because of sex discrimination. (Plaintiff lost in lower court and has appealed).
>
> *Leslie C. O' Bell v. U. T. Austin, et al*. Cause No. A87CA015, U.S. Dist. Ct. W. Dist. Tex., filed 1/27/87; Plaintiff, a tenured professor, alleges sex discrimination regarding compensation, terms, conditions and privileges of employment.
>
> *Nancy Davis v. McDonald Observatory* (*U. T. Austin*) *et al*, Cause No. 1412, 83rd Judicial Court, Ft. Davis, Jeff Davis County; Plaintiff alleges that she was subjected to sexual harassment.

Accordingly, an appropriate condition will be specified.

3. *Residence*. Section II, Item 4 of FCC Form 340 requires that an applicant specify its address (number, street, city, state) as well as the home address of each of its principals. University has not completed Item 4 correctly. University's application gives the same address for each of its principals. Accordingly, University must submit an amendment which gives all the information required by Section II, Item 4 to the presiding Administrative Law Judge after this Order is released.

4. *Air Hazard*. Attempts to obtain FAA clearance through the Commission's Antenna Survey Branch and the University have been unsuccessful. Accordingly, since no determination has been received as to whether the antenna proposed by University would constitute a hazard to air navigation, an issue with respect thereto will be included and the FAA made a party to the proceeding.

5. *Share-time Arrangement*. None of the applicants have indicated that an attempt has been made to negotiate a share-time arrangement. Therefore, an issue will be specified to determine whether a share-time arrangement between the applicants would be the most effective use of the frequency and thus better serve the public interest. *Granfalloon Denver Educational Broadcasting, Inc.*, 43 Fed. Reg. 49560 (October 24, 1978). In the event that this issue is resolved in the affirmative, an issue will also be specified to determine the nature of such an arrangement. It should be noted that our action specifying a share-time issue is not intended to preclude the applicants, either before the commencement of the hearing or at any time during the course of the hearing, from participating in negotiations with a view toward establishing a share-time agreement among themselves.

6. The respective proposals, although for different communities, would serve substantial areas in common. Consequently, in addition to determining, pursuant to Section 307(b) of the Communications Act of 1934, as amended, which of the proposals would best provide a fair, efficient and equitable distribution of radio service, a contingent comparative issue will also be specified.

7. Inasmuch as it appears that there would be a significant difference in the size of the areas and populations which would receive service from the proposals, and since

this proceeding involves competing applicants for noncommercial educational facilities, the standard areas and populations issue will be modified in accordance with the Commission's prior action in *New York University*, FCC 67-673, released June 8, 1967, 10 RR 2d 215 (1967). Thus, the evidence adduced under this issue will be limited to available non-commercial educational FM signals within the respective service areas.

8. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

9. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

> 1. To determine whether there is a reasonable possibility that the tower height and location proposed by the University would constitute a hazard to air navigation.
>
> 2. To determine: (a) the number of other reserved channel noncommercial educational FM services available in the proposed service area of each applicant, and the area and population served thereby; (b) whether a share-time arrangement between the applicants would result in the most effective use of the channel and thus better serve the public interest and, if so, the terms and conditions thereof; and (c) in light of Section 307(b) of the Communications Act of 1934, as amended, which of the proposals would best provide a fair, efficient and equitable distribution of radio service.
>
> 3. To determine, in the event it is concluded that a choice between the applications should not be based solely on considerations relating to Section 307(b), the extent to which each of the proposed operations will be integrated into the overall cultural and educational objectives of the respective applicants; and whether other factors in the record demonstrate that one applicant will provide a superior FM educational broadcast service.
>
> 4. To determine, in light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

10. IT IS FURTHER ORDERED, That, in the event a construction permit is awarded to University as a result of this proceeding, its grant shall be without prejudice to whatever action, if any, the Commission may deem appropriate in accordance with the outcome in Charge Numbers: 36B 880006, 31C 880020, 310 87 0226, 065 83 0867, 31C 88 0292, 310 87 0437 and Cause Numbers: A86CA318, A87CA015, 1412.

11. IT IS FURTHER ORDERED, That University shall submit an amendment which contains the information required by Section II, Item 4 of FCC Form 301, to the presiding Administrative Law Judge within 30 days after the release of this Order.

12. IT IS FURTHER ORDERED, That the Federal Aviation Administration IS MADE A PARTY to this proceeding with respect to the air hazard issue only.

13. IT IS FURTHER ORDERED, That a copy of each document filed in this proceeding subsequent to the date of adoption of this Order shall be served on the counsel of record in the Hearing Branch appearing on behalf of the Chief, Mass Media Bureau. Parties may inquire as to the identity of the counsel of record by calling the Hearing Branch at (202) 632-6402. Such service shall be addressed to the named counsel of record, Hearing Branch, Enforcement Division, Mass Media Bureau, Federal Communications Commission, 2025 M Street, N.W., Suite 7212, Washington, D.C. 20554. Additionally, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall also be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Federal Communications Commission, Room 350, 1919 M Street, N.W., Washington, D.C. 20554.

14. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

15. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-496

In the Matter of

Amendment of Section 73.202(b), RM-7381
Table of Allotments,
FM Broadcast Stations.
(Crawford, Georgia)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: January 28, 1991; Released: February 4, 1991

By the Acting Chief, Allocations Branch:

1. Pursuant to the request of Georgia Family Radio Limited Partnership (petitioner), the Commission has before it the *Notice of Proposed Rule Making*, 5 FCC Rcd 6347 (1990), proposing the substitution of Channel 271C3 for Channel 271A at Crawford, Georgia, and the modification of its construction permit (BMPH-891109IC) for Station WGMG(FM) to specify operation on Channel 271C3. Broadcast Investment Properties, Inc. ("Broadcast"), successor-in-interest to the petitioner,[1] filed comments stating its intention to apply for Channel 271C3, if allotted. No other comments were received.

2. We believe the public interest would be served by substituting Channel 271C3 for Channel 271A at Crawford, Georgia, since it would provide Crawford with an expanded coverage area FM service. Channel 271C3 can be allotted to Crawford in compliance with the Commission's minimum distance separation requirements with a site restriction of 17 kilometers (10.5 miles) northeast[2] n order to avoid a short-spacing to Station WGGA, Channel 270A at Cleveland, Georgia, and vacant but applied for Channel 271A at Bolingbroke, Georgia. In accordance with Section 1.420(g) of the Commission's Rules, we are modifying the construction permit of Station WGMG(FM) to specify operation on Channel 271C3.

3. Accordingly, pursuant to the authority found in Secions 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **March 21, 1991,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, as follows:

City	Channel No.
Crawford, Georgia	271C3

4. IT IS FURTHER ORDERED, That pursuant to Secion 316(a) of the Communications Act of 1934, as amended, the construction permit of Station WGMG(FM), Crawford, Georgia, IS MODIFIED to specify operation on Channel 271C3 in lieu of Channel 271A, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the permittee shall submit to the Commission a minor change application for a construction permit (Form 301), specifying the new facility;

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620; and

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

5. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

6. For further information concerning this proceeding, contact Nancy J. Walls, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Andrew J. Rhodes
Acting Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

FOOTNOTES

[1] Broadcast Investment Properties, Inc., is the assignee of Station WGMG(FM).

[2] The coordinates are North Latitude 33-57-10 and West Longitude 82-59-30.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-09

In the Matter of

Amendment of Section 73.202(b). RM-7423
Table of Allotments.
FM Broadcast Stations.
(Greenfield and Del Rey Oaks,
California)

NOTICE OF PROPOSED RULE MAKING

Adopted: January 28, 1991; Released: February 4, 1991

By the Acting Chief, Allocations Branch:

1. Before the Commission for consideration is a petition for rule making, as amended,[1] filed on behalf of Troposphere Broadcasting Limited Partnership (petitioner), permittee of Station KQKZ(FM), Channel 300B, Greenfield, California, requesting the reallotment of its channel to Del Rey Oaks, California, and modification of its construction permit to specify operation on Channel 300A at the new community. If modified, petitioner states that it will promptly file an application to relocate its transmitter site to provide Del Rey Oaks with a city grade signal.

2. In support of its proposal, petitioner seeks to invoke the provisions of Section 1.420(i) of the Commission's Rules.[2] Petitioner premises its proposal on its desire to provide a first local aural transmission service to Del Rey Oaks. Petitioner states that the allotment of Channel 300A to Del Rey Oaks (pop. 1,557) [3] is mutually exclusive with the present allotment of Channel 300B at Greenfield (pop. 4,181). The distance between the petitioner's presently authorized site at Greenfield[4] and the site suggested for its use on Channel 300A at Del Rey Oaks[5] is 67 kilometers (42 miles), whereas Commission Rule 73.207(b)(1) requires a distance of 178 kilometers (110 miles) between co-channel Class A and B stations. Petitioner states that its proposal would not deprive Greenfield of local service.[6]

3. In further support of its proposal, petitioner advises that although its request would result in a downgrade of Station KQKZ(FM) from a Class B to a Class A station, the reallotment to Del Rey Oaks would enable the station to provide a signal strength of 60 dBu or greater to 250,466 persons in an area of 1,181 square kilometers, whereas its use on Channel 300B at Greenfield would provide a signal strength of 60 dBu or greater to 200,458 persons in an area of 7,206 square kilometers.

4. Based on the information before us, we are unable to determine whether petitioner's proposal would result in a preferential arrangement of allotments. We note that Del Rey Oaks is within the Seaside-Monterey Urbanized Area as defined by the U.S. Census. We question whether Del Rey Oaks is deserving of a first local FM service preference, or whether Del Rey Oaks should be credited with all of the aural services authorized to communities within the Seaside-Monterey Urbanized Area. Petitioner is requested to submit information sufficient to show that Del Rey Oaks is deserving of such a preference. *See Community of License MO & O*, 5 FCC Rcd 7094 (1990).

5. In light of the above, although we are unable to conclude at this time that the public interest would be served by substituting Channel 300A for Channel 300B and reallotting the channel from Greenfield to Del Rey Oaks, California, we will tentatively propose to do so, pending an evaluation of the requested information. A staff engineering review of the proposal confirms that Channel 300A can be allotted to Del Rey Oaks in conformity with the minimum distance separation requirements of Section 73.207(b)(1) of the Commission's Rules, provided Channel 300B is deleted at Greenfield. In accordance with the provisions of Section 1.420(i) of the Commission's Rules, we will not accept competing expressions of interest for the use of Channel 300A at Del Rey Oaks or require the petitioner to demonstrate the availability of an additional equivalent channel at that community.

6. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to the communities listed below, as follows:

	Channel No.	
City	Present	Proposed
Del Rey Oaks, California	--	300A
Greenfield, California	258B, 300B	258B

7. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

8. Interested parties may file comments on or before **March 28, 1991**, and reply comments on or before **April 12, 1991**, and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner's counsel, as follows:

Howard M. Liberman, Esq.
Jonathan V. Cohen, Esq.
Arter & Hadden
1919 Penn. Ave., N.W.
Suite 400
Washington, D.C. 20006

9. The Commission has determined that the relevan provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202 (b), 73.504 and 73.606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

10. For further information concerning this proceeding, ontact Nancy Joyner, Mass Media Bureau, (202) 34-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are dvised that no *ex parte* presentations are permitted from he time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and uch decision is no longer subject to reconsideration by he Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by he Commission or staff for the clarification or adduction f evidence or resolution of issues in the proceeding. However, any new written information elicited from such request or a summary of any new oral information shall e served by the person making the presentation upon the ther parties to the proceeding unless the Commission pecifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *x parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been erved on the person(s) who filed the comment, to which he reply is directed, constitutes an *ex parte* presentation nd shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Andrew J. Rhodes
Acting Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i). 5(c)(1), 03(g) and (r) and 307(b) of the Communications Act of 934, as amended, and Sections 0.61 0.204(b) and 0.283 of he Commission's Rules, IT IS PROPOSED TO AMEND he FM Table of Allotments. Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is ttached.

2. *Showings Required*. Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will e expected to answer whatever questions are presented in nitial comments. The proponent of a proposed allotment s also expected to file comments even if it only resubmits r incorporates by reference its former pleadings. It hould also restate its present intention to apply for the hannel if it is allotted and, if authorized, to build a tation promptly. Failure to file may lead to denial of the equest.

3. *Cut - off Procedures*. The following procedures will overn the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service*. Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a). (b) and (c) of the Commission's Rules.)

5. *Number of Copies*. In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings*. All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTES

[1] Petitioner originally requested the reallotment of Channel 300B to Chualar, California, but amended its proposal to specify Del Rey Oaks.

[2] *See Amendment to the Commission's Rules Regarding Modification of FM and TV Authorizations to Specify a New Community of License*, 4 FCC Rcd 4870 (1989), *pets. for recon. granted in part*, 5 FCC Rcd 7094 (1990) *("Community of License MO&O")*.

[3] Population figures are from the 1980 U.S. Census.

[4] Coordinates at the site specified in the construction permit issued to the petitioner at Greenfield are 36-19-50 and 121-10-16.

[5] Coordinates used for Channel 300A at Del Rey Oaks are 36-34-47 and 121-50-50.

[6] Station KSUR-FM, Channel 258B, has been issued a license to cover its construction permit (File No. BLH-890807KE) at Greenfield. Additionally, we note that an application has been filed by Prunedale Educational Association (File No. BPED-890214ME) to operate a noncommercial educational FM station on Channel 219B at Greenfield. Although Prunedale's application may constitute an additional factor to be considered in resolving petitioner's proposal, it does not constitute an "existing service" in analyzing this proposal. *See Community of License MO&O*, 5 FCC Rcd 7094, 7097 (1990).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-211

In the Matter of

Amendment of Section 73.202(b), Table of Allotments, FM Broadcast Stations. (Gretna, Marianna, Quincy and Tallahassee, Florida)	RM-7178 RM-7515

REPORT AND ORDER
(Proceeding Terminated)

Adopted: January 24, 1991; Released: February 4, 1991

By the Acting Chief, Allocations Branch:

1. Pursuant to the request of Dolcom Broadcasting, Inc. ("Dolcom"), the Commission has before it the *Notice of Proposed Rule Making*, 5 FCC Rcd 2668 (1990), proposing the substitution of Channel 276C2 for Channel 276A at Tallahassee, Florida, and modification of its license for Station WTHZ(FM) to specify operation on the higher class channel. The *Notice* also proposed the substitution of Channel 231A for vacant but applied for Channel 227A at Marianna, Florida, for which two applications are pending,[1] substitution of Channel 227A for Channel 264A at Gretna, Florida, and modification of the license for Station WGWD(FM), and substitution of Channel 264A for vacant but applied for Channel 274A at Quincy, Florida, for which two applications are pending.[2]

2. In response to the *Notice*, Dolcom filed comments restating its intention to apply for Channel 276C2, if allotted. Asset Investments, Inc., licensee of Channel 264A at Gretna, Florida, filed supporting comments. Wolff Broadcasting Corporation ("Wolff"), licensee of Station WIJK(FM), Channel 227C2, Evergreen, Alabama, filed supporting comments. William F. Dunkle, III ("Dunkle") filed a counterproposal seeking the allotment of Channel 276A to Steinhatchee, Florida, as that community's first local FM broadcast service. [3] Kudzu Broadcasting Partnership ("Kudzu"), licensee of Station WQUH(FM), Channel 276A, Defuniak Springs, Florida, filed a counterproposal requesting the substitution of Channel 276C1 for Channel 276A at Defuniak Springs or Freeport, Florida, and the modification of Station WQUH's license. Thomasville Radio, Inc. ("TRI"), licensee of Station WSTT(FM), Channel 296A, Thomasville, Georgia, filed opposing comments. Dolcom and Kudzu filed reply comments.[4] After the record closed, Dunkle filed a request for leave to file responsive comments. Dolcom filed a motion to strike Dunkle's comments, as well as an opposition. Dunkle filed a letter.[5]

3. Dunkle, in its counterproposal, states that Steinhatchee is not incorporated, but lies within both Taylor and Dixie Counties, Florida. Dunkle notes that Steinhatchee has a post office with its own zip code, a grade school and six churches. He alleges that Steinhatchee has a business district which includes restaurants and other retail outlets and that its population is approximately 1,500 permanent residents, which elevates substantially during the tourist season when the area attracts many campers and fishing enthusiasts. He adds that there is a volunteer fire department in Steinhatchee, and that Steinhatchee is served by the Steinhatchee Water Association, a self-sufficient water system which is governed by a local voluntary board of directors. According to Dunkle, Taylor County provides a sheriff to patrol duties in Steinhatchee.

4. In response to Dunkle's counterproposal, Dolcom contends that Steinhatchee does not rise to the level of a cognizable community for allotment purposes. Dolcom states that Steinhatchee straddles the counties of Taylor and Dixie, is not recognized by any governmental body as a municipality, and is not incorporated or listed by the U.S. Census. Dolcom also contends that Steinhatchee has no internal governing body, mayor, city hall, chamber of commerce, and no municipally provided services of any kind, and no real community identity. Dolcom states that Steinhatchee is a quiet, sparsely populated area, and most of the residents are retirees or fishermen, seeking to live in a rural setting. While it contains a small number of businesses, such as convenience stores, a hardware store, and a mechanic shop to provide area residents with some essential services, Dolcom alleges that the nearest grocery and clothing stores are located in Perry and Cross City, Florida. Dolcom contends that there is no "business district" in Steinhatchee and that, the area is devoid of sidewalks and traffic lights. Dolcom notes that in the event the Commission deems Steinhatchee to be a community for allotment purposes, there are alternative channels available for allotment to Steinhatchee. Dolcom recommends that either Channel 243A or Channel 257A be allotted to Steinhatchee.

5. The Commission's policy is that, if a community is not incorporated or listed in the census reports, the proponents of an allotment must show the place to be a geographically identifiable population grouping.[6] The proponent needs not show that the borders of the locality are precisely ascertainable. Instead, what must be shown is that residents of the locality are commonly regarded as a distinct group. This can be proven by the "testimony of local residents or by objective indications of the existence of a common perception that a locality's populace constitutes a distinct 'geographical population grouping'".[7] Examples of objective indications of community status include receipts from local businesses, photographs of local churches, the existence of political, commercial, social and religious organizations, and services in the community. Another indication of community status is "whether the residents function as and conceive of themselves as residents of a community, around which their interests coalesce."[8]

6. Based upon the showing submitted by Dunkle, we do not believe that Steinhatchee is a community for allotment purposes. Although the 1988 edition of the *Rand McNally Commercial Atlas* lists Steinhatchee as having a population of 800, the town is neither incorporated nor listed in the U.S. Census. In addition, Dunkle has not shown other indicia of community status such as political, social, or business organizations, or testimony of local residents. In this regard, it appears that there is no local government. Furthermore, while Dunkle has alleged that

here are some local businesses and churches, he has not pecifically identified these entities or shown that they are ntended to serve Steinhatchee, as opposed to other areas. his is a critical deficiency because, in past cases, we have ejected claims of community status where a nexus has ot been shown between the political, social, and commercial organizations and the community in question. ee, *e.g.*, *Coker, Alabama*, 43 R.R. 2d 190, 193 (1978); and *Malone and Owls Head, New York*, 3 FCC Rcd 5243 1988). *Cf. Semora, North Carolina, supra* note 7. Accordingly, we believe that the record in this proceeding is nsufficient to find that Steinhatchee is a community for llotment purposes, and we will therefore not allot Channel 276A to Steinhatchee. However, since other channels may be available for allotment to Steinhatchee, our decision in this proceeding should not preclude Dunkle or ny other party from filing a new petition for rule making which would provide additional information regarding teinhatchee's status as a community.[9]

7. An engineering analysis has determined that Channel 76C2 can be substituted for Channel 276A at Tallahassee's present transmitter site in compliance with the Commission's minimum distance separation requirements with site restriction of 7.4 kilometers (4.6 miles) northeast of he community.[10] Channel 227A can be substituted for hannel 264A at Gretna in compliance with the minimum distance separation requirements with a site restriction of 8.7 kilometers (5.4 miles) southeast at Station WGWD's licensed site.[11] Channel 231A can be substituted or vacant but applied for Channel 227A at Marianna in ompliance with the Commission's minimum distance eparation requirements with a site restriction of 1.2 ilometers (0.8 miles) south.[12] and Channel 264A can be ubstituted for vacant but applied for Channel 274A at Quincy in compliance with the Commission's minimum istance separation requirements with a site restriction of .6 kilometers (4.1 miles) southeast.[13]

8. After consideration of the information filed in this roceeding, we believe the public interest would be served y the substitution of Channel 276C2 for Channel 276A t Tallahassee, Florida. In order to accommodate the upgrade at Tallahassee, we will substitute Channel 227A for hannel 264A at Gretna, substitute Channel 231A for acant but applied for Channel 227A at Marianna, and ubstitute Channel 264A for vacant but applied for Channel 274A at Quincy. In accordance with Section 1.420(g) f the Commission's Rules, we will modify the license of tation WTHZ(FM) at Tallahassee to specify operation hannel 276C2, and we will also modify the license of tation WGWD(FM) at Gretna to specify operation on hannel 227A.[14]

9. Dolcom has stated its willingness to reimburse the icensee of Station WGWD for all reasonable and necessary expenses incurred with the change in channels. *See ircleville, Ohio*, 8 FCC 2d 159 (1967).

10. Accordingly, pursuant to the authority found in ections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the ommunications Act of 1934, as amended, and Sections .61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **March 21, 1991,** the FM Table f Allotments, Section 73.202(b) of the Commission's ules, IS AMENDED for the community listed below, as llows:

City	Channel No.
Gretna, Florida	227A
Marianna, Florida	231A
Quincy, Florida	264A
Tallahassee, Florida	235C, 241C2 255C1, 276C2, 281C, 291A

11. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the license of Station WTHZ(FM), Tallahassee, Florida, IS MODIFIED to specify operation on Channel 276C2 in lieu of Channel 276A, subject to the following conditions:

> (a) Within 90 days of the effective date of this *Order*, the licensee shall submit to the Commission a minor change application for a construction permit (Form 301), specifying the new facility;
>
> (b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620; and
>
> (c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

12. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the license of Station WGWD(FM), Gretna, Florida, IS MODIFIED to specify operation on Channel 227A in lieu of Channel 264A, subject to the following conditions:

> (a) Nothing contained herein shall be construed as authorizing any change in license (BLH-890630KE) except the channel as specified above. Any other changes, except for those so specified under Section 73.1690 of the Rules, require prior authorization pursuant to an application for construction permit (FCC Form 301).
>
> (b) Program tests may be conducted in accordance with the provisions of Section 73.1620 of the Rules, PROVIDED the transmission facilities comply in all respects with license (BLH-890630KE) except for the channel as specified above and a license application (FCC Form 302) is filed within 10 days of commencement of program tests.

13. IT IS FURTHER ORDERED, That the Secretary shall send a copy of this *Report and Order* by Certified Mail, Return Receipt Requested, to the applicants for Channel 227A at Marianna, Florida, and Channel 274A at Quincy, Florida, as follows:

Jackson Radio, Ltd.
P.O. Box 777
Marianna, FL 32446
(BPH-880630MG)

Shelia Ann Adams
314 South Jefferson Street
Marianna, FL 32446
(BPH 880629MJ)

Monte R. Bitner & Leah R. James Route 6, Box 586 Quincy, FL 32551 (BPH-870227ME)	Quincy Broadcasters, Inc. Route 4, Box 1550 Havana, FL 32333 (BPH-870313NY)

14. IT IS FURTHER ORDERED, That the request of William F. Dunkle. III for the allotment of Channel 276A to Steinhatchee, Florida (RM-7515), IS DENIED.

15. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

16. For further information concerning this proceeding, contact Nancy J. Walls, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Andrew J. Rhodes
Acting Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

FOOTNOTES

[1] Applicants for Channel 227A at Marianna, Florida, are Jackson Radio Ltd. (BPH-880630MG) and Sheila Ann Adams (BPH-880629MJ).

[2] Applicants for Channel 274A at Quincy, Florida, are Monte R. Bitner-Leah R. James (BPH-870227ME), and Quincy Broadcasters, Inc. (BPH-870313NY).

[3] Public Notice of the counterproposal was given on October 12, 1990, Report No. 1827 (RM-7515).

[4] Thereafter, on September 24, 1990, TRI withdrew its opposing comments and now supports Dolcom's proposal. In addition, on September 25, 1990, Kudzu requested voluntary dismissal and withdrawal of its counterproposal. Therefore, we will dismiss Kudzu's counterproposal and all comments responsive thereto will not be discussed. Kudzu's reply comments are moot, due to the withdrawal of its counterproposal.

[5] The Commission's Rules do not contemplate the filing of pleadings beyond the comment and reply comment period. Therefore, in accordance with Section 1.415(d) of the Commission's Rules, we shall not accept the unauthorized pleadings.

[6] *Revision of FM Assignment Policies and Procedures*, 90 FCC 2d 88, 101 (1982).

[7] *See Beacon Broadcasting*, 2 FCC Rcd 3469 (1987), *recon. denied*, 2 FCC Rcd 7562 (1987). *See also Semora, North Carolina*, 5 FCC Rcd 934 (1990).

[8] *See Mighty - Mac Broadcasting Co.*, 58 RR 2d 599, 603, (1985); *North Naples, Florida*, 41 RR 2d 1549, 1551 (1977).

[9] In its reply comments, Dolcom also argued that Dunkle's counterproposal was procedurally defective because he failed to submit the proper expression of interest in the channel required of counterproponents. While Dunkle represented that he would apply for a construction permit if the channel were allotted, Dolcom contends that Dunkle failed to represent that, if he became the permittee, he would build the station promptly as required in the Appendix to the *Notice of Proposed Rule Making* in this proceeding. However, in view of our determination that Steinhatchee is not a community for allotment purposes, it is not necessary for us to decide this issue.

[10] The coordinates for Channel 276C2 at Tallahassee are North Latitude 30-29-43 and West Longitude 84-13-51.

[11] The coordinates for Channel 227A at Gretna are North Latitude 30-33-24 and West Longitude 84-36-05.

[12] The coordinates for Channel 231A at Marianna are North Latitude 30-45-47 and West Longitude 85-13-52.

[13] The coordinates for Channel 264A at Quincy are North Latitutde 30-32-05 and West Longitude 84-32-37.

[14] Since these allotments are made pursuant to a petition for rule making filed prior to October 2, 1989, the licensee of Station WTHZ(FM) at Tallahassee, the licensee of Station WGWD(FM) at Gretna, and the applicants at Marianna, and Quincy, Florida, may avail themselves of the provisions of Section 73.213(c)(1) of the Commission's Rules. *See* 47 CFR §73.213(c).

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: February 4, 1991

PACIFIC BELL FILES REVISIONS TO ITS COST ALLOCATION MANUAL

PUBLIC COMMENT INVITED

On December 20, 1990, Pacific Bell filed proposed evisions to the cost categories of its permanent cost alocation manual for the separation of regulated and inregulated costs. These revisions reflect the transfer of oice mail, electronic messaging, voice storage and forvard and fax store and forward services to a separate ubsidiary, Pacific Bell Information Services. The formaion of this subsidiary is contingent upon California Pubic Utilities Commission approval.

Parties may file comments on the proposed revisions to he cost manual no later than **March 1, 1991.** Replies hould be filed by **March 18, 1991.** A copy of each leading should be sent to Alicia Dunnigan, FCC, Comnon Carrier Bureau, 2000 L Street, N.W., Room 812, Vashington, D.C. 20554 and to Downtown Copy Center DCC), 1114 21st Street, N.W., Washington, D.C. 20036, 202) 452-1422. Copies are available for public inspection nd copying in the Accounting and Audits Division pubic reference room 2000 L Street, N. W., Room 812, Vashington, D.C. Copies are also available from FCC.

For further information contact Alicia Dunnigan, (202) 34-1861.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Pacific Bell's
Permanent Cost Allocation Manual
for the Separation of Regulated
and Nonregulated Costs

ORDER

Adopted: January 25, 1991; Released: February 4, 1991

By the Chief, Accounting and Audits Division:

1. On January 9, 1991, Pacific Bell (Pacific) filed a revision to its Cost Allocation Manual (CAM)[1] that it claims will enhance current time reporting procedures for Operations personnel. Pacific states that this enhancement implements a statistically valid sampling technique as an augment to current time reporting procedures. The primary component of Pacific's proposal is a statistical sampling methodology that analyzes time spent on various activities by operating technicians. The technicians sampled will identify specific activities and time incurred with the daily workload, and then coding analysts will convert the time reported by technicians into the various accounting classifications. Pacific believes that its proposal is consistent with well-established, statistically-based accounting procedures, and notes that its proposal will not change pool allocation methods and is fully auditable.

2. Normally, a revision to the time reporting procedures specified in a cost allocation manual is effective 60 days following the submission of the revision. However, in this instance, we believe that Pacific's proposed revision raises serious concerns, not only as to how the costs associated with Operating personnel are to be allocated between regulated and nonregulated activities, but also as to how these costs are to be assigned initially to the appropriate Part 32 Accounts. Because of these concerns, we will stay the effective date of this revision for 180 days, or until September 10, 1991. During this period, we will review whether the revision complies with the Commission's cost allocation rules and policies. This stay is in accordance with the *Nevada and Pacific Order* which states that, "[P]roposed amendments to the manual will be deemed accepted unless the Common Carrier Bureau, pursuant to its delegated authority, stays the effectiveness of the change or rejects the change."[2]

3. Accordingly, IT IS ORDERED that the revision to Pacific's Cost Allocation Manual filed January 9, 1991 IS STAYED until September 10, 1991.

4. IT IS FURTHER ORDERED that parties may file comments on Pacific's revisions no later than February 25, 1991. Pacific may file reply comments no later than March 11, 1991.

FEDERAL COMMUNICATIONS COMMISSION

Kenneth P. Moran
Chief, Accounting and Audits Division

FOOTNOTES

[1] On January 10, 1991, Pacific filed a correction of a typographical error contained in the cover letter accompanying the January 9 submission.

[2] Nevada Bell's Permanent Cost Allocation Manual for the Separation of Regulated and Nonregulated Costs and Pacific Bell's Permanent Cost Allocation Manual for the Separation of Regulated and Nonregulated Costs, 3 FCC Rcd 287, 301 (Com. Car. Bur. 1988) (*Nevada and Pacific Order*).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

GTE SOUTHWEST AAD 8-1902

Request to Allow Amortization
of Debt Refinancing Expenses and
Unamortized Discounts and Premiums
Associated with Reacquired Debt

ORDER

Adopted: January 24, 1991; Released: February 4, 1991

By the Chief, Common Carrier Bureau:

1. On May 8, 1990, the Common Carrier Bureau ("Bureau") denied a request by GTE Southwest Incorporated ("GTE") for permission to amortize expenses associated with certain bond and preferred stock redemptions.[1] The Bureau also found GTE apparently liable for a forfeiture of $9000 under Section 220(d) of the Communications Act [2] for its failure to follow the Commission's rules when accounting for these redemptions. By pleadings filed June 7, 1990, GTE contested the proposed forfeiture and sought Commission review of the Bureau's decision.

2. On January 10, 1991, GTE withdrew its Application for Review of the Bureau's decision, and tendered payment of the proposed forfeiture. [3] As GTE no longer contests this matter, this proceeding is concluded.

3. Accordingly, IT IS ORDERED, pursuant to Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. §154(i), that this proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Firestone
Chief, Common Carrier Bureau

FOOTNOTES

[1] *See* GTE Southwest, Request to Allow Amortization of Debt Refinancing Expenses and Unamortized Discounts and Premiums Associated with Reacquired Debt, *Memorandum Opinion and Order and Notice of Apparent Liability*, 5 FCC Rcd 2897 (Com.Car.Bur. 1990).

[2] 47 U.S.C. §220(d).

[3] *See* Letter from Carol L. Bjelland, Director, Regulatory Matters, GTE Service Corporation to Cynthia D. Jalloh (January 10, 1991) (transmitting payment of the forfeiture).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

COMPETITIVE
TELECOMMUNICATIONS
ASSOCIATION, et al.,
Complainants,

v.

THE CHESAPEAKE AND POTOMAC TELEPHONE COMPANIES,	File No. E-89-382
NEW JERSEY BELL TELEPHONE COMPANY,	File No. E-89-383
MICHIGAN BELL TELEPHONE COMPANY,	File No. E-89-384
WISCONSIN BELL, INC.	File No. E-89-385
THE MOUNTAIN STATES TELEPHONE AND TELEGRAPH COMPANY,	File No. E-89-386
NORTHWESTERN BELL TELEPHONE COMPANY,	File No. E-89-387
PACIFIC NORTHWEST BELL TELEPHONE COMPANY,	File No. E-89-388
PACIFIC BELL TELEPHONE COMPANY,	File No. E-89-389
SOUTHWESTERN BELL TELEPHONE COMPANY,	File No. E-89-390
GTE NORTH, INC.,	File No. E-89-391
GTE SOUTH, INC.,	File No. E-89-392
GTE SOUTHWEST, INC.,	File No. E-89-393
CENTRAL TELEPHONE COMPANY and	File No. E-89-395
THE CONTINENTAL TELEPHONE COMPANIES,	File No. E-89-396

Defendants.

ORDER

Adopted: January 25, 1991; Released: February 5, 1991

By the Chief, Enforcement Division, Common Carrier Bureau:

1. On August 17, 1990, the U.S. Court of Appeals for the District of Columbia Circuit granted a petition for review of a Commission order[1] that codified the rules for calculating the rate base used to determine the interstate revenue requirement of dominant carriers.[2] Review was granted with regard to certain exclusions from the rate base mandated by the Commission, and these issues have been remanded for further consideration and explication.

2. In light of the issues raised by the Court's remand, the Commission will hold in abeyance the captioned proceedings until such time as the Commission acts upon the remand.

3. Pleading and discovery filing deadlines will also be held in abeyance.

4. This Order is effective upon adoption.

FEDERAL COMMUNICATIONS COMMISSION

Mary Beth Richards
Chief, Enforcement Division
Common Carrier Bureau

FOOTNOTES

[1] Amendment of Part 65 of the Commission's Rules to Prescribe Components of the Rate Base and Net Income of Dominant Carriers, *Report and Order*, 3 FCC Rcd 269 (1987), *recon.*, 4 FCC Rcd 1697 (1989).

[2] *Illinois Bell Tel. Co. v. FCC*, No. 88-1175 (D.C. Cir. August 17, 1990).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

US SPRINT
COMMUNICATIONS
COMPANY, L.P.,
Complainant,

v.

PACIFIC NORTHWEST BELL TELEPHONE COMPANY,	E-89-368
THE MOUNTAIN STATES TELEPHONE AND TELEGRAPH COMPANY,	E-89-369
NORTHWESTERN BELL TELEPHONE COMPANY,	E-89-370
THE DIAMOND STATE TELEPHONE COMPANY,	E-89-371
THE CHESAPEAKE AND POTOMAC TELEPHONE COMPANIES,	E-89-372
NEW JERSEY BELL TELEPHONE COMPANY,	E-89-373
MICHIGAN BELL TELEPHONE COMPANY,	E-89-374
WISCONSIN BELL, INC.,	E-89-375
SOUTHERN BELL TELEPHONE AND TELEGRAPH COMPANY,	E-89-376
SOUTH CENTRAL BELL TELEPHONE COMPANY,	E-89-377
PACIFIC BELL TELEPHONE COMPANY,	E-89-378
SOUTHERN NEW ENGLAND TELEPHONE COMPANY,	E-89-380
WISCONSIN BELL, INC.,	E-90-116
MICHIGAN BELL TELEPHONE COMPANY,	E-90-117
OHIO BELL TELEPHONE COMPANY,	E-90-118
INDIANA BELL TELEPHONE COMPANY,	E-90-119
SOUTHERN BELL TELEPHONE AND TELEGRAPH COMPANY,	E-90-120
SOUTH CENTRAL BELL TELEPHONE,	E-90-121
NEW YORK TELEPHONE COMPANY,	E-90-122
NEW ENGLAND TELEPHONE AND TELEGRAPH COMPANY,	E-90-123
CINCINNATI BELL TELEPHONE COMPANY,	E-90-125
THE CHESAPEAKE AND POTOMAC TELEPHONE COMPANIES,	E-90-126
NEVADA BELL TELEPHONE COMPANY and	E-90-156
PACIFIC BELL TELEPHONE COMPANY,	E-90-157

Defendants.

ORDER

Adopted: January 25, 1991; Released: February 5, 1991

By the Chief, Enforcement Division, Common Carrier Bureau:

1. On August 17, 1990, the U.S. Court of Appeals for the District of Columbia Circuit granted a petition for review of a Commission order[1] that codified the rules for calculating the rate base used to determine the interstate revenue requirement of dominant carriers.[2] Review was granted with regard to certain exclusions from the rate base mandated by the Commission, and these issues have been remanded for further consideration and explication.

2. In light of the issues raised by the Court's remand, the Commission will hold in abeyance the captioned proceedings until such time as the Commission acts upon the remand.

3. Pleading and discovery filing deadlines will also be held in abeyance.

4. This Order is effective upon adoption.

FEDERAL COMMUNICATIONS COMMISSION

Mary Beth Richards
Chief, Enforcement Division
Common Carrier Bureau

FOOTNOTES

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[1] Amendment of Part 65 of the Commission's Rules to Prescribe Components of the Rate Base and Net Income of Dominant Cariers, *Report and Order*, 3 FCC Rcd 269 (1987), *recon.*, 4 FCC Rcd 1697 (1989).

[2] *Illinois Bell Tel. Co. v. FCC*, No. 88-1175 (D.C. Cir. August 17, 1990).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

WILLIAMS
TELECOMMUNICATIONS
GROUP, INC.,
Complainant,

v.

THE CHESAPEAKE AND POTOMAC TELEPHONE COMPANIES.	File No. E-89-397
NEW JERSEY BELL TELEPHONE COMPANY.	File No. E-89-398
SOUTHWESTERN BELL TELEPHONE COMPANY.	File No. E-89-399
NORTHWESTERN BELL TELEPHONE COMPANY.	File No. E-89-400
THE BELL ATLANTIC TELEPHONE COMPANIES.	File No. E-90-444
BELLSOUTH CORPORATION.	File No. E-90-445
CINCINNATI BELL TELEPHONE COMPANY.	File No. E-90-446
INDIANA BELL TELEPHONE COMPANY.	File No. E-90-447
MICHIGAN BELL TELEPHONE COMPANY.	File No. E-90-448
OHIO BELL TELEPHONE COMPANY.	File No. E-90-449
WISCONSIN BELL. INC..	File No. E-90-450
THE MOUNTAIN STATES TELEPHONE AND TELEGRAPH COMPANY.	File No. E-90-451
NORTHWESTERN BELL TELEPHONE COMPANY.	File No. E-90-452
NEVADA BELL TELEPHONE COMPANY.	File No. E-90-453
PACIFIC BELL TELEPHONE COMPANY and	File No. E-90-454
SOUTHWESTERN BELL TELEPHONE COMPANY.	File No. E-90-455

Defendants.

ORDER

Adopted: January 25, 1991; Released: February 5, 1991

By the Chief, Enforcement Division, Common Carrier Bureau:

1. On August 17, 1990, the U.S. Court of Appeals for the District of Columbia Circuit granted a petition for review of a Commission order[1] that codified the rules for calculating the rate base used to determine the interstate revenue requirement of dominant carriers.[2] Review was granted with regard to certain exclusions from the rate base mandated by the Commission. and these issues have been remanded for further consideration and explication.

2. In light of the issues raised by the Court's remand, the Commission will hold in abeyance the captioned proceedings until such time as the Commission acts upon the remand.

3. Pleading and discovery filing deadlines will also be held in abeyance.

4. This Order is effective upon adoption.

FEDERAL COMMUNICATIONS COMMISSION

Mary Beth Richards
Chief. Enforcement Division
Common Carrier Bureau

FOOTNOTES

[1] Amendment of Part 65 of the Commission's Rules to Prescribe Components of the Rate Base and Net Income of Dominant Cariers. *Report and Order,* 3 FCC Rcd 269 (1987), *recon.,* 4 FCC Rcd 1697 (1989).

[2] *Illinois Bell Tel. Co. v. FCC,* No. 88-1175 (D.C. Cir. August 17. 1990).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

MIDAMERICAN LONG
DISTANCE COMPANY,
Complainant,

v.

THE CHESAPEAKE AND POTOMAC TELEPHONE COMPANIES,	File No. E-89-401
NEW JERSEY BELL TELEPHONE COMPANY,	File No. E-89-402
MICHIGAN BELL TELEPHONE COMPANY,	File No. E-89-403
WISCONSIN BELL, INC.,	File No. E-89-404
PACIFIC BELL TELEPHONE COMPANY,	File No. E-89-406
THE MOUNTAIN STATES TELEPHONE AND TELEGRAPH COMPANY and	File No. E-89-407
NORTHWESTERN BELL TELEPHONE COMPANY,	File No. E-89-408

Defendants.

ORDER

dopted: January 25, 1991; Released: February 5, 1991

By the Chief, Enforcement Division, Common Carrier
ureau:

1. On August 17, 1990, the U.S. Court of Appeals for
e District of Columbia Circuit granted a petition for
eview of a Commission order[1] that codified the rules for
alculating the rate base used to determine the interstate
evenue requirement of dominant carriers.[2] Review was
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3. Pleading and discovery filing deadlines will also be
eld in abeyance.

4. This Order is effective upon adoption.

FEDERAL COMMUNICATIONS COMMISSION

Mary Beth Richards
Chief, Enforcement Division
Common Carrier Bureau

FOOTNOTES

[1] Amendment of Part 65 of the Commission's Rules to Prescribe Components of the Rate Base and Net Income of Dominant Cariers, *Report and Order*, 3 FCC Rcd 269 (1987), *recon.*, 4 FCC Rcd 1697 (1989).

[2] *Illinois Bell Tel. Co. v. FCC*, No. 88-1175 (D.C. Cir. August 17, 1990).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

CHARTER NETWORK COMPANY, L.P.,
Complainant,

v.

MICHIGAN BELL TELEPHONE COMPANY,	E-89-414
WISCONSIN BELL, INC.,	E-89-415
NORTHWESTERN BELL TELEPHONE COMPANY,	E-89-416
SOUTHWESTERN BELL TELEPHONE COMPANY,	E-89-417
GTE NORTH, INC.,	E-89-418
BELL TELEPHONE COMPANY OF PENNSYLVANIA,	E-90-270
INDIANA BELL TELEPHONE COMPANY,	E-90-271
MICHIGAN BELL TELEPHONE COMPANY,	E-90-272
OHIO BELL TELEPHONE COMPANY,	E-90-273
NEW YORK TELEPHONE COMPANY,	E-90-274
NEW ENGLAND TELEPHONE AND TELEGRAPH COMPANY,	E-90-275
THE MOUNTAIN STATES TELEPHONE AND TELEGRAPH COMPANY,	E-90-276
NORTHWESTERN BELL TELEPHONE COMPANY,	E-90-277
PACIFIC NORTHWEST BELL TELEPHONE COMPANY,	E-90-278
SOUTH CENTRAL BELL TELEPHONE COMPANY,	E-90-279
SOUTHERN BELL TELEPHONE AND TELEGRAPH COMPANY,	E-90-280
SOUTHWESTERN BELL TELEPHONE COMPANY,	E-90-281
CINCINNATI BELL TELEPHONE COMPANY,	E-90-282
GTE NORTH, INC.,	E-90-284
UNITED TELEPHONE COMPANY OF INDIANA and	E-90-285
UNITED TELEPHONE COMPANY OF OHIO,	E-90-286

Defendants.

ORDER

Adopted: January 25, 1991; Released: February 5, 1991

By the Chief, Enforcement Division, Common Carrier Bureau:

1. On August 17, 1990, the U.S. Court of Appeals for the District of Columbia Circuit granted a petition for review of a Commission order[1] that codified the rules for calculating the rate base used to determine the interstate revenue requirement of dominant carriers.[2] Review was granted with regard to certain exclusions from the rate base mandated by the Commission, and these issues have been remanded for further consideration and explication.

2. In light of the issues raised by the Court's remand, the Commission will hold in abeyance the captioned proceedings until such time as the Commission acts upon the remand.

3. Pleading and discovery filing deadlines will also be held in abeyance.

4. This Order is effective upon adoption.

FEDERAL COMMUNICATIONS COMMISSION

Mary Beth Richards
Chief, Enforcement Division
Common Carrier Bureau

FOOTNOTES

[1] Amendment of Part 65 of the Commission's Rules to Prescribe Components of the Rate Base and Net Income of Dominant Cariers, *Report and Order*, 3 FCC Rcd 269 (1987), *recon.*, 4 FCC Rcd 1697 (1989).

[2] *Illinois Bell Tel. Co. v. FCC*, No. 88-1175 (D.C. Cir. August 17, 1990).

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of

PHONE AMERICA
OF CAROLINA, INC.,
Complainant,

v.

CONTEL OF E-89-363
NORTH CAROLINA, INC.,
ILLINOIS BELL E-89-364
TELEPHONE COMPANY and
SOUTHERN BELL E-89-367
TELEPHONE AND
TELEGRAPH
COMPANY.
Defendants.

ORDER

dopted: January 25, 1991; Released: February 5, 1991

By the Chief, Enforcement Division, Common Carrier ureau:

1. On August 17, 1990, the U.S. Court of Appeals for e District of Columbia Circuit granted a petition for eview of a Commission order[1] that codified the rules for alculating the rate base used to determine the interstate evenue requirement of dominant carriers.[2] Review was ranted with regard to certain exclusions from the rate ase mandated by the Commission, and these issues have een remanded for further consideration and explication.

2. In light of the issues raised by the Court's remand, e Commission will hold in abeyance the captioned proeedings until such time as the Commission acts upon the mand.

3. Pleading and discovery filing deadlines will also be eld in abeyance.

4. This Order is effective upon adoption.

FEDERAL COMMUNICATIONS COMMISSION

Mary Beth Richards
Chief, Enforcement Division
Common Carrier Bureau

FOOTNOTES

[1] Amendment of Part 65 of the Commission's Rules to Prescribe Components of the Rate Base and Net Income of Dominant Cariers, *Report and Order*, 3 FCC Rcd 269 (1987), *recon.*, 4 FCC Rcd 1697 (1989).

[2] *Illinois Bell Tel. Co. v. FCC*, No. 88-1175 (D.C. Cir. August 17, 1990).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

ALLNET
COMMUNICATION
SERVICES, INC.,
Complainant,

v.

THE DIAMOND STATES TELEPHONE COMPANY,	File No. E-89-343
THE CHESAPEAKE AND POTOMAC TELEPHONE COMPANIES,	File No. E-89-344
WISCONSIN BELL, INC.,	File No. E-89-345
MICHIGAN BELL TELEPHONE COMPANY,	File No. E-89-346
NEW JERSEY BELL TELEPHONE COMPANY,	File No. E-89-347
PACIFIC BELL TELEPHONE COMPANY,	File No. E-89-348
SOUTHWESTERN BELL TELEPHONE COMPANY,	File No. E-89-349
NEW YORK TELEPHONE COMPANY,	File No. E-90-183
NEW ENGLAND TELEPHONE AND TELEGRAPH COMPANY,	File No. E-90-184
ILLINOIS BELL TELEPHONE COMPANY,	File No. E-91-30
INDIANA BELL TELEPHONE COMPANY,	File No. E-91-31
MICHIGAN BELL TELEPHONE COMPANY,	File No. E-91-32
OHIO BELL TELEPHONE COMPANY and	File No. E-91-33
WISCONSIN BELL, INC.,	File No. E-91-34

Defendants.

ORDER

Adopted: January 25, 1991; Released: February 5, 1991

By the Chief, Enforcement Division, Common Carrier Bureau:

1. On August 17, 1990, the U.S. Court of Appeals for the District of Columbia Circuit granted a petition for review of a Commission order[1] that codified the rules for calculating the rate base used to determine the interstate revenue requirement of dominant carriers.[2] Review was granted with regard to certain exclusions from the rate base mandated by the Commission, and these issues have been remanded for further consideration and explication.

2. In light of the issues raised by the Court's remand, the Commission will hold in abeyance the captioned proceedings until such time as the Commission acts upon the remand.

3. Pleading and discovery filing deadlines will also be held in abeyance.

4. This Order is effective upon adoption.

FEDERAL COMMUNICATIONS COMMISSION

Mary Beth Richards
Chief, Enforcement Division
Common Carrier Bureau

FOOTNOTES

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[1] Amendment of Part 65 of the Commission's Rules to Prescribe Components of the Rate Base and Net Income of Dominant Cariers, *Report and Order,* 3 FCC Rcd 269 (1987), *recon.,* 4 FCC Rcd 1697 (1989).

[2] *Illinois Bell Tel. Co. v. FCC,* No. 88-1175 (D.C. Cir. August 17, 1990).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Application for Review Concerning
Liability of The Dalton Group, Inc.,
Former Licensee of Radio Stations
WXTR and WXTR-FM, La Plata, Maryland

For a Forfeiture

MEMORANDUM OPINION AND ORDER

dopted: January 22, 1991; Released: February 5, 1991

By the Commission:

1. The Commission has under consideration an Aplication for Review of the Mass Media Bureau's Foreiture Order finding the Dalton Group, Inc. ("Dalton"), ormer licensee of WXTR(AM) and WXTR-FM, La Plata, MD[1], in violation of the Commission's main studio, proram origination and public inspection file rules and mposing a $10,000 forfeiture.

2. A Notice of Apparent Liability (NAL) was issued gainst Dalton after a November 25, 1985, on-site invesigation by the Mass Media Bureau's Complaints and Inestigations Branch determined that Dalton had epeatedly violated Sections 73.1125, 73.1130 and 3.3526(d) of the Commission's Rules.[2] These rules reuired a broadcast licensee to maintain a main studio in s community of license (Section 73.1125), to originate a ajority of its non-network programming from that main tudio (Section 73.1130), and to maintain a public inspecion file in the community of license (Section 73.3526). lthough the stations were licensed to La Plata, the invesigators found the studio there locked and unoccupied. he stations were operating from a studio in Marlow eights, MD, some thirty miles away without having reuested or received a waiver of the program origination ule that would have permitted them to originate a majorty of its entertainment programming from an auxiliary tudio ("Arizona Waiver"). The facts are set forth in full etail in the NAL.

3. In its Application for Review, Dalton presents two uestions for review: first, "Whether the Mass Media Bueau properly considered Dalton's allegations and arguents with regard to mitigation or remission of the 10,000 forfeiture assessed;" and second, "Whether the mount of the forfeiture is consistent with precedent, olicy and prior decisions particularly an analogous mater where a $10,000 forfeiture was reduced to $1,300." In ddressing the first question, Dalton re-asserts arguments t has previously made, and expresses a belief that its ontentions, particularly in regard to its service to the La lata community, have yet to be "fully and fairly considred and decided in either the Forfeiture Order or the econsideration Order." In addressing the second question, Dalton cites *Memorandum Opinion and Order, Liability of James River Broadcasting Corp.*, issued April 29, 1987, by the Mass Media Bureau.

4. Dalton states that in determining the amount of a forfeiture penalty, consideration should be given to the seriousness or "gravity" of the violations alleged and the circumstances under which they arose. [3] Dalton states that after the NAL was issued, the Commission modified its main studio location rules and eliminated its program origination requirements and, in so doing, called into question the rationale for them. Dalton admits that these changes do not excuse prior violations, but asserts they should be considered both with regard to the facts of the violations and their gravity. Consequently, Dalton believes that its violation of these rules before their change or elimination should warrant a mild sanction, if any.

5. Dalton also points to asserted good faith efforts to comply with the Commission's requirements by seeking and relying on counsel's advice that Dalton's actions would comply with the Commission's rules. Dalton states that these factors warrant either a substantial reduction in the amount of the forfeiture or its recission altogether.

6. With respect to the alleged public inspection file violation, Dalton characterizes its conduct as being in "technical" violation of part of the rule (*i.e.*, that portion regarding the file's location and availability during normal business hours), and argues that it prejudiced no one since access to the stations' file was never requested and since the file was always available within a reasonable time. Accordingly, Dalton believes that the portion of the forfeiture attributable to the violation of the public inspection file rule should be rescinded. Additionally, Dalton believes that its record of local service should be considered and that the $10,000 forfeiture should be rescinded or substantially mitigated.

7. Dalton also argues that comparison with other cases warrants recission or mitigation of the forfeiture because $10,000 forfeitures have been assessed for "serious conduct distinguishable from all violations alleged against Dalton," and cites cases that it believes support that proposition. Finally, Dalton states that the *James River* case, cited by the Commission in the Forfeiture Order, resulted in a forfeiture reduction from $10,000 to $1,300. Dalton believes the instant case to be analogous, and requests a similar result.

8. Dalton's arguments, with one exception, are unpersuasive. The licensee has failed to demonstrate that the actions taken pursuant to delegated authority were in conflict with the law, precedent or policy. The main studio and program origination rules were clearly violated. The public inspection files were not readily available for inspection during regular business hours at the main studio, or other accessible place in the community of license, as required by the rule. The subsequent changes in the rules do not preclude the Commission from enforcing the rules against violations that occurred prior to the changes. *Court House Broadcasting Co.*, 25 RR 649 (1963); *Hanson R. Carter*, 23 FCC2d 511 (1970). Nor will the allegedly faulty advice of counsel or licensee's good faith reliance on it excuse Dalton's failure to comply with the rules. *Triad Broadcasting Co., Inc.*, 96 FCC 2d 1235, 1242 (1984).

9. Dalton's reliance on the Bureau's decision in *James River*, in which a $10,000 forfeiture was reduced to $1,300, is misplaced. The $10,000 was assessed for apparent violation of the main studio rule, the program origi-

nation rule and the public inspection file rule. Subsequently, the Commission found that the main studio rule had not been violated; rather, the licensee had violated only the requirement to notify the Commission that it had moved its main studio to its transmitter site, as permitted by the rules. The Commission also accepted the licensee's contentions that the program origination rule had not been violated. Thus, the $1,300 forfeiture was issued only for failure to timely notify the Commission of the main studio relocation, as required by Section 73.1125(b)(3)(iii) and the public inspection file violation. The analogous situation to the instant case existed in the *James River* case when the main studio rule, program origination rule, and public inspection file rule were deemed to have been violated, and the forfeiture amount was $10,000.

10. As to the factors diminishing the gravity of the violations and warranting reduction in the forfeiture, while we concur in the Bureau's judgment that the forfeiture amount assessed was consistent with applicable precedent, we note that Dalton's service to and involvement with the La Plata community were demonstrated to be significant and, accordingly, warrant mitigation of the forfeiture amount. Although this type of effort would not normally warrant forfeiture mitigation, it does in this case because the instant violations are associated with abandonment of community. Further, the licensee has compiled an otherwise excellent compliance record.

11. ACCORDINGLY, IT IS ORDERED, That the Application for Review, filed December 22, 1989, by The Dalton Group, Inc., former licensee of Stations WXTR and WXTR-FM, La Plata, Maryland IS GRANTED, IN PART, AND DENIED, IN PART.

12. IT IS FURTHER ORDERED That The Dalton Group, Inc., former licensee of Stations WXTR and WXTR-FM, La Plata, Maryland, SHALL FORFEIT to the UNITED STATES OF AMERICA the sum of seven thousand, five hundred dollars ($7,500) for repeated violations of Section 73.1125, 73.1130 and 73.3526(d) of the Commission's Rules.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] There have been several changes of licensee with respect to WXTR(AM) and WXTR-FM since the subject violations occurred. WXTR(AM) (now WSMD), is currently licensed to Southernwood Media Corporation; WXTR-FM is currently licensed to Radio Ventures I, L.P. To simplify matters we continue to use the name Dalton for purposes of this proceeding and references to "licensee" refer to Dalton.

[2] The first two of these rules have since been changed, effective July 16, 1987. *See Main Studio and Program Origination Rules*, 2 FCC Rcd. 3215 (1987) *recon. denied*, 3 FCC Rcd 5024 (1988). The main studio rule, Section 73.1125, was modified and the program origination rule, Section 73.1130, was deleted.

[3] In support, Dalton cites Section 503(b)(2) of the Communications Act of 1934, as amended, 47 U.S.C. Section 503(b)(2), in which Congress specified the factors which the Commission should consider in determining the amount of a forfeiture penalty. These factors are: the nature, circumstances, extent, and gravity of the prohibited acts committed and, with respect to the violator, the degree of culpability, any history of prior offenses, ability to pay, and such other matters as justice may require.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

COM SYSTEMS, INC.,
Complainant,

v.

PACIFIC BELL TELEPHONE COMPANY, File No. E-89-420
THE MOUNTAIN STATES TELEPHONE AND TELEGRAPH COMPANY, and File No. E-89-421
PACIFIC BELL TELEPHONE COMPANY, File No. E-90-210
Defendants.

ORDER

Adopted: January 25, 1991; Released: February 6, 1991

By the Chief, Enforcement Division, Common Carrier Bureau:

1. On August 17, 1990, the U.S. Court of Appeals for he District of Columbia Circuit granted a petition for eview of a Commission order[1] that codified the rules for alculating the rate base used to determine the interstate evenue requirement of dominant carriers.[2] Review was ranted with regard to certain exclusions from the rate ase mandated by the Commission, and these issues have een remanded for further consideration and explication.

2. In light of the issues raised by the Court's remand, he Commission will hold in abeyance the captioned proeedings until such time as the Commission acts upon the emand.

3. Pleading and discovery filing deadlines will also be eld in abeyance.

4. This Order is effective upon adoption.

FEDERAL COMMUNICATIONS COMMISSION

Mary Beth Richards
Chief, Enforcement Division
Common Carrier Bureau

FOOTNOTES

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[1] Amendment of Part 65 of the Commission's Rules to Precribe Components of the Rate Base and Net Income of Domiant Carriers, *Report and Order*, 3 FCC Rcd 269 (1987), *recon.*, FCC Rcd 1697 (1989).

[2] *Illinois Bell Tel. Co. v. FCC*, No. 88-1175 (D.C. Cir. August 17, 1990).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

ACCESS LONG DISTANCE CORPORATION,
Complainant,

v.

THE MOUNTAIN STATES TELEPHONE AND TELEGRAPH COMPANY,	File No. E-89-422
NEW YORK TELEPHONE COMPANY, and	File No. E-90-315
NEW ENGLAND TELEPHONE AND TELEGRAPH COMPANY	File No. E-90-316

Defendants.

ORDER

Adopted: January 25, 1991; Released: February 6, 1991

By the Chief, Enforcement Division, Common Carrier Bureau:

1. On August 17, 1990, the U.S. Court of Appeals for the District of Columbia Circuit granted a petition for review of a Commission order[1] that codified the rules for calculating the rate base used to determine the interstate revenue requirement of dominant carriers.[2] Review was granted with regard to certain exclusions from the rate base mandated by the Commission, and these issues have been remanded for further consideration and explication.

2. In light of the issues raised by the Court's remand, the Commission will hold in abeyance the captioned proceedings until such time as the Commission acts upon the remand.

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4. This Order is effective upon adoption.

FEDERAL COMMUNICATIONS COMMISSION

Mary Beth Richards
Chief, Enforcement Division
Common Carrier Bureau

FOOTNOTES

[1] Amendment of Part 65 of the Commission's Rules to Prescribe Components of the Rate Base and Net Income of Dominant Carriers, *Report and Order,* 3 FCC Rcd 269 (1987), *recon.,* 4 FCC Rcd 1697 (1989).

[2] *Illinois Bell Tel. Co. v. FCC,* No. 88-1175 (D.C. Cir. August 17, 1990).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

TELEDIAL AMERICA, INC.,
Complainant,

v.

MICHIGAN BELL TELEPHONE COMPANY,	File No. E-89-424
GTE NORTH, INC.,	File No. E-89-425
INDIANA BELL TELEPHONE COMPANY,	File No. E-90-258
MICHIGAN BELL TELEPHONE COMPANY,	File No. E-90-259
OHIO BELL TELEPHONE COMPANY,	File No. E-90-260
NEW YORK TELEPHONE COMPANY,	File No. E-90-262
NEW ENGLAND TELEPHONE AND TELEGRAPH COMPANY,	File No. E-90-263
SOUTHERN BELL TELEPHONE AND TELEGRAPH COMPANY,	File No. E-90-264
SOUTH CENTRAL BELL TELEPHONE COMPANY,	File No. E-90-265
SOUTHWESTERN BELL TELEPHONE COMPANY,	File No. E-90-266
PACIFIC BELL TELEPHONE COMPANY,	File No. E-90-267
CINCINNATI BELL TELEPHONE COMPANY and	File No. E-90-268
GTE NORTH, INC.,	File No. E-90-269

Defendants.

ORDER

Adopted: January 25, 1991; Released: February 6, 1991

By the Chief, Enforcement Division, Common Carrier Bureau:

1. On August 17, 1990, the U.S. Court of Appeals for the District of Columbia Circuit granted a petition for review of a Commission order[1] that codified the rules for calculating the rate base used to determine the interstate revenue requirement of dominant carriers.[2] Review was granted with regard to certain exclusions from the rate base mandated by the Commission, and these issues have been remanded for further consideration and explication.

2. In light of the issues raised by the Court's remand, the Commission will hold in abeyance the captioned proceedings until such time as the Commission acts upon the remand.

3. Pleading and discovery filing deadlines will also be held in abeyance.

4. This Order is effective upon adoption.

FEDERAL COMMUNICATIONS COMMISSION

Mary Beth Richards
Chief, Enforcement Division
Common Carrier Bureau

FOOTNOTES

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[1] Amendment of Part 65 of the Commission's Rules to Prescribe Components of the Rate Base and Net Income of Dominant Carriers, *Report and Order*, 3 FCC Rcd 269 (1987), *recon.*, 4 FCC Rcd 1697 (1989).

[2] *Illinois Bell Tel. Co. v. FCC*, No. 88-1175 (D.C. Cir. August 17, 1990).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

AMERICAN TELEPHONE
AND TELEGRAPH
COMPANY,
Complainant,

v.

CINCINNATI BELL TELEPHONE COMPANY, and	File No. E-90-42
WALNUT HILL TELEPHONE COMPANY, Defendants.	File No. E-90-60

ORDER

Adopted: January 25, 1991; Released: February 6, 1991

By the Chief, Enforcement Division, Common Carrier Bureau:

1. On August 17, 1990, the U.S. Court of Appeals for the District of Columbia Circuit granted a petition for review of a Commission order[1] that codified the rules for calculating the rate base used to determine the interstate revenue requirement of dominant carriers.[2] Review was granted with regard to certain exclusions from the rate base mandated by the Commission, and these issues have been remanded for further consideration and explication.

2. In light of the issues raised by the Court's remand, the Commission will hold in abeyance the captioned proceedings until such time as the Commission acts upon the remand.

3. Pleading and discovery filing deadlines will also be held in abeyance.

4. This Order is effective upon adoption.

FEDERAL COMMUNICATIONS COMMISSION

Mary Beth Richards
Chief, Enforcement Division
Common Carrier Bureau

FOOTNOTES

[1] Amendment of Part 65 of the Commission's Rules to Prescribe Components of the Rate Base and Net Income of Dominant Carriers, *Report and Order*, 3 FCC Rcd 269 (1987), *recon.*, 4 FCC Rcd 1697 (1989).

[2] *Illinois Bell Tel. Co. v. FCC*, No. 88-1175 (D.C. Cir. August 17, 1990).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

MID ATLANTIC
TELECOM. INC.,
Complainant,

v.

BELL TELEPHONE File No. E-90-185
COMPANY OF
PENNSYLVANIA,
THE CHESAPEAKE AND File No. E-90-186
POTOMAC TELEPHONE
COMPANIES,
THE CHESAPEAKE File No. E-90-187
AND POTOMAC TELEPHONE
COMPANY OF MARYLAND,
THE CHESAPEAKE File No. E-90-188
AND POTOMAC TELEPHONE
COMPANY OF VIRGINIA,
THE CHESAPEAKE File No. E-90-189
AND POTOMAC TELEPHONE
COMPANY OF
WEST VIRGINIA and
NEW JERSEY BELL File No. E-90-190
TELEPHONE COMPANY,
Defendants.

ORDER

Adopted: January 25, 1991; Released: February 6, 1991

By the Chief, Enforcement Division, Common Carrier Bureau:

1. On August 17, 1990, the U.S. Court of Appeals for he District of Columbia Circuit granted a petition for eview of a Commission order[1] that codified the rules for calculating the rate base used to determine the interstate evenue requirement of dominant carriers.[2] Review was granted with regard to certain exclusions from the rate base mandated by the Commission, and these issues have been remanded for further consideration and explication.

2. In light of the issues raised by the Court's remand, he Commission will hold in abeyance the captioned proceedings until such time as the Commission acts upon the emand.

3. Pleading and discovery filing deadlines will also be eld in abeyance.

4. This Order is effective upon adoption.

FEDERAL COMMUNICATIONS COMMISSION

Mary Beth Richards
Chief, Enforcement Division
Common Carrier Bureau

FOOTNOTES

[1] Amendment of Part 65 of the Commission's Rules to Prescribe Components of the Rate Base and Net Income of Dominant Carriers, *Report and Order*, 3 FCC Rcd 269 (1987), *recon.*, 4 FCC Rcd 1697 (1989).

[2] *Illinois Bell Tel. Co. v. FCC*, No. 88-1175 (D.C. Cir. August 17, 1990).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

TELESPHERE NETWORK, INC.,
Complainant,

v.

THE CHESAPEAKE AND POTOMAC TELEPHONE COMPANIES,	File No. E-89-426
NEW JERSEY BELL TELEPHONE COMPANY,	File No. E-89-427
MICHIGAN BELL TELEPHONE COMPANY,	File No. E-89-428
WISCONSIN BELL, INC.,	File No. E-89-429
PACIFIC BELL TELEPHONE COMPANY,	File No. E-89-430
PACIFIC NORTHWEST BELL TELEPHONE COMPANY,	File No. E-89-431
THE MOUNTAIN STATES TELEPHONE AND TELEGRAPH COMPANY,	File No. E-89-432
NORTHWESTERN BELL TELEPHONE COMPANY,	File No. E-89-433
SOUTHWESTERN BELL TELEPHONE COMPANY,	File No. E-89-434
BELL TELEPHONE COMPANY OF PENNSYLVANIA,	File No. E-90-160
THE CHESAPEAKE AND POTOMAC TELEPHONE COMPANIES,	File No. E-90-161
THE CHESAPEAKE AND POTOMAC TELEPHONE COMPANY OF MARYLAND,	File No. E-90-162
THE CHESAPEAKE AND POTOMAC TELEPHONE COMPANY OF VIRGINIA,	File No. E-90-163
THE CHESAPEAKE AND POTOMAC TELEPHONE COMPANY OF WEST VIRGINIA,	File No. E-90-164
THE DIAMOND STATE TELEPHONE COMPANY,	File No. E-90-165
NEW JERSEY BELL TELEPHONE COMPANY,	File No. E-90-166
INDIANA BELL TELEPHONE COMPANY,	File No. E-90-167
MICHIGAN BELL TELEPHONE COMPANY,	File No. E-90-168
OHIO BELL TELEPHONE COMPANY,	File No. E-90-169
SOUTHWESTERN BELL TELEPHONE COMPANY,	File No. E-90-170
NEVADA BELL TELEPHONE COMPANY,	File No. E-90-174
PACIFIC BELL TELEPHONE COMPANY,	File No. E-90-175
SOUTH CENTRAL BELL TELEPHONE COMPANY and	File No. E-90-176
SOUTHERN BELL TELEPHONE AND TELEGRAPH COMPANY,	File No. E-90-177

Defendants.

ORDER

Adopted: January 25, 1991; Released: February 6, 1991

By the Chief, Enforcement Division, Common Carrier Bureau:

1. On August 17, 1990, the U.S. Court of Appeals for the District of Columbia Circuit granted a petition for review of a Commission order [1] that codified the rules for calculating the rate base used to determine the interstate revenue requirement of dominant carriers. [2] Review was granted with regard to certain exclusions from the rate base mandated by the Commission, and these issues have been remanded for further consideration and explication.

2. In light of the issues raised by the Court's remand, the Commission will hold in abeyance the captioned proceedings until such time as the Commission acts upon the remand.

3. Pleading and discovery filing deadlines will also be held in abeyance.

4. This Order is effective upon adoption.

FEDERAL COMMUNICATIONS COMMISSION

Mary Beth Richards
Chief, Enforcement Division
Common Carrier Bureau

FOOTNOTES

[1] Amendment of Part 65 of the Commission's Rules to Prescribe Components of the Rate Base and Net Income of Dominant Carriers, *Report and Order*, 3 FCC Rcd 269 (1987), *recon.*, 4 FCC Rcd 1697 (1989).

[2] *Illinois Bell Tel. Co. v. FCC*, No. 88-1175 (D.C. Cir. August 17, 1990).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

ONE CALL
COMMUNICATIONS, INC.,
Complainant,

v.

SOUTH CENTRAL BELL TELEPHONE COMPANY,	E-90-193
SOUTHERN BELL TELEPHONE AND TELEGRAPH COMPANY,	E-90-194
SOUTHWESTERN BELL TELEPHONE COMPANY,	E-90-195
CINCINNATI BELL TELEPHONE COMPANY,	E-90-197
PACIFIC BELL TELEPHONE COMPANY,	E-90-198
NEW ENGLAND TELEPHONE AND TELEGRAPH COMPANY,	E-90-199
MICHIGAN BELL TELEPHONE COMPANY,	E-90-200
INDIANA BELL TELEPHONE COMPANY and	E-90-201
OHIO BELL TELEPHONE COMPANY,	E-90-202

Defendants.

ORDER

Adopted: January 25, 1991; Released: February 6, 1991

By the Chief, Enforcement Division, Common Carrier Bureau:

1. On August 17, 1990, the U.S. Court of Appeals for the District of Columbia Circuit granted a petition for review of a Commission order[1] that codified the rules for calculating the rate base used to determine the interstate revenue requirement of dominant carriers.[2] Review was granted with regard to certain exclusions from the rate base mandated by the Commission, and these issues have been remanded for further consideration and explication.

2. In light of the issues raised by the Court's remand, the Commission will hold in abeyance the captioned proceedings until such time as the Commission acts upon the remand.

3. Pleading and discovery filing deadlines will also be held in abeyance.

4. This Order is effective upon adoption.

FEDERAL COMMUNICATIONS COMMISSION

Mary Beth Richards
Chief, Enforcement Division
Common Carrier Bureau

FOOTNOTES

[1] Amendment of Part 65 of the Commission's Rules to Prescribe Components of the Rate Base and Net Income of Dominant Carriers, *Report and Order*, 3 FCC Rcd 269 (1987), *recon.*, 4 FCC Rcd 1697 (1989).

[2] *Illinois Bell Tel. Co. v. FCC*, No. 88-1175 (D.C. Cir. August 17, 1990).

Before the
Federal Communications Commission
Washington, D.C. 20554

In re

SOUTH GEORGIA COMMUNICATIONS, INC. File No. 63500-91-16-JSG

Notice of Apparent Liability for Forfeiture Penalty for Station KIY503 in the Public Land Mobile Service at Jackson, Florida

ORDER

Adopted: January 30, 1991; Released: February 6, 1991

By the Chief, Mobile Services Division:

1. On November 19, 1990, the Mobile Services Division issued a Notice of Apparent Liability for Forfeiture (*NALF)* to South Georgia Communications, Inc. (South Georgia), finding that an apparent violation of Section 22.9(b)(1) of the Commission's rules had occurred for operating Station KIY503 at Jackson, Florida, in an unauthorized manner, and assessed a forfeiture in the amount of $3,000.00.

2. South Georgia has taken no action in response to the *NALF*, and the $3,000.00 forfeiture has remained unpaid. As a result, South Georgia is hereby ordered to pay $3,000.00

ORDERING PARAGRAPHS

3. Accordingly, pursuant to Section 503(b) of the Communications Act of 1934, as amended, 47 U.S.C. § 503(b), and Section 1.80(f)(4) of the Commission's rules, 47 C.F.R. § 1.80(f)(4), IT IS ORDERED that South Georgia Communications, Inc. FORFEIT to the United States the sum of Three Thousand Dollars ($3,000.00) for the violation of Section 22.9(b)(1) of the Commission's rules. Payment of the forfeiture may be made by mailing a check or similar instrument to the Commission within thirty (30) days of release of this Order to: Federal Communications Commission, Fee Section, Finance Branch, P.O. Box 19209, Washington, DC 20036.

4. IT IS FURTHER ORDERED that if said forfeiture is not paid within the period specified, the case will be referred to the Department of Justice for collection pursuant to Section 504(a) of the Communications Act, as amended, 47 U.S.C. § 504(a).

5. IT IS FURTHER ORDERED that a copy of this Order BE SENT to South Georgia Communications, Inc. by Certified Mail, Return Receipt Requested.

FEDERAL COMMUNICATIONS COMMISSION

Gregory J. Vogt
Chief, Mobile Services Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

ADVANCED
TELECOMMUNICATIONS
CORPORATION,
AND ITS SUBSIDIARIES,
Complainant,

v.

PACIFIC BELL E-90-352
TELEPHONE COMPANY,
THE CHESAPEAKE E-90-353
AND POTOMAC TELEPHONE
COMPANIES,
NEW JERSEY BELL E-90-354
TELEPHONE COMPANY,
MICHIGAN BELL E-90-355
TELEPHONE COMPANY,
WISCONSIN BELL, INC., E-90-356
SOUTHWESTERN E-90-357
TELEPHONE COMPANY,
NORTHWESTERN E-90-360
BELL TELEPHONE
COMPANY and
THE MOUNTAIN E-90-361
STATES TELEPHONE
AND TELEGRAPH
COMPANY,
Defendants.

ORDER

dopted: January 25, 1991; Released: February 6, 1991

By the Chief, Enforcement Division, Common Carrier ureau:

1. On August 17, 1990, the U.S. Court of Appeals for ne District of Columbia Circuit granted a petition for eview of a Commission order[1] that codified the rules for alculating the rate base used to determine the interstate evenue requirement of dominant carriers.[2] Review was ranted with regard to certain exclusions from the rate ase mandated by the Commission, and these issues have een remanded for further consideration and explication.

2. In light of the issues raised by the Court's remand, ne Commission will hold in abeyance the captioned proeedings until such time as the Commission acts upon the emand.

3. Pleading and discovery filing deadlines will also be eld in abeyance.

4. This Order is effective upon adoption.

FEDERAL COMMUNICATIONS COMMISSION

Mary Beth Richards
Chief, Enforcement Division
Common Carrier Bureau

FOOTNOTES

[1] Amendment of Part 65 of the Commission's Rules to Prescribe Components of the Rate Base and Net Income of Dominant Carriers, *Report and Order*, 3 FCC Rcd 269 (1987), *recon.*, 4 FCC Rcd 1697 (1989).

[2] *Illinois Bell Tel. Co. v. FCC*, No. 88-1175 (D.C. Cir. August 17, 1990).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

SOUTH TEL, INC.,
Complainant,

v. File No. E-90-390

SOUTHERN BELL
TELEPHONE AND
TELEGRAPH COMPANY,
Defendant.

ORDER

Adopted: January 25, 1991; Released: February 6, 1991

By the Chief, Enforcement Division, Common Carrier Bureau:

1. On August 17, 1990, the U.S. Court of Appeals for the District of Columbia Circuit granted a petition for review of a Commission order[1] that codified the rules for calculating the rate base used to determine the interstate revenue requirement of dominant carriers.[2] Review was granted with regard to certain exclusions from the rate base mandated by the Commission, and these issues have been remanded for further consideration and explication.

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4. This Order is effective upon adoption.

FEDERAL COMMUNICATIONS COMMISSION

Mary Beth Richards
Chief, Enforcement Division
Common Carrier Bureau

FOOTNOTES

[1] Amendment of Part 65 of the Commission's Rules to Prescribe Components of the Rate Base and Net Income of Dominant Carriers, *Report and Order*, 3 FCC Rcd 269 (1987), *recon.*, 4 FCC Rcd 1697 (1989).

[2] *Illinois Bell Tel. Co. v. FCC*, No. 88-1175 (D.C. Cir. August 17, 1990).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

TFN CORP.,
Complainant,

v.

THE CHESAPEAKE AND POTOMAC TELEPHONE COMPANIES, E-90-203
THE CHESAPEAKE AND POTOMAC TELEPHONE COMPANY OF MARYLAND E-90-204
THE CHESAPEAKE AND POTOMAC TELEPHONE COMPANY OF VIRGINIA, E-90-205
THE CHESAPEAKE AND POTOMAC TELEPHONE COMPANY OF WEST VIRGINIA, E-90-206
NEW JERSEY BELL TELEPHONE COMPANY, E-90-207
NEW YORK TELEPHONE COMPANY and E-90-208
SOUTHERN BELL TELEPHONE AND TELEGRAPH COMPANY, E-90-209
Defendants.

ORDER

Adopted: January 25, 1991; Released: February 6, 1991

By the Chief, Enforcement Division, Common Carrier Bureau:

1. On August 17, 1990, the U.S. Court of Appeals for he District of Columbia Circuit granted a petition for eview of a Commission order[1] that codified the rules for alculating the rate base used to determine the interstate evenue requirement of dominant carriers.[2] Review was ranted with regard to certain exclusions from the rate ase mandated by the Commission, and these issues have een remanded for further consideration and explication.

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4. This Order is effective upon adoption.

FEDERAL COMMUNICATIONS COMMISSION

Mary Beth Richards
Chief, Enforcement Division
Common Carrier Bureau

FOOTNOTES

[1] Amendment of Part 65 of the Commission's Rules to Prescribe Components of the Rate Base and Net Income of Dominant Carriers, *Report and Order*, 3 FCC Rcd 269 (1987), *recon.*, 4 FCC Rcd 1697 (1989).

[2] *Illinois Bell Tel. Co. v. FCC*, No. 88-1175 (D.C. Cir. August 17, 1990).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

LDDS COMMUNICATIONS, INC.,
Complainant,

v.

BELL TELEPHONE COMPANY OF PENNSYLVANIA,	File No. E-90-214
THE CHESAPEAKE AND POTOMAC TELEPHONE COMPANIES,	File No. E-90-215
THE CHESAPEAKE AND POTOMAC TELEPHONE COMPANY OF MARYLAND,	File No. E-90-216
THE CHESAPEAKE AND POTOMAC TELEPHONE COMPANY OF VIRGINIA,	File No. E-90-217
THE CHESAPEAKE AND POTOMAC TELEPHONE COMPANY OF WEST VIRGINIA,	File No. E-90-218
THE DIAMOND STATE TELEPHONE AND TELEGRAPH COMPANY,	File No. E-90-219
NEW JERSEY BELL TELEPHONE COMPANY,	File No. E-90-220
INDIANA BELL TELEPHONE COMPANY,	File No. E-90-221
MICHIGAN BELL TELEPHONE COMPANY,	File No. E-90-222
OHIO BELL TELEPHONE COMPANY,	File No. E-90-223
NEW YORK TELEPHONE COMPANY,	File No. E-90-224
NEW ENGLAND TELEPHONE AND TELEGRAPH COMPANY,	File No. E-90-225
PACIFIC BELL TELEPHONE COMPANY,	File No. E-90-229
SOUTHERN BELL TELEPHONE AND TELEGRAPH COMPANY,	File No. E-90-230
SOUTH CENTRAL BELL TELEPHONE COMPANY,	File No. E-90-231
SOUTHWESTERN BELL TELEPHONE COMPANY,	File No. E-90-232
CINCINNATI BELL TELEPHONE COMPANY,	File No. E-90-233
CONTEL OF ARKANSAS, INC.,	File No. E-90-236
CONTEL OF CALIFORNIA, INC.,	File No. E-90-237
CONTEL OF INDIANA, INC.,	File No. E-90-238
CONTEL OF IOWA, INC.,	File No. E-90-239
CONTEL OF KANSAS, INC.,	File No. E-90-240
CONTEL OF KENTUCKY, INC.,	File No. E-90-241
CONTEL OF MISSOURI, INC.,	File No. E-90-242
CONTEL OF NORTH CAROLINA, INC.,	File No. E-90-243
CONTEL OF SOUTH ALABAMA, INC.,	File No. E-90-244
CONTEL OF SOUTH GEORGIA, INC.,	File No. E-90-245
GTE NORTH, INC.,	File No. E-90-246
GTE SOUTHWEST, INC.,	File No. E-90-247
CAROLINA TELEPHONE AND TELEGRAPH COMPANY, INC.,	File No. E-90-248
UNITED TELEPHONE OF THE CAROLINAS, INC.,	File No. E-90-249
UNITED TELEPHONE OF INDIANA, INC.,	File No. E-90-250
UNITED TELEPHONE OF NEW JERSEY, INC.,	File No. E-90-251
UNITED TELEPHONE OF OHIO, INC. and	File No. E-90-252
UNITED TELEPHONE OF TENNESSEE, INC.,	File No. E-90-253

Defendants.

ORDER

Adopted: January 25, 1991; Released: February 6, 1991

By the Chief, Enforcement Division, Common Carrier Bureau:

1. On August 17, 1990, the U.S. Court of Appeals for he District of Columbia Circuit granted a petition for eview of a Commission order[1] that codified the rules for calculating the rate base used to determine the interstate evenue requirement of dominant carriers.[2] Review was granted with regard to certain exclusions from the rate base mandated by the Commission, and these issues have been remanded for further consideration and explication.

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3. Pleading and discovery filing deadlines will also be held in abeyance.

4. This Order is effective upon adoption.

FEDERAL COMMUNICATIONS COMMISSION

Mary Beth Richards
Chief, Enforcement Division
Common Carrier Bureau

FOOTNOTES

[1] Amendment of Part 65 of the Commission's Rules to Prescribe Components of the Rate Base and Net Income of Dominant Carriers, *Report and Order,* 3 FCC Rcd 269 (1987), *recon.,* 4 FCC Rcd 1697 (1989).

[2] *Illinois Bell Tel. Co. v. FCC,* No. 88-1175 (D.C. Cir. August 17, 1990).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

FIRST PHONE OF
NEW ENGLAND, INC.,
Complainant,

v.

BELL TELEPHONE COMPANY OF PENNSYLVANIA,	E-90-303
THE CHESAPEAKE AND POTOMAC TELEPHONE COMPANIES,	E-90-304
THE CHESAPEAKE AND POTOMAC TELEPHONE COMPANY OF MARYLAND,	E-90-305
THE CHESAPEAKE AND POTOMAC TELEPHONE COMPANY OF VIRGINIA,	E-90-306
THE CHESAPEAKE AND POTOMAC TELEPHONE COMPANY OF WEST VIRGINIA,	E-90-307
THE DIAMOND STATE TELEPHONE COMPANY,	E-90-308
NEW JERSEY BELL TELEPHONE COMPANY,	E-90-309
OHIO BELL TELEPHONE COMPANY,	E-90-310
NEW YORK TELEPHONE COMPANY,	E-90-311
NEW ENGLAND TELEPHONE AND TELEGRAPH COMPANY and	E-90-312
SOUTHERN BELL TELEPHONE AND TELEGRAPH COMPANY,	E-90-313

Defendants.

ORDER

Adopted: January 25, 1991; Released: February 6, 1991

By the Chief, Enforcement Division, Common Carrier Bureau:

1. On August 17, 1990, the U.S. Court of Appeals for the District of Columbia Circuit granted a petition for review of a Commission order[1] that codified the rules for calculating the rate base used to determine the interstate revenue requirement of dominant carriers.[2] Review was granted with regard to certain exclusions from the rate base mandated by the Commission, and these issues have been remanded for further consideration and explication.

2. In light of the issues raised by the Court's remand, the Commission will hold in abeyance the captioned proceedings until such time as the Commission acts upon the remand.

3. Pleading and discovery filing deadlines will also be held in abeyance.

4. This Order is effective upon adoption.

FEDERAL COMMUNICATIONS COMMISSION

Mary Beth Richards
Chief, Enforcement Division
Common Carrier Bureau

FOOTNOTES

[1] Amendment of Part 65 of the Commission's Rules to Prescribe Components of the Rate Base and Net Income of Dominant Carriers, *Report and Order*, 3 FCC Rcd 269 (1987), *recon.*, 4 FCC Rcd 1697 (1989).

[2] *Illinois Bell Tel. Co. v. FCC*, No. 88-1175 (D.C. Cir. August 17, 1990).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

LITEL TELECOMMUNICATIONS, CORP.,
Complainant,

v.

BELL TELEPHONE COMPANY OF PENNSYLVANIA,	E-90-317
THE CHESAPEAKE AND POTOMAC TELEPHONE COMPANIES,	E-90-318
THE CHESAPEAKE AND POTOMAC TELEPHONE COMPANY OF MARYLAND,	E-90-319
THE CHESAPEAKE AND POTOMAC TELEPHONE COMPANY OF VIRGINIA,	E-90-320
THE CHESAPEAKE AND POTOMAC TELEPHONE COMPANY OF WEST VIRGINIA,	E-90-321
THE DIAMOND STATE TELEPHONE COMPANY,	E-90-322
NEW JERSEY BELL TELEPHONE COMPANY,	E-90-323
INDIANA BELL TELEPHONE COMPANY,	E-90-324
MICHIGAN BELL TELEPHONE COMPANY,	E-90-325
OHIO BELL TELEPHONE COMPANY,	E-90-326
WISCONSIN BELL, INC.,	E-90-327
NEW YORK TELEPHONE COMPANY,	E-90-328
NEW ENGLAND TELEPHONE AND TELEGRAPH COMPANY,	E-90-329
THE MOUNTAIN STATES TELEPHONE AND TELEGRAPH COMPANY,	E-90-330
NORTHWESTERN BELL TELEPHONE COMPANY,	E-90-331
PACIFIC NORTHWEST BELL TELEPHONE COMPANY,	E-90-332
PACIFIC BELL TELEPHONE COMPANY,	E-90-333
SOUTH CENTRAL BELL TELEPHONE COMPANY,	E-90-334
SOUTHERN BELL TELEPHONE AND TELEGRAPH COMPANY,	E-90-335
SOUTHWESTERN BELL TELEPHONE COMPANY,	E-90-336
CINCINNATI BELL TELEPHONE COMPANY,	E-90-337
GTE NORTH, INC.,	E-90-340
UNITED TELEPHONE COMPANY OF THE CAROLINAS,	E-90-342
UNITED TELEPHONE COMPANY OF INDIANA,	E-90-343
UNITED TELEPHONE COMPANY OF OHIO and	E-90-344
UNITED TELEPHONE COMPANY OF PENNSYLVANIA,	E-90-345

Defendants.

ORDER

Adopted: January 25, 1991; Released: February 8, 1991

By the Chief, Enforcement Division, Common Carrier Bureau:

1. On August 17, 1990, the U.S. Court of Appeals for the District of Columbia Circuit granted a petition for review of a Commission order[1] that codified the rules for calculating the rate base used to determine the interstate revenue requirement of dominant carriers.[2] Review was granted with regard to certain exclusions from the rate base mandated by the Commission, and these issues have been remanded for further consideration and explication.

2. In light of the issues raised by the Court's remand, the Commission will hold in abeyance the captioned proceedings until such time as the Commission acts upon the remand.

3. Pleading and discovery filing deadlines will also be held in abeyance.

4. This Order is effective upon adoption.

FEDERAL COMMUNICATIONS COMMISSION

Mary Beth Richards
Chief, Enforcement Division
Common Carrier Bureau

FOOTNOTES

[1] Amendment of Part 65 of the Commission's Rules to Prescribe Components of the Rate Base and Net Income of Dominant Carriers, *Report and Order,* 3 FCC Rcd 269 (1987), *recon.*, 4 FCC Rcd 1697 (1989).

[2] *Illinois Bell Tel. Co. v. FCC,* No. 88-1175 (D.C. Cir. August 17, 1990).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

TELECOM*USA, INC.,
Complainant,

v.

PACIFIC BELL TELEPHONE COMPANY,	E-90-346
THE CHESAPEAKE AND POTOMAC TELEPHONE COMPANIES,	E-90-347
NEW JERSEY BELL TELEPHONE COMPANY,	E-90-348
MICHIGAN BELL TELEPHONE COMPANY,	E-90-349
WISCONSIN BELL, INC.,	E-90-350
SOUTHWESTERN BELL TELEPHONE COMPANY,	E-90-351
THE MOUNTAIN STATES TELEPHONE AND TELEGRAPH COMPANY,	E-90-362
PACIFIC NORTHWEST BELL TELEPHONE COMPANY and	E-90-363
NORTHWESTERN BELL TELEPHONE COMPANY,	E-90-364

Defendants.

ORDER

dopted: January 25, 1991; Released: February 6, 1991

By the Chief, Enforcement Division, Common Carrier ureau:

1. On August 17, 1990, the U.S. Court of Appeals for ie District of Columbia Circuit granted a petition for eview of a Commission order[1] that codified the rules for alculating the rate base used to determine the interstate evenue requirement of dominant carriers.[2] Review was ranted with regard to certain exclusions from the rate ase mandated by the Commission, and these issues have een remanded for further consideration and explication.

2. In light of the issues raised by the Court's remand, ie Commission will hold in abeyance the captioned proeedings until such time as the Commission acts upon the emand.

3. Pleading and discovery filing deadlines will also be eld in abeyance.

4. This Order is effective upon adoption.

FEDERAL COMMUNICATIONS COMMISSION

Mary Beth Richards
Chief, Enforcement Division
Common Carrier Bureau

FOOTNOTES

[1] Amendment of Part 65 of the Commission's Rules to Prescribe Components of the Rate Base and Net Income of Dominant Carriers, *Report and Order*, 3 FCC Rcd 269 (1987), *recon.*, 4 FCC Rcd 1697 (1989).

[2] *Illinois Bell Tel. Co. v. FCC*, No. 88-1175 (D.C. Cir. August 17, 1990).

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 87-313

In the Matter of

Policy and Rules Concerning Rates
for Dominant Carriers

MEMORANDUM OPINION AND ORDER ON RECONSIDERATION

Adopted: January 10, 1991; Released: February 8, 1991

By the Commission:

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I. INTRODUCTION AND BACKGROUND

1. Price cap regulation for most of AT&T's common carrier services has been in effect for a period of approximately a year and a half.[1] Eighteen parties have asked this Commission to reconsider various parts of the price cap system that was implemented on July 1, 1989.[2] In the instant order, we generally affirm the price cap system as it was adopted and implemented, and we make a series of clarifying statements and amendments to our rules. First we make minor clarifying amendments to our rule specifying the cost showing that accompanies below-band rates. We also make minor clarifications to our streamlined tariff procedures so that certain simple, noncontroversial filings that would otherwise be subject to more lengthy notice periods may be given streamlined treatment. We also clarify treatment of promotional offerings under price cap regulation and resolve the classification of 800 data base service. [3] We create a new service category in the 800 services basket for use when 800 data base service becomes incorporated into price cap regulation on July 1, 1991. Finally, we decide that changes in Generally Accepted Accounting Principles should be evaluated on a case-by-case basis to determine if exogenous treatment is warranted. We deny the remaining petitions.

2. In the *AT&TPrice Cap Order*, the Commission confirmed the tentative conclusion that incentive based regulation is superior to rate of return for the regulation of certain dominant carriers. The Commission concluded that a system of regulation that "capped" prices, but not profits, of certain companies would provide incentives to those companies to improve management of underlying costs and increase responsiveness to consumer demand. Under price cap regulation, rates AT&T may charge for service are limited for tariff review purposes by a predetermined formula that operates as a benchmark of cost changes AT&T is likely to experience. If AT&T can reduce the change in its actual costs to a level below the change in the benchmark, it is permitted to benefit from improved earnings. Thus, the formula provides AT&T with incentives to reduce its total costs each year to levels lower than existing rate of return regulation could be expected to produce. Consumers benefit under the plan because the benchmark formula requires AT&T to be more productive than it historically has been, and because the incentives within the plan to lower costs will enable AT&T to lower rates.

3. The AT&T price cap plan divides most of AT&T's services into several groups, or "baskets," each governed by its own price cap index.[4] The price cap index is computed with a three-part formula. First, changes AT&T experiences in the costs of factors of production (inflation), as measured by the Gross National Product Price Index, are counted. Second, the amount of inflation is reduced by a 3 percent productivity offset that represents

e difference between AT&T's productivity and the pro-
ctivity in the economy as a whole (as embodied in the
flation measure), and includes a .5 percent Consumer
oductivity Dividend. Third, the formula is adjusted for
ecific cost changes known as exogenous cost factors that
nerally result from changes in our rules or from other
anges beyond the control of AT&T. Exogenous costs
clude, for example, changes in the access rates AT&T
ys for use of the local network. Compliance with the
ice cap is measured by a formula known as the Actual
ice Index that measures aggregate rates in a basket.

4. There is one price cap index for each of AT&T's
ree baskets. Baskets are constructed to maximize protec-
on to various consumer and user groups, so that the
icing flexibility permitted under price caps cannot be
ed to disadvantage one particular group of ratepayers.

5. The first AT&T basket consists of residential and
nall business services. Services are divided into the fol-
wing categories within the basket: (1) daytime Message
elephone Service (MTS), AT&T's basic long distance
rvice; (2) evening MTS; (3) weekend and night MTS; (4)
ternational MTS; (5) Reach Out calling plan; and (6)
erator assistance and credit card calling.

6. Under the price cap plan, AT&T can qualify for
reamlined tariff review for these services as long as the
gregate weighted price for all services does not exceed
e price cap. In addition, the Commission imposed other
icing constraints on AT&T's ability to qualify for
reamlined treatment. AT&T may raise prices for
ening, night, and weekend MTS a maximum of 4
rcent per year above the change in the price cap index
thout triggering more exhaustive tariff scrutiny. Rates
the other service categories may rise no more than 5
rcent per year, adjusted for changes in the price cap, to
alify for streamlined tariff review. Streamlined rate de-
eases are limited to 5 percent per year adjusted for
anges in the price cap for all categories in this basket.
addition, to qualify for streamlined review AT&T is
quired to decrease aggregate residential rates in this
sket by 2 percent a year in real (inflation-adjusted)
rms, a pricing limit known as the Residential Price
dex.[5]

7. The Commission grouped AT&T's remaining services
to two baskets, according to an evaluation of the degree
competition AT&T faces in the provision of such ser-
ces.[6] An 800 Services (inward dialing) basket segregates
T&T's 800 services from the remainder of the business
rvices AT&T provides. The Commission divided 800
rvices into four service categories: (1) Readyline 800; (2)
T&T 800; (3) Megacom 800; and (4) All Other 800. The
nal basket consists of all other AT&T business services,
hich include the most competitive segment of the tele-
mmunications market.[7] Service categories for the busi-
ss basket consist of (1) ProAmerica calling plans; (2)
ATs (outward dialing); (3) Megacom; (4) SDN; (5) Oth-
switched services; (6) voice grade private lines services
d below; and (7) private line services larger than voice
ade. As is the case with the other baskets, AT&T will
t be able to increase or decrease rates in any of these
tegories or in the 800 or Business baskets more than 5
rcent per year adjusted for changes in the price cap,
thout triggering more comprehensive tariff scrutiny.

8. For all baskets, the Commission provided that should
T&T file tariffs for services that exceed the price bands,
e filing will not be eligible for streamlined review on 14
ys' notice with a presumption of lawfulness.[8] Rates that exceed either the 5 percent annual limit on price increases for service categories or the limit on upward movement in aggregate residential rates must be placed on 90 days' notice and be justified on the basis that AT&T has substantial cause to make such a filing. Similarly, any rates filed that cause the weighted average of prices for a basket to exceed the cap are subject to an extensive cost support showing to demonstrate that the rates are just and reasonable. These filings will also be placed on 90 days' notice and will likely be suspended. An above-cap filing must be accompanied by an explanation of how AT&T allocated costs among services, and among its various baskets. In order to ensure that precipitous price decreases are adequately scrutinized in the tariff review process for possible anticompetitive effect, the plan provided that below-band filings must be made on 45 days' notice and must be accompanied by a showing that the new rates for the service category cover that category's average variable cost.

9. The Commission also adopted rules regarding AT&T's ability to introduce new services, and to restructure existing services, under a price cap system.[9] New services are defined as any filing that expands consumers' range of options within those services subject to price cap regulation. New services may be introduced on 45 days' notice, provided AT&T can demonstrate that the new service will generate net revenues within 24 months from the incorporation of the new service into an annual price cap tariff or within 36 months after the effective date, whichever occurs first. To develop the historical data needed to perform index calculations for new services, new services will be included in price cap regulation in the first annual price cap tariff filing after completion of the base year in which the new service becomes effective.

10. Services that are within the cap and restructured by AT&T will remain under price cap constraints at all times. Since tariffs that restructure existing services could potentially raise issues of unlawful discrimination or other statutory concerns, such tariffs will be filed on a 45-day notice period.

11. The Commission also decided that several of AT&T's services should be excluded from price cap regulation because some services are structured or priced in such a way that applying a price cap structure to them would be excessively difficult or unnecessary.[10] Services subject to separate accounting requirements, special construction services, Tariff 11 services, Tariff 12, and "custom" tariffs, such as Tariff 15 and Tariff 16 services, shall be excluded from price cap regulation, and remain subject to conventional tariff review procedures.

12. The Commission also affirmed the tentative view, announced in the *Further Notice*, that AT&T's existing rates are a suitable point of departure for the price cap system.[11] The Commission found, for example, that AT&T earned less than its authorized rate of return during the first three quarters of 1988, and that recent investigation of a number of AT&T rates provided sufficient assurance that rates were generally not unlawful.

13. In adopting price caps for AT&T, the Commission restated and renewed the previously articulated Commission policy in favor of geographic rate averaging for AT&T.[12] Other policies and rules of the Commission, such as other market rules, accounting rules, and separations rules, are unaffected by the adoption of price caps. The Commission did, however, decide to eliminate the Interim Cost Allocation Manual for AT&T, that specified

how AT&T's earnings in its interstate regulated operations would be reported. The Commission also found that AT&T's service quality is not likely to decline under price cap regulation, and that in general sufficient monitoring is in place at the federal and state level to detect a decline. However, the Commission pledged to initiate quality of service monitoring in areas where equal access is not yet available.

14. The Commission monitors AT&T operations to ensure that the price cap system is functioning properly. After the third year of price cap regulation for AT&T, the Commission will conduct a comprehensive performance review of the price cap system.

II. STRUCTURE OF BASKETS AND BANDS

A. Lower Bands and Below-Band Filings

15. The *AT&T Price Cap Order* permits AT&T to exercise limited pricing flexibility in setting rates. Aggregate rates in each of the various service categories are generally permitted to increase or decrease 5 percent per year, a feature of price cap regulation known as pricing "bands.[13] The lower band applied to each category is intended to reduce the possibility that AT&T might engage in predatory pricing, cross-subsidization, or other anticompetitive practices.[14] If AT&T proposes rate reductions that will cause aggregate rates to fall to a level more than 5 percent below the levels in effect at the end of the preceding tariff year (adjusted for changes in the price cap), the rate revision must be filed on 45 days' notice and be accompanied by a showing that the rates cover average variable cost in the service category.[15] The Commission did not adopt a proposal described in an earlier Notice not to "credit" below-band price decreases for the purposes of calculating the Actual Price Index (API).[16] By crediting the full amount of the below-band decrease, the API is lowered to reflect the full extent of the decrease.

1. Existence of lower bands

16. Various parties dispute the need for lower bands and the accompanying tariff requirements for below-band filings. AT&T and several large users challenge the need for lower bands and contend that lower bands prevent AT&T from offering consumers lower rates, interfere with competition, and will, if retained, lead to aggregate rate increases.[17] These commenters argue that predation is unlikely given the ease of entry into the interexchange marketplace.[18] These parties also challenge as arbitrary the decision to trigger a cost-based filing requirement whenever service category rates dip at least 5 percent below the levels in effect on the last day of the preceding tariff year.[19] They argue that users prefer rate decreases, not "speculative future benefits" to be derived from applying anticompetitive safeguards that restrict AT&T's downward pricing flexibility.[20] Accordingly, such commenters urge this Commission to abolish the lower bands.[21]

17. While other parties generally support the use of lower bands as a check against potentially predatory activity,[22] they contend that current baskets and bands are inadequate and urge that the baskets and bands be tightened.[23] This group of commenters argues that the use of lower bands as a check against AT&T's ability to decrease prices in an anticompetitive manner reflects a view of predation that is much too narrow. According to these
commenters, the baskets and bands created provide AT&
with an opportunity to engage in a range of strateg
behavior calculated to discipline actual competition
discourage potential competition.

18. In the *AT&T Price Cap Order*, the Commissio
imposed lower bands out of "an abundance of caution.
In adopting lower bands, the Commission stated a beli
that the system of baskets, subdivided into service cat
gories, and limited by upper bands, makes predation
the form of cost-shifting or cross-subsidy unprofitable an
unlikely.[25] The Commission recognized that tariff requir
ments having the effect of slowing AT&T rate decreas
could only be justified by a corresponding interest
preserving the future of interexchange competition. Th
decisions to require lengthier review of rate decrease
greater than 5 percent annually, and to review thos
decreases with reference to AT&T's average variable cos
represent the Commission's effort to balance a desire
see rate cuts that directly and immediately benefit co
sumers with the need to ensure that competition conti
ues to benefit consumers in the long term.

19. Since that decision was reached, this Commissio
has initiated a Rule Making to examine the extent
competition for interexchange services.[26] Unlike the pric
cap proceeding, which assumed *arguendo* the dominar
status of AT&T, the *Interexchange Notice* seeks to examir
competition in the interexchange market and to ena
regulatory reform, if appropriate, to reflect current ma
ket conditions. The *Interexchange Notice* tentatively co
cludes that increased competition for interexchang
services warrants new approaches to the regulation
AT&T's services. The *Interexchange Notice* also tentative
finds that competition is particularly well-developed wit
regard to services that large users employ, a group th
includes the Business Services Basket established und
price caps. In light of this tentative conclusion, this Con
mission proposed in the *Interexchange* proceeding
eliminate lower bands for service categories in the Bus
ness Services basket.[27]

20. We believe the need for lower bands is an issue th
can best be decided in the context of the *Interexchan*
docket. The *Interexchange Notice* seeks to develop a reco
on the state of competition for interexchange services, ar
notes our tentative views on the economics of predatio
The record before us on reconsideration in the AT&
price cap proceeding is limited in comparison to t
record we have thus far collected in our *Interexchan*
docket. Analysis of the record in the *Interexchange* pr
ceeding will be important in reviewing whether compet
tion is sufficiently rivalrous to eliminate lower bands f
the Business basket services, and whether our tentati
judgment in that proceeding to retain for the time bei
lower bands for the other two baskets is the best cours
While parties to this reconsideration have made cle
their conclusions with regard to these issues, our ability
find the facts that lie at the heart of their judgmen
should be measurably enhanced by an analysis of t
record in the *Interexchange* proceeding.[28]

21. Pending any possible changes that we may adopt
that proceeding, and based on the record evidence in th
proceeding, we adhere to the decision to permit AT&T
file rate decreases on a streamlined basis as long as t
proposed rate decreases do not cause rates for the servi
category to drop more than 5 percent per year, adjust
for the change in the price cap index. We reject sugge
tions that the 5 percent level is either too strict or t

iberal a demarcation point between filings that are treamlined and those that are not. With respect to arguments that 5 percent is too tight a constraint, our experience with price cap regulation thus far demontrates that below-band filings have represented only a handful of the hundreds of filings AT&T made in its first year under price caps, and that in no case did the tariff requirement ultimately prevent a rate decrease from takng effect.[29] With respect to arguments that a 5 percent price change gives AT&T too much pricing flexibility, we believe that commenters supporting this view place too ittle weight on the historical movement in interexchange prices[30] and on the cost showing that must accompany a below-band proposal. We will thus retain lower bands of 5 percent at the service category level.[31]

2. Filing requirements

22. A number of parties challenge the average variable cost test established to evaluate AT&T's below-band filings. Such parties claim that the test is so vague as to create a "loophole" for AT&T and prevents the Commission and others from adequately evaluating such filings.[32] These parties argue that this test is not the correct standard to be applied in such cases[33] and that it is not adequately supported by the record in this proceeding.[34] These parties also argue that the infirmities inherent in he test render it unenforceable.[35] This group also tends to view the 45-day notice period as insufficient, while AT&T views the notice period as unnecessarily lengthy.[36]

23. We reject arguments that the Commission lacks an adequate basis to adopt average variable cost as the standard to evaluate below band filings. In both economics and law, average variable cost is a well recognized standard for deciding whether a particular price reduction is potentially anticompetitive.[37] While we recognize that not all economists would endorse average variable cost as a itmus test for predation,[38] we note that our use of this est is for the limited purpose of deciding whether a tariff revision should be suspended or investigated. As many federal courts have recognized for some time, average variable cost provides a meaningful and measurable basis on which to judge prices.[39] And, as we said in the *AT&T Price Cap Order*, parties may be able to demonstrate that a below-band filing should be investigated even if the average variable cost test has been satisfied.[40]

24. We therefore disagree that the average variable cost standard is vague, undefined, or unmeasurable. Economists define average variable cost as the total variable cost of producing a good (or service), divided by the number of units of the good produced. Variable costs are the costs which vary as the amount of the good produced varies. They are distinguished from fixed costs, which are incurred regardless of the level of production. Average variable cost is a basic economic concept, and its measurement is a relatively straightforward task.[41]

25. We wish to clarify, however, that there exist different ways to demonstrate that a service category's rates cover its average variable cost. One way is to present the average variable cost of the service category. Another way s to provide an incremental net revenue showing of the ype AT&T provided in its Transmittal 1690.[42] We therefore clarify that the showing provided to meet the average variable cost test can be either an average variable cost howing or the incremental net revenue test used to support Transmittal 1690. We have accordingly amended Section 61.49(d) of our rules to give effect to this clarification.[43]

26. Given that lower bands, as well as the economic definition of predation, are open issues in the *Interexchange* Rule Making, we believe the best course is to continue to apply the average variable cost test, as clarified here, to below-band rates. Similarly, we will not disturb the filing period required for below band tariffs. We are not persuaded by AT&T's argument that the 45-day period hobbles its ability to compete, given the relatively few below-band filings that have been made. We also see no reason to lengthen the notice period for below-band filings. While deferral of the effective date of a tariff for the maximum period remains an option for filings that raise substantial concerns, we do not perceive the need to delay routinely the effectiveness of rate cuts once we have had an opportunity to check for possibly predatory activity.

27. Commenters disagree about the wisdom of giving AT&T full credit in its price indexes for price decreases below the lower band.[44] We decline to adopt the "no-credit" rule suggested by several petitioners. Subject to the existing restrictions on below-band filings, we want to encourage AT&T to lower its rates wherever and whenever possible.[45] Given the structural limitations on AT&T's ability under price caps to cross-subsidize lower rates in more competitive markets with higher rates in less competitive markets, we find that such a rule would discourage rate reductions by AT&T to the detriment of some of its customers without substantial assurance of a corresponding benefit for other customers or for competition in general.

B. Baskets

28. Some petitioners contend that the Residential and Small Business basket and the Business basket should be further divided. With respect to the Business basket, parties argue that private line services should be isolated in two or more separate baskets. With respect to the Residential and Small Business basket, parties argue that International Message Telecommunications Service (IMTS) and Operator and Credit Card services should each have separate baskets.

29. Parties argue that consolidation of switched and private line services within the Business basket permits AT&T to engage in cross subsidization.[46] These commenters argue that AT&T retains market power over many private line services offered in the Business basket. Other parties state that AT&T will be able to migrate customers from private line services to switched services to the detriment of providers of multiplexing and routing equipment normally used in conjunction with private line services.[47] Parties opposing the existing basket structure generally argue that the present structure of baskets and bands provides inadequate protection from the cross subsidization concerns the Commission identified in promulgating baskets and bands.

30. Parties favoring separate baskets for IMTS and Operator and Credit Card services make similar arguments about cross subsidy.[48] These parties also argue that IMTS and Operator and Credit Card services have different operating characteristics that require different treatment.[49] Parties argue that these services do not exclusively serve residential customers, and that the services are not substitutes for other services in the basket.[50]

31. We decline to split the baskets further. In designing AT&T's baskets and bands, the Commission observed that subjecting different groups of services to separate price caps impairs economic efficiency.[51] One cap on all of AT&T's services arguably could generate the most efficient results because prices could be set in the most efficient way to recover company costs, while the cap on prices would drive AT&T to lower those costs through productivity gains. The Commission nevertheless rejected this approach in favor of multiple baskets, each subject to a separate cap, because a single basket would have given AT&T too much pricing flexibility. Multiple baskets, however, raise different complications. Every time a new basket is created, the process of allocating exogenous costs among baskets becomes more burdensome, including the process of ensuring that the correct allocation was made. Moreover, since the productivity offset used in the price cap formula is based on total company productivity performance, application of the same offset to each of several baskets raises concerns about the accuracy of the offset as applied to that particular segment of the firm's operations.[52]

32. Arrayed against this set of concerns are the problems of rate shock and cross subsidization. The Commission recognized that unfettered pricing flexibility might result in sudden and substantial changes in the price of a service. The Commission also expressed concerned that unfettered pricing flexibility might result in potentially anticompetitive pricing actions, since not all of AT&T's services are subject to equal levels of competition.

33. The Commission therefore decided to limit AT&T's pricing flexibility. The Commission first decided to segregate into one basket, subject to its own price cap, those services used by residential and small business customers. The Commission next decided to segregate 800 services due to the existence of structural barriers to full competition in the 800 services market. Finally, the Commission evaluated the remainder of AT&T's services to determine if further segregation would be required. The Commission concluded that additional baskets were not necessary. Unlike the residential basket, there were no further universal service goals to be attained by segregating the remaining business services. Nor did the Commission find institutional barriers to competition of the type associated with 800 services.

34. We do not agree with those commenters that argue that the danger of cross subsidization with respect to less competitive private line offerings is so great as to warrant the creation of additional baskets. Given that institutional barriers to entry of the type found in the 800 market appear to be non-existent, and competition for private line services appears to be growing generally,[53] attempts by AT&T to engage in predation are likely to be met with additional entry in the service that is the source of the subsidy.

35. We also disagree with arguments that IMTS and Operator and Credit Card services do not belong in the Residential and Small Business services basket because they do not exclusively serve residential customers, or are not substitutable for other services in the basket. As AT&T argues, the majority of minutes generated in IMTS are billed to residential accounts.[54] Since the purpose of the residential basket is to ensure that residential subscribers benefit from price cap regulation, and that price cap regulation performs in a manner consistent with our universal service goals, IMTS is properly associated with other services that residential customers use. AT&T is also correct in stating that, for the purposes of calculating indexes, the minutes of international and operator/credit card services generated by subscribers of AT&T's other business services (*e.g.*, Megacom, SDN) are attributed to the Business basket 3 and the relevant service category within that basket.[55]

C. Related Issues

1. Service category bands

36. Petitioners argue that the number of service categories established within the three baskets are too few. Since the categories operate to limit annual prices changes, petitioners argue, more categories are needed to prevent AT&T from engaging in cross-subsidization within the service categories, or across categories.[56] IDCMA argues that the number of categories in the Business basket are insufficient, particularly in light of the narrow categories established in the Residential and Small Business basket and 800 Services basket.[57] Comptel also argues that the Commission's decision to move from its original proposal to band individual rate elements, electing instead to band prices at the service category level, was not explained in the *AT&T Price Cap Order*. Comptel states the Commission should adopt rate element banding constraints.[58]

37. We will not further divide the service categories originally adopted. In the Residential and Small Business basket, there are six service categories. Four of those categories are basic long distance service: day, evening, night/weekend, and international calling. Operator and credit card calling, which are offered in conjunction with the basic schedule offerings, are in a separate category. Reach Out America, an optional calling plan offered as an alternative to basic long distance service, is the sixth category.

38. Inward-dialing 800 services are divided into four categories -- Readyline 800, AT&T 800, Megacom 800, and all other 800 -- reflecting the different types of 800 service AT&T offers. Thus, the first two baskets -- Residential and Small Business as well as 800 Services -- utilize narrowly defined service categories, particularly given the number of services assigned to each. Commenters have not suggested how we would further split the narrow service categories in these two baskets, short of banding individual rate elements. As we discuss, below, rate element banding greatly adds to the administrative burdens associated with price cap regulation, in direct opposition to the Commission's stated goal of easing administrative burdens.[59] We therefore do not believe that further segregation of these categories is necessary or desireable.[60]

39. Similarly, we decline to expand the number of categories in the Business services basket. In selecting the basket and category configuration applied to AT&T's business services, the Commission found that these offerings were subject to the greatest amount of competition. Furthermore, the Commission specifically recognized the concerns parties had expressed with respect to private line offerings, and elected to separate private line into two categories -- voice grade and below, and all other private line.[61] Moreover, the seven service categories in this basket already outnumber the six categories in the Residential basket and the four categories in the 800 Services basket. Given the relative size of the baskets, measured in

terms of revenues, the Business basket is already subject to more service category segmentation than the other baskets.[62]

40. We disagree with parties' arguments that the system of baskets and service categories will contribute to unlawful cross-subsidization. The baskets and categories have been carefully designed to segregate services residential customers use from services businesses use. Subjecting these services to different caps minimizes any incentive to disadvantage particular customer classes. Within the baskets, unlawful cross subsidization is discouraged by the existence of service category bands that permit prices to move up or down 4 or 5 percent a year, but require more exhaustive tariff support if prices rise or fall more extensively. Thus, if AT&T were interested in pursuing a strategy involving predatory pricing of a service, it would have to move prices incrementally downward over several successive years, or be prepared to cost justify a larger price decrease. Furthermore, AT&T remains subject to the complaint process, including allegations that AT&T is offering service at predatory levels.

41. Within a single service category, we believe it would be difficult for AT&T to engage in predation. In most cases, service categories are narrowly enough defined that AT&T could not benefit from lowering rates for some elements to predatory levels while profiting from the charges on other elements. Customers (or potential customers) of the category would see such rate action as a "wash," and would not have a financial incentive to become AT&T customers.

42. Of course, to the extent parties are arguing that price cap regulation allows AT&T to migrate its rates away from fully distributed costing methods and toward market-based pricing, the parties are arguing that they would prefer rate of return regulation. Simply because prices are no longer established by reference to fully distributed costing methods does not mean that the prices represent unlawful cross-subsidization.

43. We also reject arguments to apply bands to rate elements. As the Commission stated in the *AT&T Price Cap Order*, AT&T has over 6,000 rate elements. Collecting banding information at this level of detail would greatly expand the administrative burden on AT&T without offsetting public interest benefits. Given that AT&T's services have been divided into three baskets and 17 service categories, designed to minimize incentives and opportunities for cross-subsidy, we reject the idea that rate element banding is necessary or desirable.

2. Residential price index

44. The *AT&T Price Cap Order* requires AT&T to maintain an index of residential prices as an additional check on changes in rates that residential customers pay. The index measures prices in the Residential and Small Business basket, focusing only on those services that customers actually purchase.[63] AT&T's tariff filings in the Residential and Small Business basket remain eligible for streamlined treatment so long as the residential price index does not increase more than 1 percent per year adjusted for changes in the price cap index. Allnet argues that the pricing protections offered by the residential price index should be fortified by "discount stabilizer factors" that link price movements for evening and night/weekend MTS with the "all other" service category in the Business basket. Allnet argues that the Commission should require AT&T to maintain the rate relationship between the "all other" services category in the Business basket and evening and night/weekend MTS in the Residential basket, so that MTS customers can benefit from declining prices in the Business basket.[64]

45. We disagree that fixed price relationships between AT&T's services assigned to different baskets should be established. Price cap regulation is designed to give AT&T limited flexibility to change prices so long as aggregate prices for the basket remain below the cap, and do not result in increases or decreases beyond the service band limits. This system permits AT&T to migrate its prices incrementally away from prices based on fully distributed costing and toward efficient prices, which the Commission defined as marginal cost pricing.[65] Since different services have different cost and demand characteristics, we expect that the price relationships existing on the day price cap regulation became effective for AT&T would change over time. Allnet's proposal, in contrast, would have us, in effect, declare that the marginal cost and demand characteristics of providing evening and night/weekend MTS are identical to the services offered in the "all other" category of the Business basket. Even if such a relationship existed (and there has been no showing that it does), we are opposed to implementing cross-basket price controls. The baskets selected for AT&T were designed, in part, to recognize different levels of competition and different customer groups. By segregating services in this way, we have minimized the opportunities for cross-subsidization. Creating fixed relationships among prices in different baskets raises regulatory concerns that we have been able to minimize under the current structure.

3. Promotional offerings

46. Promotional pricing activities are not discussed in the *AT&T Price Cap Order*. Two parties request clarification of the treatment promotional pricing activities should receive in a price caps regime.[66] We agree that clarification of the treatment of promotional price changes is needed, particularly in view of AT&T's expanded use of promotions in the last few years.

47. Under price cap regulation, carriers have a profit-based incentive to increase operational efficiency. In addition to cutting costs, one of the principal mechanisms to increase efficiency is to generate additional minutes of use on the network.[67] Promotional offerings are one method of stimulating usage. As long as a promotional offering does not raise discrimination issues or otherwise fail to comply with the Communications Act, we will not limit AT&T's efforts to generate greater network efficiencies by restricting promotional activity.

48. Although we do not seek to inhibit AT&T's ability to offer promotions, we view as a separate question whether promotional price changes should be included in the calculation of the Actual Price Index, Service Band Index, and Residential Price Index. By including promotional price activity in the calculation of these indexes, the value of indexes decreases when a promotion is initiated, giving AT&T additional upward flexibility to raise prices in another service category or rate elements within the same basket. At the time the promotion concludes, the indexes are elevated by the same amount they were previously lowered. We decide that, in general, promotional pricing should not be credited in price index calculations. However, where AT&T makes a simple price change to a rate element, and then markets that price

change in conjunction with a promotion, the rate change can be credited in the price indexes. We explain the reasoning for this distinction, and our decision generally to exclude promotions, below.

49. Price cap regulation is premised on the principle that a regulatory system that rewards efficiency will cause a carrier to lower its per unit costs, and its prices, over time. Under price caps, AT&T is not held to a specific ceiling on its rate of return on investment, and its rates are not based on regulatory cost allocation requirements, such as fully distributed costing. The price cap system for AT&T provides limited pricing flexibility to permit AT&T to migrate prices away from levels established using rate of return methodology and toward a more efficient set of rates.[68] In the *AT&T Price Cap Order*, the Commission specifically rejected a price cap system that would have provided AT&T with unlimited pricing flexibility.[69] Rather than place all of AT&T's services under one cap, services are divided into three individually-capped baskets, and within the baskets, into a total of 17 service categories. Streamlined tariff treatment applies only to simple price changes (*i.e.*, when the dollar amount associated with a rate element is changed and nothing else in the tariff changes) that remain within the cap and within the plus or minus 5 percent pricing bands, as well as within additional limits established by the Residential Price Index.

50. Thus, the regulatory system the Commission established contemplates streamlining only in those cases in which the price of a rate element changes, and that price change does not violate cap and band rules. Furthermore, the system of baskets, service categories, and banding restraints included in the plan ensures that if AT&T's aggregate prices are at the cap or ceiling for the basket, a rate increase in one service within the basket will require a rate decrease somewhere else in the basket. Changes to the tariff other than pure price changes are treated as a restructuring of the existing offering, and must be filed on 45 days' notice. Index credit is given for price changes associated with restructures only after the filing has passed muster in a 45 day review to determine whether the restructure violates Section 202 or any other section of the Act or is otherwise unlawful.

51. Promotions usually involve restructuring of the tariff by creating a sub-class of customers eligible to receive a special, promotional rate for a limited period of time. For example, promotions might be limited to customers in a particular geographic area, to customers that have at least a certain dollar amount of monthly bills, or to new subscribers. While the no-suspension zone created with the basket, band, and tariff filing requirements allows AT&T limited flexibility to realign service category rates, the structure does not contemplate that promotional price changes affecting limited subgroups of ratepayers can be used to create upward pricing flexibility in other services within a basket. In our view, inclusion of all promotional offerings in price caps would grant AT&T an additional degree of pricing freedom not contemplated under the regulatory structure.[70] This additional flexibility, in turn, might also provide additional incentives to engage in promotions because the promotion can provide room to raise rates for other services when the API is at the cap.

52. We therefore find that where AT&T establishes qualifying criteria associated with a promotional offering, including time limits, AT&T will not be permitted to receive credit on its price indexes. This practice ensures that the amount of pricing flexibility AT&T receives under price caps is limited to that resulting from price changes that are available to all.[71]

53. Some promotional activities, however, involve nothing more than a simple price change. We believe that simple price changes, which change the price available to all without establishing time limits or other qualifying criteria, ought to be treated as a routine streamlined price changes under caps, and given index credit. We recognize that AT&T might advertise or market a simple price change as a "limited time" promotional rate, without acknowledging in its tariff that it intends to increase rates in the near future. AT&T would thus obtain index credit for the promotion. None of our price cap rules limits AT&T's ability to "take back" a rate decrease, even after a limited period of time, provided that the revised rate remains within the cap and band limitations.[72] Moreover, because the new rate is available to all, we do not have the same concerns as when AT&T attaches some type of promotional eligibility criteria to a rate element.

54. For those promotional tariffs that are excluded from price cap regulation, we must specify the tariff requirements associated with them. We find that the 14 day notice period normally associated with promotional filings has effectively and adequately balanced the interests of AT&T in responding to marketplace conditions with our interests in enforcing the Communications Act. For the present, we will entertain requests for special permission that allow AT&T to file promotions on 14 days' notice. We will also require these filings to include, for illustrative purposes only, the Actual Price Index values and Service Band Index values that would exist if the promotional offering had been included in price cap regulation. Illustrative indexes are most consistent with our regulatory requirements for capped services, an important feature since these offerings promote services subject to price cap regulation. Use of illustrative indexes also avoids devising burdensome cost allocation systems that price cap regulation seeks to avoid. If illustrative index values revea that the filing would result in rates that are below band AT&T will be required to file the additional cost support associated with below band filings.[73] This requirement continues the Commission's practice of ensuring that price decreases do not raise anticompetitive concerns.

55. We believe that this Order should apply to current index levels. We require AT&T to submit in its next tariff filings for each of the baskets, revised Actual Price Index Service Band Indexes, and Residential Price Index values deleting any credit for promotions that are currently in effect, and that have received index credit. We take this action because our decision not to credit promotions in the price indexes is intended to clarify the structure of the price cap rules currently in effect. Since our decision is predicated upon enforcing the price cap structure as we believe it was originally adopted, we believe that the clarification should be applied to existing measures o AT&T prices.

56. Our decision to require recalculation of price indexes will affect at least one pending tariff transmittal Until recently, AT&T had claimed index credit for al price changes associated with promotions. In AT&T Transmittal 2652, AT&T took advantage of the pricing flexibility it had created by virtue of several promotion offered during the latter half of 1990 by seeking a 2.2 percent rate increase for night/weekend rates. That Transmittal remains pending. Once index credit for the promo

tional offerings is removed, AT&T's aggregate Residential and Small Business basket rates are at the cap: to raise Night/Weekend. AT&T would have to lower a rate elsewhere in the basket or file an above-cap transmittal. We do not believe that our decision to require currently effective promotions to be pulled out of index values will pose a hardship for AT&T.[74] For example, AT&T may, within the price cap rules, raise Night/Weekend rates, provided another rate in the basket decreases so that aggregate rates are below cap. Or, AT&T may choose to make the showing required of an above-cap rate. AT&T also may offer any promotions that are consistent with the requirements of the Act. AT&T may not, however, offset a promotional rate decrease targeted to a subgroup of ratepayers, with a rate increase that all persons taking service under the tariff must pay.

4. 800 Directory Assistance

57. No parties raise the issue of the treatment of 800 Directory Assistance (DA) in the pleadings on reconsideration of AT&T price cap regulation. In the *800 Data Base Order*, the Commission decided that AT&T, as the sole provider of 800 DA service, should tariff its 800 DA offering to ensure that the service is provided on a nondiscriminatory basis.[75] Under the price cap rules, the offering will be incorporated into price caps on July 1, 1991.[76] The *800 Data Base Order*, however, does not provide direction as to either the basket or band treatment for 800 DA once it is incorporated into price caps. Since in this case, basket and band treatment is not obvious, and the monopoly provision of 800 DA by AT&T raises significant issues, we will use this Reconsideration Order to address the issue.

58. We decide that 800 DA service is most closely associated with offerings in the 800 Services basket, and should be incorporated into price cap regulation as part of that basket. We also decide that, due to the monopoly nature of the offering, incorporation of 800 DA into one of the existing service categories would permit AT&T to increase the price of 800 DA service, while decreasing the price of another 800 offering that may be subject to limited competition. We accordingly create a separate service category in the 800 Services basket for 800 DA service. To provide further assurances that rates for 800 DA will remain just and reasonable, we establish an upper 3 percent banding limitation for 800 DA rates.

59. In reaching these conclusions, we have considered a variety of potential treatments of 800 DA service under price cap rules. For example, since 800 DA uses information operators to respond to requests for 800 numbers, we considered placing 800 DA in the Operator and Credit Card service category in the 800 services basket. We decided, however, that 800 DA is a discrete offering for those seeking 800 numbers, and is therefore more closely associated with 800 services. Furthermore, a decision to incorporate 800 DA in the 800 basket is consistent with the attribution for index purposes of operator and credit card calls to the Business basket, when operator and credit card calls stem from a Business basket service.[77]

60. We also decide against including 800 DA in one of the four service categories established for the 800 basket - (1) Readyline 800; (2) AT&T 800; (3) Megacom 800; and (4) all other 800. In the *AT&T Price Cap Order*, the Commission observed that impediments remained to the full development of competion for 800 service, citing the absence of 800 number portability for 800 customers seeking to change to a different interexchange carrier. The Commission also noted that while AT&T's competitors had begun to offer 800 service, the 800 market as a whole was "less competitive" than the market for business services over all. In the present case, no competition for 800 DA exists. Incorporating 800 DA into a service category, such as "all other 800" which includes international calls, would position AT&T to be able to increase its monopoly 800 DA rates, while decreasing its rates for international 800, without breaching the banding limitations established for the category as a whole.

61. We believe the better course is to isolate 800 DA in its own service category within the 800 services basket, and we have amended our rules to create such a category.[78] Separation of 800 DA into its own category ensures that the market power AT&T currently possesses with respect to 800 DA service cannot be leveraged to AT&T's benefit in a service that is subject to limited competition.

62. We have decided to apply a stricter upper band limitation for interstate 800 DA than for other services because of the unique circumstances under which 800 DA is offered. In the *800 Data Base Order*, we expressed concern "about the incentives and market power inherent in a situation in which an 800 service carrier provides the only DA service for the industry.[79] We encouraged parties to continue exploring 800 DA issues in industry fora and to develop alternative solutions that might be superior to existing arrangements. Thus far, no alternatives have been presented to us. This may well reflect a consensus among interexchange carriers that AT&T has been providing satisfactory 800 DA service at reasonable prices.[80] Nevertheless, 800 DA is a service that AT&T is providing on a regulatorily-sanctioned monopoly basis to its competitors in an important, rapidly-growing market. Moreover, the 800 services basket includes services that are considerably more competitive than 800 DA and 800 DA is a component of the other 800 services in the basket. Under the circumstances, we believe we should apply tighter upper band limitations to 800 DA than apply to other services.

III. EXOGENOUS COSTS

63. Exogenous costs are part of the calculation of the price cap index. Once the effects of inflation and the productivity offset have been summed, the effect of exogenous changes -- those beyond a carrier's control and specified by Commission action -- are added to produce a new cap.

A. Access Flow-through Rule

64. At issue in this reconsideration is not the treatment of access charges as an exogenous cost, but the rule that dictates how access charge changes are allocated among baskets. To allocate changes in non-traffic sensitive (NTS) access charges, AT&T must allocate NTS charges among baskets according to the proportion of total base period NTS originating and terminating minutes associated with each basket.[81] AT&T objects to this rule on the grounds that it is not cost-causative and that it will artificially depress the PCI of the Residential Basket.[82] AT&T explains that NTS access costs are not incurred on the basis of *total* minutes, but are incurred on the basis of originating minutes, terminating minutes, and presubscribed lines. AT&T argues that the rule should be changed to permit it to flow through changes in NTS access costs

according to changes in its basket-by-basket payments for access.[83] Other parties argue that the access flow-through rule should be amended to flow through changes to the service category level.[84]

65. We do not share AT&T's view that the access flow through rule fails to allocate the cost changes correctly. The presubscribed line charges AT&T would like us to take into account represent the current mechanism by which federal high cost assistance and lifeline programs are funded -- per presubscribed line charges assessed on interexchange carriers.[85] In adopting a per line charge to finance the high cost and lifeline programs, the Commission replaced a system of high cost recovery in which the costs were recovered through the carrier common line per minute charge. Thus. under the former system. anyone buying carrier common line minutes (switched access) contributed to high cost support. While the Commission decided to separate the high cost fund from carrier common line, creating a high cost presubscribed line charge. the Commission did not intend by its action to shift the high cost burden from all switched access ratepayers to a particular subset of ratepayers. Indeed. it would seem illogical to do so, since all customers of switched access benefit from having the maximum number of subscribers on the telephone network. The effect of AT&T's proposed rule. in contrast. would be to shift additional burdens to ratepayers of AT&T's Residential basket, while shifting burdens away from ratepayers in the 800 and Business baskets.

66. We also find no evidence that the current rule is harming AT&T's ratepayers or its competitors. Under AT&T's proposed rule, increased presubscribed line payments by AT&T to support a growing high cost fund would result in access charge decreases flowing in greater proportion to the 800 and Business Baskets. Stated differently, the current allocator results in PCIs for the 800 and Business baskets that are higher than they should be and a PCI for the Residential basket that is lower than it should be. in AT&T's view. Of course. since the current PCIs for the 800 and Business baskets are substantially above the prices AT&T is currently charging. business customers are not paying more for service as a result of the alleged misallocation. Furthermore. residential and small business customers may benefit from the allocation rule. given that prices for services in the Residential and Small Business basket are at the cap. Since we find no adverse effect stemming from our current rule. we decide to keep the access flow through rule as adopted. We will continue to monitor access flow throughs to see if some other unintended effect results from the current rule.

67. A number of parties argue. for reasons different than AT&T. that the access flow-through rule should be changed. They argue that the flow-through rule confers too much flexibility.[86] They contend that AT&T can engage in cross subsidization by manipulating access flow-through between service categories in any basket and suggest that the rule should be changed to require that access charge changes be flowed through proportionately to service categories.[87] We do not believe that the rule should be changed to require that access charge changes be flowed through proportionately to service categories. Those that advocate this position apparently wish to limit the discretion that AT&T may exercise in allocating its access costs. However, under the present rule. AT&T's ability to manipulate the allocation of its access costs is already limited by the mechanical operation of the rule that requires AT&T simply to add together its access costs and then allocate them according to the proportion of total base period NTS originating and terminating minutes associated with each basket. By inserting a requirement that AT&T must allocate its access costs not only on a per minute basis, but also on a service category basis, we would be creating a regulatory requirement that appears to be at odds with the limited pricing flexibility AT&T is permitted under the price cap rules.

B. Related Issues

1. Treatment of AT&T bypass

68. While changes in the charges AT&T pays for access to LECs' networks results in an exogenous adjustment to its price caps, cost changes that result from an AT&T decision to bypass local networks are not treated as exogenous changes to AT&T's price cap indexes.[88] On reconsideration, the LECs renew their argument that cost changes associated with bypass should also be exogenous.[89] They state that the price cap formula is constructed so that decreases in access costs lower the price cap index (assuming no net change in other formula variables), and argue that in an environment of declining access charges, AT&T can attempt to maintain its price caps at an inflated level by purchasing less access from LECs and replacing access minutes with bypass.[90] According to the LECs, the incentive to keep its price caps as high as possible will drive AT&T to bypass their networks. Moreover, the threat of bypass, they say, will inhibit them from lowering their access prices.

69. We reject the LECs' argument for the same reasons it was rejected in the *AT&T Price Cap Order*. [91] The LECs cite two circumstances in which AT&T would be tempted to maintain artificially high price cap index levels by switching to bypass. In the first scenario. access costs are declining, and bypass costs AT&T more than purchasing access from the LECs. In the second scenario. access costs as a trend are declining. but bypass and access costs are currently the same.

70. The first scenario cited by the LECs would not logically result in AT&T engaging in more expensive bypass for the sake of maintaining its price caps at their current level. Specifically, the LECs do not explain why a carrier faced with a cap on prices -- not profits -- would voluntarily choose to increase its costs, thereby adversely affecting its profit-making potential without some substantial gain in network functionality, quality, or some other parameter. We also reject the logic of the LECs' second scenario since we believe that in an environment where access costs are generally declining, as the LEC argument stipulates, the most rational economic response from AT&T would be to continue to seek out the lowest cost method of provisioning a service. Under these circumstances, AT&T would continue to purchase LEC access.

71. In addition to running counter to the cost incentives inherent in price caps, the LECs' arguments appear unlikely due to the presence of competition in mos markets served by AT&T. If AT&T attempted to take advantage of artificially high price cap index levels by raising its prices, customers would be free to seek out one of AT&T's competitors to obtain service. Thus, a more expensive bypass alternative is unlikely to be used in an environment in which AT&T faces competition.

72. As the Commission stated in the *AT&T Price Cap Order*, the bypass scenario presented by the LECs requires AT&T to predict far into the future a number of cost variables that would render a decision to bypass profitable, assuming AT&T could ultimately take advantage of its allegedly "higher" caps.[92] Given the long-term nature of bypass investment, we disagree with the LECs that AT&T could make all its predictions accurately enough to manipulate the price cap formula to its advantage.[93]

73. More importantly, the phenomenon of AT&T bypass of LEC networks is most likely to occur if an alternative access provider, or AT&T itself, offers less expensive or higher quality circuits to and from AT&T's point of presence. We do not believe we should recapture AT&T's cost savings whenever AT&T develops a way to keep its costs below the PCI. Indeed, the very purpose of price cap regulation is to provide strong incentives for AT&T to become more efficient in the provision of common carrier services.[94]

2. USOA/GAAP changes

74. The *AT& T Price Cap Order* made changes in Generally Accepted Accounting Principles (GAAP), brought about by action of the Financial Accounting Standards Board, exogenous if the Commission approves the change as compatible with its regulatory accounting needs.[95] One party disputes this treatment, arguing that it will result in double-counting of costs changes already reflected in the Gross National Product Price Index (GNP-PI).[96] It argues that GAAP changes should be considered exogenous only on a case-by-case basis where the effect of a GAAP change is unique or disproportionate to the carrier.

75. We agree with the DC PSC. As we have recognized in the case of tax law changes, GAAP changes should be eligible for exogenous treatment after a case-by-case review indicates that the change will not be adequately reflected in the GNP-PI.[97] Thus, AT&T must demonstrate that a GAAP change it seeks to treat as exogenous will not be double counted in the Price Cap Index, once in the GNP-PI and once as an exogenous cost.[98] In deciding to treat GAAP changes as exogenous on a case-by-case basis instead of automatically treating them as exogenous, we must also revisit the rationale found in the *AT&T Price Cap Order* supporting the original decision. That *Order* stated that it is "not always clear" that GAAP changes have the same effect on carriers as on industry generally.[99] Upon reconsideration, we decide that we should take more seriously the absence of clarity on the question of possible double-counting, and evaluate GAAP changes on a case-by-case basis.

IV. TARIFF ISSUES

76. In the following section, we discuss the tariff filing requirements developed for AT&T in the *AT&T Price Cap Order*. Issues relating to the filing requirements associated with below band filings have been addressed in the previous section of this Order dealing with lower bands.

A. New and Restructured Filings

77. In the *AT&T Price Cap Order*, the Commission recognized that new and restructured services need to be integrated into AT&T's price cap system and that, although they could be a potential source of innovation and healthy competition, they also could be a potential source of anticompetitive behavior and discrimination. Accordingly, the *AT&T Price Cap Order* required that both new and restructured services be filed on 45 days' notice, that new services satisfy the net revenue test, and that restructured services satisfy existing cap and band limitations.[100] AT&T argues that all new and restructured filings should be accorded streamlined tariff review on 14 days' notice and a presumption of lawfulness. AT&T contends that too few of its filings qualify for streamlined treatment, that the resulting delay unfairly disadvantages it relative to its competitors, and that other safeguards inherent in price cap regulation and other Commission rules prevent or remedy any harm from streamlining these new and restructured filings.[101]

78. We decline AT&T's request to streamline all new and restructured services. These filings can present important and controversial issues, notwithstanding their compliance with the applicable price cap requirements, and they may require more scrutiny than is afforded by 14 days' notice. AT&T's concern, that its ability to compete in the marketplace is being hampered by these rules, is an issue that is being explored in the context of our *Interexchange* proceeding.[102]

79. We do find, however, that clarification of certain portions of the *AT&T Price Cap Order* in this context will enable AT&T to obtain streamlined treatment for some types of its filings that until now have been defined as "restructured" and subjected to the longer notice period. Our action here constitutes an administrative refinement rather than a major change of policy or substance in the AT&T price cap regime. The subcategories clarified here will still be required to comply with the cap and band restrictions. But the 45 days' notice period will no longer be required, and the filings will be treated in the same way as simple repricing.[103]

80. Our price cap plan for AT&T is founded on creation of a no-suspension zone for tariff filings falling within applicable cap and band limitations for the baskets and services in question. For a transmittal to fall within the no-suspension zone, it must do no more than reprice an existing service in effect in the base year, produce an Actual Price Index (API) value below the applicable cap, and produce a Service Band Index (SBI) value that is no more or less than 5 percent different from the SBI in effect on the last day of the preceding tariff year, adjusted for any changes in the value of the price cap.[104] In the case of both the API and SBI, index values are the product of three variables -- existing price, new price, and historical base year demand. Thus, the no-suspension zone is set by reference to quantifiable, tangible data -- prices and quantities.

81. New or restructured filings can contain extensive provisions expressed in language that theoretically could present issues of predation, discrimination or other abuses, notwithstanding compliance with the applicable net revenue test or caps and bands. These issues do not fit neatly within a price cap no-suspension zone bounded by limits that are set by price and quantity variables. For this reason, the Commission elected not to give new and restructured services streamlined treatment. Yet, based on our experience under price cap regulation, we now believe some restructures are so simple and straightforward that they generally will not raise the kind of issues the Commission was concerned about when it created these categories. It would be in the public interest if we could

refine and clarify our rules to streamline more of the routine filings while continuing to focus on the difficult ones. To this end, we now clarify our rules such that the following three types of filings can be accorded streamlined tariff review.

82. The first type consists of a restructured filing that in effect only adds the availability of a service or technological function to a geographic location. Such a filing does not involve a recalculation of prices or base period quantities and therefore does not affect the actual price index or service band index at the time the change is made. Moreover, this type of filing tends to be straightforward and uncontroversial. Since the addition of a service or technological function to an area does not result in changed index levels and does not appear to raise concerns under the Communications Act, we believe that the public interest is best served by permitting AT&T to add services or technological functions to a geographic area on 14 days' notice with a presumption of lawfulness. As is our current practice, we will not require AT&T to file index information with these filings since no changes to indexes are effected.[105]

83. The second type consists of a restructured filing expressed partially or wholly as a language change that simply eliminates one or more rate elements in a manner tantamount to a repricing to zero.[106] Such a filing involves relatively simple recalculations of indexes based on the new price --$0 -- and does not require amendment of base year demand, as more complex restructures do. Provided AT&T's tariff change falls within applicable cap and band limitations, we believe that these filings should be permitted to be effective on 14 days' notice with a presumption of lawfulness.[107]

84. The last type consists of a restructured filing expressed partially or wholly as a language change that alters the volume discount structure of a single service in a single basket, wherein both the beginning and endpoints of the taper do not change. When (1) a single taper point within the range is split into two or more taper points; (2) two or more taper points within the range are condensed into a single taper point; or (3) taper points within the pre-existing beginning and end points are amended, we will treat the filing as a simple reprice.

85. In making this determination, we are aware that, unlike the clarifications discussed above, realignment of a volume discount taper within a fixed range does involve recalculation of base year quantities. The issue to be faced in calculating new index levels is to formulate base year demand as if the restructured volume discount plan had been in effect in the base year. However, unlike more complex restructures that involve estimation techniques, realignment of base year demand for the volume discount structures we describe is simple -- since AT&T knows from its customer billing records the number of minutes sold to each customer in the base year, it simply reassigns customers to the restructured taper points as applicable. Since we are limiting this exception in our restructure rule to cases in which the beginning and end points of the volume discount do not change, we believe that a 45-day notice period is not required for what amounts to a repricing.[108] If the volume discount change meets the qualifications described above, and falls within applicable cap and band limits, it may be filed on 14 days' notice with a presumption of lawfulness.

86. Several parties criticize the net revenue test for new services, and suggest modifications or clarifications to it. Cable & Wireless contends that this test should be applied only to the net revenue of the service in question, not to the net revenue sum for all three AT&T price cap baskets, as the *AT&T Price Cap Order* requires.[109] Cable & Wireless also maintains that there should be an explicit requirement that the revenue used in the test should not be based on price increases in other services.[110] As we concluded in the *AT&T Price Cap Order*, [111] however, revenues from all three baskets must be considered to reflect cross-elasticities of demand for services among them. We therefore reject this argument. But Cable & Wireless is correct that only revenue changes stemming directly or indirectly from the proposed filing should be considered, in the sense that all other variables should be held constant when the test is calculated.

87. TLD argues that AT&T should have to meet the net revenue test, not only in preliminary projections at the introduction of the service, but also throughout the entire initial pre-price cap period of up to three years, in the form of a fixed price floor for that duration.[112] In the *AT&T Price Cap Order*, the Commission required that AT&T file quarterly reports comparing actual operating results with projections, beginning six months after the initiation of the new service. The Commission further stated that reports will help us to monitor whether a new service is increasing or is likely to increase net revenues, and to decide whether action on our part is necessary.[113] We believe TLD's concern is adequately addressed by our ongoing monitoring process.

88. Finally, US Sprint advocates imposing separate caps on new services that are "merely discounts from existing services," in order to prevent cross-subsidy and excessive pricing.[114] If we were to accept US Sprint's argument, we would have to treat some services as "restructured" offerings when they are simply different versions of an existing service. Under our current rules, we treat as "new" any service that expands the customer's range of options. We find that the distinction made by the current rule is administratively easier than the version suggested by US Sprint. In addition, the net revenue test we apply to new services already sufficiently addresses the possibility of cross-subsidy.

B. Within-Band Filings

89. Tariff revisions that result in an actual price index below the applicable cap and a service band index within the band limitations are accorded streamlined tariff review, effective on 14 days' notice and accompanied by a presumption of lawfulness with respect to suspension.[115] These filings "must be accompanied by supporting materials sufficient to establish compliance with the applicable bands, and to calculate the necessary adjustments to the affected APIs and SBIs.[116] To make these calculations, AT&T develops a series of price ratios for each rate element, by dividing the existing price for the element into the proposed price. The resulting ratio is then weighted according to demand for that element in the base year (the year ending six months before the most recent annual price cap filing).[117] Commenters argue that the Commission should require AT&T to reveal cost and demand information for each rate element. Parties argue that cost data are necessary to verify the reasonableness of the rates, while demand data are necessary to verify index calculations.[118] IDCMA further argues that the Commis-

sion has failed to enunciate any clear standard by which we will evaluate the reasonableness and lawfulness of a challenged within-band filing.[119]

90. We reject petitioners' arguments. Cost data provided at the rate element level of detail has never been required by the Commission as a matter of course, even under the rate of return regulatory system. Under rate of return, we exercised our statutory responsibility by evaluating service costs, rates, and projected demand. In a price cap system, we continue to evaluate costs, but on a different basis. Under price cap regulation, we track and index aggregate cost changes with our price cap formula to ensure that AT&T's proposed rates are reasonable. Our decision to forgo collection of service cost information for within-band filings, and to rely on indexes, is a necessary predicate for creating the kinds of incentives that will drive productivity increases resulting in consumer benefits. By severing the link between service costs and rates, and refocusing our attention on measuring changes in aggregate costs, we explicitly reject the type of debate the parties seek to continue -- whether a given service or rate element is "too high" by rate of return standards. We believe the trade-off we have made will result in a significant net benefit to consumers, who will see rates continue to drop on an inflation-adjusted basis, while AT&T becomes more productive.

91. Although we have created a "no-suspension" zone for within-band filings, it is still possible to suspend a within-band filing.[120] As the *AT&T Price Cap Order* stated, evidence of several rate increases in succession for a particular service, discriminatorily high increases for certain services, or precipitous decreases having an anticompetitive effect are examples of the type of showing that would likely warrant our requiring AT&T to come forward with additional information about a proposed rate.[121] Arguments that suggest the price cap structure does not enable petitioners to challenge rates they perceive are unjust, unlawful, or discriminatory therefore do not reflect the plain language of the *Order* that it is possible to overcome the presumption of lawfulness attached to within-band, within- cap filings. Moreover, even if rates are permitted to go into effect, they can be challenged in a Section 208 complaint proceeding.

92. We also find that the rate element demand data used to construct the actual price index and service band index need not be filed with each proposed tariff. Historical quantity data is the type of data that is available from business records AT&T routinely keeps. As AT&T argues, this information may also be competitively sensitive. In the process of computing the indexes, historical base year quantities are simply multiplied by the publicly-available prices to develop the indexes. The process of checking the accuracy of the indexes is therefore a simple matter of ensuring that AT&T has correctly multiplied the quantity times the price ratio for each rate element.[122] Given the possibly competitively sensitive nature of this information, and the voluminous workpapers AT&T would have to file to show that it has correctly multiplied the price and quantity data for each of approximately 6,000 rate elements, we do not believe that AT&T should be required to disclose rate element demand when it files a within-band rate.[123]

C. Above-Band Filings

93. Parties argue that the substantial cause test established to review above-band filings is vague and subject to divergent interpretations.[124] Whenever a tariff revision would result in AT&T driving its service band index above the applicable band limitation, while remaining below the cap for that basket, the transmittal is subject to 90 days' notice, with a likelihood of suspension.[125] To support an above-band filing, AT&T is required to demonstrate that "substantial cause" exists to allow the increase to take effect.[126] The test requires a persuasive showing by the carrier that there is some causal relationship between the service for which the increase is sought and the need for increased revenue, and that this outweighs the ratepayers' legitimate expectations that such an increase would not occur.[127]

94. The vagueness arguments raised by parties on reconsideration have been raised and addressed in the *AT&T Price Cap Order*.[128] We believe the test selected properly balances the relevant interests: on one side, it weighs the legitimate expectations of ratepayers created by the price cap plan that the rate for a given service will not rise by more than 5 percent per year; and on the other side, it weighs the carrier's profferred explanation for obtaining the entire needed revenue increase through an above-band increase in just that one service rather than through several within-band increases in other related services in that basket. As the *AT&T Price Cap Order* acknowledges and Pactel argues, the customers' justifiable expectation based on the 5 percent upper band limitation is sufficiently weighty to require the carrier to come forward and meet the higher burden reflected in the substantial cause test.[129]

95. We will, however, make one adjustment to the above-band filing requirements. At the time the Commission adopted price cap regulation for AT&T, the maximum statutory notice period for tariff filings was 90 days. The statutory maximum has since been extended to 120 days.[130] In the *AT&T Price Cap Order*, the Commission stated that it would require above-band rates to be filed on the then-existing maximum notice period of 90 days, in recognition of the potential volume and complexity of the support material accompanying the filing. [131] In fact, the Commission noted that it was prohibited from adopting notice periods longer than 90 days under the then-existing provisions of the statute.[132] Now that the statute permits a 120-day notice period, we amend our price cap rules to require that above-band rates be filed on 120 days' notice.[133]

D. Above-Cap Filings

96. On reconsideration, two parties raise the issue of filing requirements associated with above-cap tariffs. The parties argue that the filing requirements and associated burdens have not been fully specified, and that in their present state of incompleteness, the requirements provide an easily accessible "escape route" for AT&T should it decide price cap regulation is too stringent.[134] The price cap rules state that when a proposed tariff would result in an actual price index above the applicable cap for the relevant basket, the tariff will be subject to 90 days' notice, will likely be suspended for 5 months, and must be accompanied by extensive supporting cost data. This showing would require data on revenues and allocation of costs over the most recent four years at the rate element level for the entire basket of the service involved, as well

as additional information regarding the carrier's other baskets.[135] Scrutiny of the justness and reasonableness of the increase would be extensive.[136]

97. Ad Hoc argues that, although the *Order* describes what kind of materials must be submitted in support of an above-cap filing, the Commission does not identify what this information must prove, what standard of proof will be applied to it, or how it will be used to determine a zone of reasonableness for the service rates involved.[137] Ad Hoc contends that the burden imposed on AT&T by this rule for above-cap increases is less than that imposed on potential petitioners for suspension of within-cap filings, and that AT&T's standard here ought to be the most stringent one of showing of unconstitutional confiscation.[138]

98. The *AT&T Price Cap Order* stated that the supporting data for a proposed above-cap rate increase would be extensive and that the burden of proof that it was just and reasonable would be extremely heavy, greater than under traditional rate of return regulation. This heavy burden is the complement of (or counterpart to) the relatively limited requirements for within-cap, within-band filings, and therefore is an integral part of a regulatory system that encourages AT&T to file prices that are within the "no-suspension zone." As Pactel and PRTC state, our evaluation of detailed cost support and revenues is crucial to our ability to judge whether the proposed above-cap rates are just, reasonable, and nondiscriminatory, the ultimate statutory review standard we must apply.[139] An above-cap filing will require an evalution of a carrier's costs, both investments and expenses, including an evaluation of a reasonable cost of capital. While it is true that written explanations of what occurred are important (*i.e.*, the price cap formula resulted in confiscatorily low rates or created a situation that could lead to service quality deterioration), we see no need to specify in advance a list of circumstances that would support an above-cap rate.

V. OTHER ISSUES

A. Structure of Price Cap System

1. Productivity offset

99. Based on various studies and indexes of telecommunications industry productivity, the Commission found a long-term historical 2.5 percent differential between productivity of the telecommunications industry and that of the economy as a whole, and adopted a productivity offset of 3 percent to reflect a .5 percent productivity dividend for consumers.[140] The Commission then examined AT&T's productivity in the post-divestiture period by indirectly measuring productivity using a price analysis. Since the study confirmed a 2.5 percent productivity differential, the Commission elected to use 2.5 percent as the basis for its selection of a 3 percent productivity offset for use in the price cap formula. One party argues that this number is too low and is founded on inadequate data and a flawed analysis of the record.[141] It states that had the Commission given greater weight to evidence other than the flawed post-divestiture study, the historical differential used as a basis for the offset would be 3 percent, not 2.5 percent. This party argues that better total factor productivity data is required for the selection of an offset.

100. We continue to believe that a 3.0 percent productivity differential, grounded in a 2.5 percent long term historical differential, is the best available predictor of AT&T's future productivity gains that we can expect as a minimum during the first four years of price cap regulation. Of course, price cap regulation requires AT&T to improve its productivity performance above historical levels, since the 3 percent offset is set with reference to a historical, achieved 2.5 percent productivity performance. We disagree that selection of a 2.5 percent historical "baseline" understates AT&T's historical productivity performance. The numerous studies and indexes identified in the *AT&T Price Cap Order* support a differential of between 2 and 3 percent.[142] While some productivity measures are higher than 3 percent, those do not represent a differential measure of telecommunications productivity and that of the economy as a whole.[143] We also disagree that additional total factor productivity measures are required to confirm the selection of a 2.5 percent offset.[144] One of the principal studies on which we relied -- the Christiansen study -- is a long term total factor productivity study of AT&T. While post-divestiture total factor productivity studies of AT&T are not available, other indirect measures of productivity (including the Commission's own price analysis in Appendix C of the *AT&T Price Cap Order)* are available for the post-divestiture period that confirm prior total factor productivity results.[145]

101. Our decision in the LEC price cap proceeding to employ a 3.3 percent productivity offset, or a 4.3 percent offset if the LEC decides to elect a higher offset, does not require us to raise the productivity offset for AT&T. The LEC productivity offsets were set in reference to specific studies of LEC interstate access productivity in the post-divestiture period.[146] Studies of interstate access price performance do not capture the productivity performance of AT&T. This is particularly true with respect to the Appendix C study attached to the *LEC Price Cap Order*, which uses the very different price cap formula for the LEC common line basket in its calculation of a post-divestiture productivity performance.

2. Use of existing rates

102. In the *AT & T Price Cap Order*, the Commission concluded that AT&T's existing rates at the outset of price caps would be the most appropriate basis for setting initial index levels because, *inter alia*, these rates already had been investigated and had in many cases resulted in underearnings.[147] The Commission also rejected conducting a full rate case before using such existing rates to initalize price caps because, *inter alia*, it would prolong arbitrary cost allocation methodologies and delay the benefits of incentive regulation.[148] On reconsideration, Ad Hoc argues that the Commission must prescribe price caps as just and reasonable under Section 205 of the Communications Act, including existing rates as the initial basis for them. Ad Hoc also claims that a full rate case for this purpose would be feasible and not unduly prolonged or burdensome.[149] Maryland PC/NASUCA simply asserts, without elaboration, that the *AT&T Price Cap Order*'s given reasons for using existing rates as the initial basis for price caps are insufficient.[150]

103. The *AT&T Price Cap Order* addressed at length the question of the Commission's legal authority for establishing price caps, concluding that prescription under Section 205 of the Act is unnecessary.[151] We believe this analysis is dispositive of Ad Hoc's contention here. As the Com-

mission stated in the *AT&T Price Cap Order*, the price cap rules do not establish the lawfulness of rates, nor prohibit the filing of nonconforming tariffs. Price cap regulation for AT&T represents only a tentative dividing line between reasonable and unreasonable rates for the limited purpose of reviewing tariffs. The other arguments by Ad Hoc and Maryland PC/NASUCA add nothing new to persuade us to reconsider our conclusions in the *AT&T Price Cap Order*, and we will not do so.

3. Existing services: inclusions and exclusions

104. One party has questioned how the Commission will determine whether rates for services excluded from price cap regulation are just and reasonable.[152] Price cap regulation of AT&T excludes several categories of services: (1) special construction; (2) services offered under Tariff 11, Tariff 12, Tariff 15, and Tariff 16; and (3) new services that are temporarily held outside of price caps.[153] While the *AT&T Price Cap Order* requires AT&T to allocate costs between price capped and excluded services on a consistent and cost-causative basis,[154] the issue raised on reconsideration is whether more specific cost allocation guidance is necessary to ensure that rates for excluded services are just and reasonable.

105. We do not believe additional cost allocation rules are necessary. Excluded services are subject to traditional tariff review, while new services that are temporarily outside of price caps are subject to a specific requirement that AT&T file cost data.[155] AT&T also reports cost and revenue data for excluded services as a group on a quarterly basis through Commission-mandated ARMIS reporting. Given that these other safeguards exist, and price cap regulation itself helps to deter cost-shifting, we find no basis for imposing additional cost allocation requirements for excluded services.

106. In addition to the cost allocation issue, one party argues that the exclusion of Tariffs 12 and 15 from price caps permits AT&T to evade the price "floors" established for capped services.[156] By offering a service in the guise of Tariff 12 or 15, the argument states, AT&T can lower rates below the 5 percent annual limit as it sees fit. We disagree with the premise of the argument. Under price cap regulation, AT&T is free to lower its prices to whatever level it desires, provided that, if the new price is more than a 5 percent annual decrease, cost support data is required as a check against predation. Similarly, when AT&T files Tariff 12 or 15 rates, it must provide cost support demonstrating that the proposed rate covers service costs. Furthermore, both types of filings are normally made on at least 45 days' notice. We therefore fail to perceive how exclusion of Tariff 12 and 15 creates an opportunity for "evasion" of our rules.

4. Monitoring

107. Various parties argue that the Commission needs to specify now what criteria it will use in its evaluation of AT&T's performance under price cap regulation. Specifically, these parties argue that unless we announce in advance the outer bounds of earnings levels that would cause us to amend the price cap formula as a result of the performance review, those parties cannot endorse the monitoring and performance review as an effective device to correct any possible misjudgments.[157] We find that announcing in advance the earnings level that would cause us to reconsider the productivity factor as part of the performance review creates a variety of problems that are not outweighed by the benefits of an early announcement.

108. The performance review, scheduled to begin after the third year of price cap regulation for AT&T, is intended to be a comprehensive evaluation of AT&T's performance under price cap regulation, as well as the performance of the plan itself.[158] Among the items for review are actual price performance, earnings levels, quality of service, and technological progressiveness. The *AT&T Price Cap Order* serves notice that adjustments to the regulatory system, including the size of the productivity offset, may be made as a result of the review. Articulating in advance that a particular level of performance will lead to some associated adjustment to price cap regulation is problematic. For example, a decision to enlarge the productivity offset as a result of AT&T's earnings performance needs to take into account AT&T's earnings over the entire price cap period. As the *AT&T Price Cap Order* states, modest changes in earnings should not be enough to cause the productivity factor to change -- the earnings experience must be substantial and persistent. In addition, we would want to evaluate earnings information in light of prevailing economic conditions to provide some framework for our judgment that earnings were above acceptable levels. Moreover, naming in advance an earnings level that would trigger an increase in the productivity offset would create incentives for AT&T to manipulate its actual earnings to a level below the announced mark, through increased depreciation levels or other means.[159]

109. Petitioners raise two other issues related to the Commission's decision not to name an earnings level that would trigger a productivity adjustment. First, parties argue that the decision to eliminate the Interim Cost Allocation Manual (ICAM) that assigned costs to broad categories of service should be reversed. Without ICAM, these parties argue, an above-cap filing would be supported by a cost allocation method of AT&T's own choosing, and services outside of price cap regulation cannot be adequately monitored.[160] Second, parties argue that the decision to eliminate application of the mandatory Part 65 rate of return profit ceiling was in error, since the rate of return will be relevant in evaluating above-band and above-cap filings, as well as evaluating earnings for the performance review.[161]

110. We reject both sets of arguments. ICAM was a product of a proceeding begun in 1979 to develop cost allocation methods for AT&T.[162] The four broad categories created for use in the ICAM were designed to fit the regulatory needs then prevailing under rate of return: ENFIA, MTS, WATS and Private Line. Below these broad levels, AT&T was simply directed to allocate costs according to principles of fully distributed costing. These categories do not mirror the system of baskets created for price cap regulation. For example, the Business basket contains a mixture of switched and private line services. More important than the mismatch of ICAM categories and price cap categories, one of the fundamental objectives of price cap regulation is the elimination of artificial cost allocation requirements and their effect on prices.[163] By creating a system that caps overall prices, while allowing pricing flexibility within a "no-suspension zone," we create the opportunity for AT&T to realize a more effi-

cient pricing system. Elimination of ICAM furthers this goal by removing a measure of costs that is linked to the former, rate of return cost allocation methods.

111. Similarly, elimination of the rate of return ceiling on AT&T profits is essential to implementation of a price cap regime. The increased risk a price cap carrier experiences, by virtue of the requirement that it must improve productivity in each and every year to keep pace with the price cap formula, requires a reward. We expect that if AT&T takes advantage of its opportunity to outperform the productivity hurdle, its earnings will exceed those available under rate of return.

B. Geographic Rate Averaging

112. Despite the Commission's specific reassurance in the *AT & T Price Cap Order* [164] that the Commission would preserve geographic rate averaging, several parties express concern that this policy directive is insufficient to protect their interests. Two parties renew an argument made in prior rounds to put in place specific regulations requiring geographic toll rate averaging.[165] Another party argues that the price cap banding rules are too flexible and improperly allow AT&T to geographically deaverage its rates by manipulating rate element levels.[166]

113. We reaffirm that implementation of price caps for AT&T does not place our geographic rate averaging policies at risk. As the Commission stated in the *AT&T Price Cap Order*, the incentives for AT&T to engage in geographic rate deaveraging have been greatly reduced by the Commission's access charge policies that have substantially lowered and stabilized the rates AT&T pays for LEC access. Programs such as the High Cost Fund, designed to "spread out" the cost of providing service in high cost areas among all interexchange carriers, further reduce AT&T's incentives to deaverage. Moreover, any effort AT&T might make to deaverage its rates would have to be done in the context of a public tariff filing. The *AT&T Price Cap Order* stated that any filing that proposed geographically deaveraged rates would be subject to the full 90-day notice period then permitted under the Communications Act, would be suspended for the full 5-month period the Act permits, and would be investigated.[167] Based on these safeguards, we do not believe that specific regulations requiring geographic toll rate averaging are necessary.[168]

114. We also do not believe that the pricing flexibility inherent in a price cap system must be tightened to avoid geographic deaveraging. While AT&T is free to adjust rates associated with mileage bands, the present configuration of AT&T's tariffs generally does not link mileage bands to particular geographic locations. Rates for calls of 1,000 miles in length are the same whether the call originates in a rural community or a large urban center.[169]

C. Impact on State Regulation

115. Two parties seek reconsideration of the Commission's judgment that price cap regulation of AT&T in the interstate jurisdiction will not result in AT&T shifting costs to the intrastate jurisdiction. These parties argue that AT&T will have the incentive to shift as much of its interstate costs as possible to intrastate activities thereby inflating profits in both jurisdictions.[170] We disagree with commenters' arguments that regulatory monitoring of the jurisdictional separations process will fail to detect cost shifting for those states remaining under rate of return. Only approximately 15 percent of AT&T's non-access costs are intrastate.[171] A shift upward in the costs of providing intrastate services can be detected at the state level through state rate cases and, at the federal level, through our ongoing monitoring of AT&T in conjunction with the ARMIS system. Where states have eliminated profit caps on AT&T's intrastate offerings, AT&T does not benefit from cost shifting. The *AT&T Price Cap Order* noted that 20 of the 42 states in which AT&T provides intrastate services no longer employ rate of return methods.[172] Thus, AT&T's opportunities to shift costs are rapidly diminishing.

D. Service Quality

116. Only one party, DC PSC, challenged the *AT & T Price Cap Order*'s extensive dicussion of the existing and planned measures by both the Commission and AT&T itself to ensure that price cap regulation does not cause service quality on the network to decline.[173] DC PSC claims that the Commission should reconsider its decision not to establish its own standards and enforcement procedures, in lieu of increased monitoring.[174] We adhere to the view that Commission-established service quality standards and enforcement procedures are not necessary at this time. Price cap regulation creates strong incentives for AT&T to maintain and improve service quality on its network. Unlike rate of return regulation, price cap regulation does not insulate AT&T from a decrease in demand that would occur if service quality declined, and customers departed for higher quality service providers. Under price cap regulation, a decline in demand would simply result in less revenues for AT&T and would not affect the ceiling on AT&T's prices. Furthermore, this Commission collects a variety of information on quality of service, including ongoing reports monitoring AT&T network service quality, annual facilities authorization reviews, Form M reports, subscriber complaints, and service quality standards contained in AT&T tariffs. Of course, as the *AT & T Price Cap Order* states, should our monitoring detect a degradation in AT&T service quality, initiation of quality standards and enforcement procedures would be among the remedial steps we would consider.[175]

VI. ORDERING CLAUSES

117. IT IS HEREBY ORDERED, that pursuant to Sections 151, 154(i) and (j), 201-205, 303(r) and 405 of the Communications Act of 1934, 47 U.S.C. §§ 151, 154(i) and (j), 201-205, 303(r) and 405, the petitions for reconsideration, partial reconsideration and/or clarification filed in this proceeding ARE DENIED, except as provided herein.

118. IT IS FURTHER ORDERED that, pursuant to Sections 4(i), 4 (j), 201-205, 303(r), and 403 of the Communications Act of 1934, 47 U.S.C. §§ 154(i), 154(j), 201-205, 303(r), and 403, that Sections 61.42(b)(2), 61.42(c)(3) and (4), Section 61.49(d), and 61.58(c)(2) and (3) of this Commission's Rules, 47 C.F.R. §§ 61.42(b)(2), 61.42 (c)(3) and (4), 61.49(d), and 61.58(c)(2) and (3) ARE AMENDED and that Part 61 of this Commission's Rules ARE FURTHER AMENDED by adding Sections 61.42(c)(5) through (8), 47 C.F.R. §§ 61.42(c)(5) through (8).

119. IT IS FURTHER ORDERED that the motion to accept late-filed reply comments submitted by the Competitive Telecommunications Association is GRANTED.

120. IT IS FURTHER ORDERED that this Memorandum Opinion and Order and the rule amendments adopted herein shall be effective 30 days after publication in the Federal Register, except that the new Section 61.42(c)(7) shall become effective immediately upon publication in the Federal Register.[176]

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX A

The following parties filed Petitions for Reconsideration:

- Ad Hoc Telecommunications Users Committee (Ad Hoc)
- Allnet Communications Services, Inc. (Allnet)
- American Petroleum Institute (API)
- American Telephone & Telegraph Co. (AT&T)
- Bell Atlantic Telephone Companies (Bell Atlantic)
- Cable & Wireless Communications Inc. (Cable & Wireless)
- Competitive Telecommunications Association (Comptel)
- District of Columbia Public Service Commission (DC PSC)
- Independent Data Communications Manufacturers Association (IDCMA)
- Maryland People's Counsel and National Association of State Utility Consumer's Advocates (Maryland/NASUCA)
- MCI Telecommunications Corporation (MCI)
- National Telephone Cooperative Association (NTCA)
- National Telecommunications Network (NTN)
- Pacific Bell and Nevada Bell (Pactel)
- Puerto Rico Telephone Company (PRTC)
- Tele-Communications Association (TCA)
- Telefonica Larga Distancia de Puerto Rico (TLD)
- US Sprint Communications Company (US Sprint)

The following parties filed Oppositions to the Petitions:

- ADAPSO (Adapso)
- Ad Hoc
- Allnet
- AT&T
- Ameritech Operating Companies (Ameritech)
- Aeronautical Radio, Inc. (Arinc)
- Bell Atlantic
- BellSouth Corporation
- Comptel
- Hawaii (Hawaii)
- MCI
- NTN
- Pactel
- PRTC
- Southern New England Telephone Company (SNET)
- Southwestern Bell Telephone Company (SWB)
- TLD
- United States Telephone Association (USTA)
- US Sprint

The following parties filed reply comments:

- Ad Hoc
- Allnet
- API
- AT&T
- Bell Atlantic
- Cable & Wireless
- Comptel
- IDCMA
- MCI
- NTN
- Pactel
- PRTC
- TCA
- TLD
- US Sprint

APPENDIX B

Amendments to the Code of Federal Regulation

PART 61 -- TARIFFS

1. The authority citation for Part 61 continues to read as follows:

Authority: Sec. 4, 48 Stat. 1066, as amended; 47 U.S.C. 154. Interpret or apply sec. 203, 48 Stat. 1070; 47 U.S.C. 203.

2. Section 61.42 is amended by revising paragraphs (b)(2) and (c)(3), redesignating (c)(4) as (c)(8), and adding new (c)(4), (5), (6), and (7) to read as follows:

§ 61.42 Price cap baskets and service categories.

* * * * *

(b) * * *

(2) The 800 service basket shall contain such services as the Commission shall permit or require, including the following service categories:

(i) Readyline 800;
(ii) AT&T 800;
(iii) Megacom 800;
(iv) Other 800; and
(v) 800 Directory Assistance.

* * * * *

(c) * * *

(3) American Telephone and Telegraph Company Tariff F.C.C. No. 12 services;
(4) Custom tariff services;
(5) Services subject to below-the-line accounting;
(6) International services, except IMTS;
(7) Promotional offerings;
(8) Such other services as the Commission may specify.

* * * * *

3. Section 61.49 is amended by revising paragraph (d) to read as follows:

§ 61.49 Supporting information to be submitted with letters of transmittal for tariffs of carriers subject to price cap regulation.

* * * * *

(d) Each price cap filing that proposes service category rates below applicable band limits established in § 61.47(e) of this part, must be accompanied by supporting materials establishing that the rates cover the service category's average variable cost, or equivalently, that the service category's net additional revenue resulting from the price change exceeds additional costs.

* * * * *

4. Section 61.58 is amended by revising paragraphs (c)(2) and (c)(3) to read as follows:

§ 61.58 Notice requirements.

* * * * *

(c) * * *

(2) Tariff filings that do not cause any API to exceed any applicable PCI pursuant to calculations provided for in § 61.46 of this part, and that do not cause any SBI to exceed its banding limitations established in § 61.47 of this part, must be made on at least 14 days' notice, provided that the tariff filing is restricted to one or more of the following changes to the tariff:

(i) alters only a rate level;
(ii) adds a geographic location;
(iii) eliminates a rate element; or
(iv) changes the number or size of taper points in a volume discount plan without changing the initial volume quantity associated with the lowest discount level or the highest volume quantity associated with the highest discount level.

(3) Tariff filings that will cause any API to exceed its applicable PCI pursuant to calculations provided for in § 61.46 of this part, that will cause any SBI to exceed its upper banding limitations established in § 61.47(e) and (f) of this part, or that will cause the composite average residential rate to exceed its limitation on upward pricing flexibility established in §61.47(g) of this part, must be made on at least 120 days' notice, or such other maximum period of notice permitted by Section 203(b) of the Communications Act, regardless of whether petitions under §1.773 of the Commission's Rules have been filed.

* * * * *

FOOTNOTES

[1] In the Matter of Policy and Rules Concerning Rates for Dominant Carriers, 4 FCC Rcd 2873 (1989) (*AT&T Price Cap Order*) ; In the Matter of Policy and Rules Concerning Rates for Dominant Carriers, 4 FCC Rcd 3379 (1989) (*Erratum*). The *AT&T Price Cap Order* also included a revised proposal for implementing price cap regulation for local exchange carriers (LECs). The LEC price cap proposal was subsequently revised in a Supplemental Notice of Proposed Rule Making, 5 FCC Rcd 2176 (1990), before the Commission adopted a final set of rules for LEC price cap regulation. In the Matter of Policy and Rules Concerning Rates for Dominant Carriers (Second Report and Order), 5 FCC Rcd 6786 (1990).

[2] Parties filing reconsideration petitions, oppositions, and replies are listed in Appendix A. We use the abbreviations listed in that appendix throughout this Order.

[3] Provision of Access for 800 Service, CC Docket No. 86-10, Report and Order, 4 FCC Rcd 2824 (1989).

[4] *AT&T Price Cap Order*, 4 FCC Rcd at 3235 (para. 751). Not all services are subject to price cap regulation.

[5] *See* 47 C.F.R. § 61.47 (g). This rule limits aggregate rate increases for residential services to 1 percent per year adjusted for the price cap index. Since the Commission imposes a 3 percent productivity offset to calculate the price cap index, the net result is that residential rates must fall 2 percent in inflation-adjusted terms.

[6] *AT&T Price Cap Order*, 4 FCC Rcd at 3236 (para. 753).

[7] *Id.* at 3238 (para. 756).

[8] *Id.* at 3095-3115 (paras. 445-501).

[9] *Id.* at 3122 (para. 518).

[10] *Id.* at 3033-37 (paras. 327-36).

[11] *Id.* at 3084-89 (paras. 424-30). *See* Policy and Rules Concerning Rates for Dominant Carriers, CC Docket No. 87-313, Further Notice of Proposed Rule Making, 3 FCC Rcd 3195, 3331-40 (1988)(*Further Notice*) (paras. 250-63).

[12] *Id.* at 2878 (para. 6).

[13] Certain service categories in the Residential and Small Business basket are more strictly limited in upward pricing flexibility. *See* 47 C.F.R. § 61.47(f) and (g).

[14] *AT & T Price Cap Order*, 4 FCC Rcd at 3114 (para. 499).

[15] 47 C.F.R. § 61.58(c)(4) and 61.49(d).

[16] *Further Notice*, 3 FCC Rcd at 3357-60 (paras. 289-91); *AT & T Price Cap Order*, 4 FCC Rcd at 3066 (para. 388).

[17] *E.g.*, AT&T Petition at 12-18; API Petition at 3-9 (citing facilities-based competition and absence of showing that predatory pricing likely, and arguing that lower bands create a price umbrella, forcing AT&T to use Tariff 15 as primary competitive vehicle).

[18] *See, e.g.*, AT&T Petition at 12-18 (distinguishing the "classic" predation scenario in which a dominant firm drives competitors from the market and subsequently reaps monopoly profits).

[19] API Petition at 3-7; Ad Hoc Opposition at 4-6.

[20] API Reply at 3-6.

[21] *See, e.g.*, Ameritech Opposition at 3-4 (floors unnecessary in light ofantitrust laws, "fragility" of theory on which predation concerns are based, and other aspects of the price cap plan).

[22] *E.g.*, MCI Opposition at 15-19.

[23] *E.g.*, NTN Opposition at 6-10; NTN Reply at 5-6 (without stronger measures, AT&T has both the ability and incentive to engage in predation); Cable & Wireless Petition at 7-11 (bands should be tightened and prescribed).

[24] *AT&T Price Cap Order*, 4 FCC Rcd at 3114 (para. 499) and 3065 (para. 387).

[25] *Id.* at 3065 (para. 387).

[26] Competition in the Interstate Interexchange Marketplace, 5 FCC Rcd 2627 (1990) (*Interexchange Notice*).

[27] *Id.* at 2640 (para. 116) (proposing maximum streamlined regulation of services within the Business Services basket).

[28] We therefore also reject suggestions that we replace lower bands and associated tariff review requirements with alternative devices to guard against predation. *See, e.g.*, Ad Hoc Opposition at 4-6; API Petition at 11-12.

[29] AT&T's Performance Under Price Cap Regulation, Report to Subcommittee on Telecommunications and Finance, Committee on Energy and Commerce, U.S. House of Representatives, FCC, Common Carrier Bureau, October, 1990, at 3.

[30] *Further Notice*, 3 FCC Rcd at 3357 (para. 287).

[31] We also reject arguments that would have us prescribe lower bands. Caps and bands are intended to function as a tentative "no-suspension zone," within which rate levels may change on a streamlined basis. Prescription is not required to establish a dividing line for that purpose. *See AT&T Price Cap Order*, 4 FCC Rcd at 3306 (para. 895); AT&T Communications Tariff F.C.C. No. 9 International 800 Service, Transmittal No. 1748, 4 FCC Rcd 8466 (Com.Car.Bur. 1989) (rejecting a below-band filing for failure to submit required supporting data).

[32] Comptel Petition at 10-18.

[33] Comptel Petition at 10-18; Comptel Reply at 4-10 (no consensus that average variable cost is correct standard); MCI Reply at 5-6 (standard should be long run incremental cost); Allnet Opposition at 4-5 (long run incremental cost approach is better); US Sprint Petition at 15-18 (long run marginal costs are better measure); NTN Petition at 8; NTN Reply at 6-7 ("floors" should be linked across services to protect customers of less competitive services)

[34] MCI Petition at 12-13 (commenters did not support average variable cost test); Comptel Petition at 10-18 (record on use of this test is "fragmentary," asymmetrical requirements for above and below band rates not adequately explained in record). *See also* NTN Petition at 6.

[35] MCI Petition at 6; US Sprint Petition at 13-14; Comptel Petition at 10-18 (competitors not adequately protected by after-the-fact complaints); MCI Petition at 14-16; MCI Reply at 6-8 (to calculate average variable costs, need an investigation of AT&T's network capacity and utilization); Comptel Petition at 10-18 (until better test found, AT&T should be required to show average variable cost as well as rates for each current service). *But see* Pactel Opposition at 13-14 (average variable cost test not vague or unenforceable); AT&T Opposition at 14-17 (average variable cost is the correct standard).

[36] *Compare* AT&T Petition at 12 n. *** *with* Comptel Petition at 10-18.

[37] *AT&T Price Cap Order*, 4 FCC Rcd at 3115 (para. 500).

[38] One treatise on industrial organization cites no less than seven analytical methods economists might use to identify predatory activities. J. Ordover & G. Saloner, "Predation, Monopolization, and Antitrust," *in Handbook of Industrial Organization* (Vol. 1), Schmalensee & Willig (eds.) (1989) at 579-590.

[39] Long run incremental costs or other adjustments proposed by parties to the tariff showing do not share the widespread usage of average variable cost. *See, e.g., Southern Pacific Communications Co. v. AT&T*, 740 F. 2d 980, 1002-07 (D.C.Cir. 1984)(finding prices below average variable cost presumptively illegal); *International Distribution Centers, Inc. v. Walsh Trucking Co., Inc.*, 812 F.2d 786 (2d Cir. 1987)(taking the same approach as the D.C. Circuit); *Barry Wright Corp. v. ITT Grinnell Corp.*, 724 F.2d 227 (1st Cir. 1983)(prices above incremental and average total costs not predatory); *SuperTurf, Inc. v. Montsano Co.*, 660 F.2d 1275 (8th Cir. 1981)(price below fully allocated costs but above average variable cost is not predatory absent predatory intent or other conduct); *Pacific Engineering & Production Co. v. Kerr-McGee Corp.*, 551 F.2d 790 (10th Cir. 1977)(prices above average variable cost, but less than average total cost not predatory).

[40] *AT&T Price Cap Order*, 4 FCC Rcd at 3115 (para. 500).

[41] *See AT&T Price Cap Order*, 4 FCC Rcd at 3115 (para. 501) (describing as variable costs access costs, billing and collection costs, and any other non-fixed costs which would not be incurred if the service were not be offered).

[42] *See* AT&T Communications Tariff F.C.C. N. 9, Transmittal 1748, 4 FCC Rcd 8466 (Com.Car.Bur. 1989) (rejecting an AT&T tariff for failure to make the correct incremental net revenue showing). The Order rejecting Transmittal 1748 explains that average variable cost is composed of variable costs divided by the quantity of output for which the costs are incurred. One way to make an average variable cost showing is to compute the services' total variable costs for the relevant period and show that these costs were less than total revenues for the service. Total revenue that is greater than total cost means that average revenue (price) exceeds average variable cost, since both are computed using the same demand base. *Id.* at 8467 (para. 11). We also note that the incremental net revenue showing AT&T

made in Transmittal 1690 included some fixed costs. Such a showing gives us even more confidence that the rates cover average variable cost.

[43] Appendix B to this Order contains amendments to the Code of Federal Regulations.

[44] Allnet Petition at 5-6; Comptel Petition at 6-10; Comptel Opposition at 2, 5-6 (Commission use of "ill-defined" average variable cost test requires greater reliance on "no-credit" rule); MCI Petition at 17-18; MCI Opposition at 14-15 (denial of credit for below-band price changes would minimize anti- competitive conduct by AT&T); NTN Petition at 7; NTN Reply at 7 ("no-credit" rule would mitigate AT&T's ability to price predatorily). *But see* AT&T Opposition at 13-14; BellSouth Opposition at 2-3 (arguing that parties advocating the "no-credit" rule are all competitors of AT&T).

[45] *See AT&T Price Cap Order*, 4 FCC Rcd at 3066 (para. 388).

[46] IDCMA Petition at 1-9; Comptel Opposition at 4-5; MCI Petition at 16-17; TCA Petition at 12-16; MCI Reply at 2-3.

[47] IDCMA Petition at 1-9.

[48] Cable & Wireless Petition at 11-12; US Sprint Petition at 3-9; TLD Petition at 3-6; TLD Reply at 2-3.

[49] TLD Petition at 3-6; TLD Reply at 2-3; MCI Petition at 16-17; MCI Opposition at 15; MCI Reply at 4.

[50] US Sprint Petition at 3-9; US Sprint Reply at 2-5.

[51] *AT&T Price Cap Order*, 4 FCC Rcd at 3051 (para. 359).

[52] *Id.* at 3065 (para. 386).

[53] *Interexchange Notice*, 5 FCC Rcd 2627 (1990).

[54] AT&T Opposition at 4-9.

[55] We also disagree with TCA's argument that the Commission failed to provide adequate notice under the Administrative Procedure Act of its decision to include switched and private line services in the same basket. The Commission proposed in the *Further Notice* to employ two baskets, one for switched and one for private line service. We believe our decision, in response to extensive comments, to employ three baskets instead of two, was well within the scope of the *Further Notice*. We note that TCA itself filed comments opposing the two-basket approach set forth in the *Further Notice*.

[56] MCI Petition at 18-19; Comptel Petition at 3-6. *But see* AT&T Opposition at 11-12 (arguing that the system of baskets and bands will allow it to realize greater efficiencies, and that additional categories are not needed).

[57] IDCMA Petition at 12-18. IDCMA argues that private line services within the Business basket should be divided into the following categories: (1) voice grade and below; (2) subrate DDS (2.4, 4.8, 9.6 kbps); (3) 56 kbps DDS; (4) hi-cap; and (5) other private line services.

[58] Comptel Petition at 3-6; Comptel Opposition at 2. *See also* TLD Petition at 6-10; MCI Petition at 18-19; IDCMA Petition at 12-18.

[59] *AT&T Price Cap Order*, 4 FCC Rcd at 2922 (para. 100).

[60] However, in Section II., C., 4, of this Order, *infra*, we create a fifth category for 800 directory assistance, a new service that will be incorporated into the 800 service basket on July 1, 1991.

[61] *AT&T Price Cap Order*, 4 FCC Rcd at 3064-65 (paras. 385-86).

[62] The Residential and Small Business basket has approximately $16 billion in annual revenues, and six service categories. The 800 Services basket has $3.4 billion in revenues and four categories. The Business basket has approximately $6 billion in revenues and seven service categories. AT&T Tr. No. 2304, D&J at Exhibit 5, filed May 17, 1990.

[63] *AT&T Price Cap Order*, 4 FCC Rcd at 3060 (para. 377).

[64] Allnet Petition at 2-4; Allnet Reply at 1-2. *See also* Comptel Opposition at 15 (endorsing Allnet's proposal).

[65] The Commission, of course, recognized that in reality it is impossible for every rate to be set at marginal cost in the long run, since rates need to recover some fixed costs in order to be economic. *AT&T Price Cap Order*, 4 FCC Rcd at 2924 (para. 105).

[66] MCI Petition at 19-22 (arguing that promotional pricing activities should be reflected in price indexes and treated as restructured offerings); US Sprint Opposition at 6 (lack of clarity with regard to promotional activities provides additional opportunities for anticompetitive activity).

[67] *See, e.g., Second Report and Order* at para. 65-70 (discussing the importance of increased usage for LECs in meeting a productivity standard).

[68] *AT&T Price Cap Order*, 4 FCC Rcd at 2912 (para. 84) and 2924-25 (paras. 104-06).

[69] *Id.* at 3051-53 (paras. 359-62).

[70] In the last two years, AT&T has been filing a significant number of promotional tariff transmittals. In the last six months in the Residential and Small Business Basket alone, AT&T has filed various transmittals to make promotional offerings worth nearly $40 million. Company-wide, the transmittals AT&T has filed during the last calendar year, together with previously allowed promotional tariffs, allow AT&T to offer more than $100 million in promotions. In some cases, AT&T elects not to change rates the full amount the tariff specifies, so the levels contained in the transmittals are not equivalent to actual rate changes. Nevertheless, the amounts involved in promotional activity are significant.

[71] Appendix B, *infra*, amends the price cap rules to exclude these promotional price changes from index calculations. We also make minor amendments to our rules to specifically list all services excluded from price cap regulation, as listed in the *AT&T Price Cap Order* and in this Memorandum Opinion and Order.

[72] If, for example, AT&T's prices are at the cap in a basket, AT&T may increase one of those rates only by filing a transmittal that provides detailed cost support required of an above-cap filing, or by offsetting the increase with a decrease in a different rate elsewhere in the basket.

[73] By this decision we do not alter the tariff support required for tariffs filed pursuant to the "generic" promotions order issued by the Bureau in 1989. In the "generic" transmittal, AT&T filed descriptions of a variety of promotions that it represented may be implemented in the future, and the cost support to justify spending a total of $50 million on those promotions. Actual implementation of the promotions would be handled by a filing routinely made on 5 days' notice. AT&T has not yet fully utilized the $50 million authorization, and from time to time continues to file tariffs pursuant to the "generic" tariff. *AT & T Communications*, Transmittal Nos. 1431 & 1552, 4 FCC Rcd 4475 (Com.Car.Bur. 1989).

[74] *See New England Tel. & Tel. Co. v. FCC*, 826 F.2d 1101 (D.C. Cir. 1987), *cert. denied* 109 S.Ct. 1942 (parties must show detrimental reliance on an existing policy in order to avoid application of that policy to them). *See also* note 176, *infra*.

[75] Provision of Access for 800 Service, 4 FCC Rcd 2824, 2836 (1989)(*800 Data Base Order)*.

[76] The time lapse between the introduction of a "new" offering and its introduction into price caps permits demand information to be developed, from which the actual price indexes and service band indexes are calculated. *AT & T Price Cap Order*, 4 FCC Rcd at 3123 (para. 520).

[77] Quantities associated with operator and credit card calls that stem from Business basket services are attributed to the Business basket for the purposes of calculating the Actual Price Index and Service Band Indexes in that basket. These operator and credit card quantities are therefore not reflected in the Residential basket. AT&T Communications, Revisions To Tariff Nos. 1 and 13, Transmittal No. 1618, 4 FCC Rcd 5783, 5788 (para. 53).

[78] *See* Appendix B.

[79] *See 800 Data Base Order*, 4 FCC Rcd at 2836 (para. 104).

[80] No party has sought reconsideration of our decision in the *800 Data Base Order* not to take provision of 800 DA away from AT&T.

[81] *AT & T Price Cap Order*, 4 FCC Rcd at 3028-3029, 3055 (paras. 318-319, 366). Since Traffic Sensitive (TS) access is charged on a per minute basis, and the flow-through rule allocates access charge changes on a per minute basis, AT&T allocates changes in its TS access costs in a manner that exactly mirrors changes in its access payments to LECs. Similarly, allocation of special access charge changes is not at issue.

[82] AT&T Petition at 1-12.

[83] AT&T further argues that the flow-through rule was not properly noticed under the Administrative Procedure Act (APA), since the Commission included a different flow-through rule in its May 1988 Further Notice of Proposed Rule Making. We believe the change in the flow-through rule was well within the scope of the *Further Notice*. *See Further Notice*, 3 FCC Rcd 3195, 3353 (seeking comment on a two-basket approach to dividing AT&T's services, and noting that such an approach would simplify access flow throughs). The access flow through rule adopted in the Report and Order became necessary as a logical outgrowth of the decision to expand the number of baskets to three.

[84] *E.g.*, PRTC Petition at 3-6.

[85] MTS and WATS Market Structure, 2 FCC Rcd 2953 (1987), *recon.* 3 FCC Rcd 4543 (1988), *aff'd*, *District of Columbia PSC v. FCC*, 897 F.2d 1168 (D.C.Cir. 1990); Amendment of Part 69 of the Commission's Rules Relating to the Assessment of Charges for the Universal Service Fund and Lifeline Assistance, 4 FCC Rcd 6134 (1989)(resolving how the per presubscribed line charge would be assessed), *appeal docketed*, *ALC Communications v. FCC*, No. 90-1041 (D.C.Cir. 1990).

[86] Cable & Wireless Petition at 15; MCI Petition at 7-8; TLD Petition at 10-12; PRTC Petition at 3-6; Comptel Opposition at 17-19.

[87] *See, e.g.*, Cable & Wireless Petition at 15; TLD Petition at 10-12; PRTC Petition at 3-6.

[88] *AT & T Price Cap Order*, 4 FCC Rcd at 3005 (para. 259), 3021-26 (para. 304).

[89] *E.g.*, Bell Atlantic Comments at 1-5. *See also AT & T Price Cap Order*, 4 FCC Rcd at 3025-26 (para. 314).

[90] The LECs argue this result would occur as long as LEC access is less than or equal to the cost of bypass.

[91] *AT & T Price Cap Order*, 4 FCC Rcd at 3029 (para. 321).

[92] In order to make uneconomic bypass profitable, AT&T would need to be able to predict accurately the future time path of non-LEC access costs, and the future time path of inflation since inflation has a bearing on the costs of current losses that would later need to be recouped through the added pricing flexibility afforded by a higher PCI. In addition, market conditions would need to be such that AT&T could actually increase revenues by raising its prices to meet the elevated PCI. *See AT & T Price Cap Order*, 4 FCC Rcd at 3029 (para. 321).

[93] We do not address Bell Atlantic's specific suggestions about the manner in which we sould handle bypass as an exogenous cost, given our determination that the cost of bypass is not exogenous. *See* Bell Atlantic Petition at 7-9.

[94] *AT & T Price Cap Order*, 4 FCC Rcd at 2922-23 (paras. 100-02).

[95] *See id.*, 4 FCC Rcd at 3017-18 (paras. 294-95).

[96] DC PSC Petition at 6-7.

[97] *See AT & T Price Cap Order*, 4 FCC Rcd at 3009-10 (paras. 272-76).

[98] As the Commission explained in the *AT & T Price Cap Order*, GAAP changes are promulgated by the Financial Accounting Standards Board (FASB). While some of the changes FASB makes to GAAP affect only certain industries, other changes have near-universal impact on U.S. corporate accounting practices. Once FASB has implemented a change in GAAP, carriers subject to our Part 32 accounting rules are required to notify us of their intention to apply the GAAP change. They may make the change only if we find it compatible with our regulatory accounting needs. Furthermore, some GAAP Changes require amendment to our accounting rules. *Id.* at 3017 (para. 295).

[99] *Id.* at 3017 n.605.

[100] *Id.* at 3122-29 (paras. 518-34).

[101] AT&T Petition at 18-23.

[102] *See Interexchange Notice*, 5 FCC Rcd 2627 (1990).

[103] *See* 47 C.F.R. § 61.58(c)(2) for the "reprice" rule.

[104] *AT&T Price Cap Order*, 4 FCC Rcd at 3072-74 (paras. 401-05), 3078-79(paras. 415-17).

[105] We encourage AT&T, in the interest of clarity, to maintain its current practice of making a statement in its transmittal letter that indexes are unchanged since no prices or base year quantities change.

[106] *See* AT&T Communications, Revisions to Tariff F.C.C. Nos. 1, 2, and 14, Transmittal 1731, 4 FCC Rcd 6645 (Com.Car.Bur. 1989).

[107] We stress that inclusion of this type of filing in the group of filings we treat as streamlined provides only a *presumption* of lawfulness, and that this presumption can be overcome. Evidence that elimination of a rate element raises discrimination issues, or other concerns under the Communications Act, would cause us to suspend the filing, or at a minimum, defer it for further examination. We expect, however, that these cases will be few.

[108] Expansion of the taper on either end, however, requires AT&T to estimate "take rates" for the expanded discount program. We believe that once "take rates" become necessary to the recalculation of demand, the filing should be treated as a restructure.

[109] Cable & Wireless Petition at 16.

[110] Cable & Wireless Petition at 16-17.

[111] *AT&T Price Cap Order*, 4 FCC Rcd at 3126 (para. 526).

[112] TLD Petition at 12-15; TLD Reply at 8-9.

[113] *AT&T Price Cap Order*, 4 FCC at 3126-27 (para. 527-28).

[114] US Sprint Petition at 16.

[115] *AT&T Price Cap Order*, 4 FCC Rcd at 3097-3100 (paras. 453-58).

[116] 47 C.F.R. § 61.49(b).

[117] 47 C.F.R. §§ 61.46 and 61.47.

[118] Allnet Opposition at 5-7; IDCMA Petition at 21.

[119] IDCMA Opposition at 19-25.

[120] *AT&T Price Cap Order,* 4 FCC Rcd at 3098 (para. 456).

[121] *Id.* at 3099 (para. 458).

[122] This process is undertaken by our staff at AT&T's offices at the time of the annual price cap filing when AT&T updates its base year quantity data. That annual review becomes a basis for judging subsequent filings for the following year.

[123] *See* AT&T Communications, Transmittal No. 1618, 4 FCC Rcd 5783, 5786 (Com.Car.Bur. 1989)(para. 30) (rejecting similar appeals made in response to AT&T's first price cap filing), app. for review *pending*. We also reject Allnet's proposal to permit disclosure of historical demand data at the rate element level if the intervening party signs a proprietary agreement with AT&T. Allnet Reply at 5-6. Allnet has not demonstrated how its counsel's participation in the process of "checking the math" will contribute to an evaluation of the indexes. Nor does Allnet allege that the business records used to identify historical demand would be inaccurate, and that its participation would enable us to correct any inaccuracies.

[124] Ad Hoc Petition at 23-24; IDCMA Petition at 8, n.5.

[125] *AT &T Price Cap Order,* 4 FCC Rcd at 3103 (paras. 466-68).

[126] *Id.* at 3103-05 (paras. 469-473).

[127] *Id.* at 3103-07 (paras. 466-478).

[128] *See id.* at 3101 (para. 462) and 3106 (para. 478).

[129] *Id.* at 3105-06 (paras. 474-77). *See* Pactel Opposition at 15-18.

[130] Federal Communications Commission Authorization Act of 1990, Public Law 101-396, Section 7. *See* Amendment of Section 58(a)(2) of the Commission's Rules and Regulations, FCC 90-428, released January 7, 1991 (amending the tariff rules to allow the Chief, Common Carrier Bureau to defer tariffs to the full extent authorized under statute).

[131] *AT&T Price Cap Order*, 4 FCC Rcd at 3103 (paras. 467-68).

[132] *Id.* at 3103 (para. 468).

[133] For the same reasons, we will extend the notice period associated with above-cap filings to 120 days.

[134] Ad Hoc Petition at 17-21; IDCMA Petition at 24.

[135] *AT&T Price Cap Order,* 4 FCC Rcd at 3109-11 (paras. 486-91).

[136] *Id.* at 3109 (paras. 487).

[137] Ad Hoc Petition at 7-9.

[138] *Id.* at 9-11.

[139] *See* Pactel Opposition at 18-20.

[140] *AT&T Price Cap Order*, 4 FCC Rcd at 2976 (para. 200).

[141] Ad Hoc Petition at 15-22.

[142] *AT&T Price Cap Order*, 4 FCC Rcd at 2990 (para. 222).

[143] *Further Notice*, 3 FCC Rcd at 3402 (para. 371).

[144] Total factor productivity studies compare a company's total inputs (i.e., capital, labor) to its outputs. Total factor productivity studies are therefore characterized as "direct" measures of a company's productivity.

[145] Ad Hoc argues that the Commission erred in the calculation of AT&T's post-divestiture productivity, as presented in Appendix C of the *AT&T Price Cap Order*. According to Ad Hoc, the Appendix does not properly reflect demand growth occuring in the post-divestiture period. If properly included in the calculation, Ad Hoc states, AT&T's productivity would be 4.08 percent. Ad Hoc Petition at 22-23. We reject Ad Hoc's argument. First, demand growth occuring in the post-divestiture period is reflected in both the revenue and cost portions of the Appendix C analysis, since growing demand will affect revenues and costs. Second, while Ad Hoc's calculation may result in a productivity measure of AT&T's post-divestiture performance, it does not appear to represent a measure of the relevant productivity differential -- the amount by which AT&T's productivity exceeded that of the economy generally.

[146] *LEC Price Cap Order* at paras. 55-102.

[147] *AT&T Price Cap Order,* 4 FCC Rcd 3084-86 (paras. 424-25).

[148] *Id.* at 3086-88 (paras. 426-28).

[149] Ad Hoc Petition at 3-4, 6.

[150] Maryland PC/NASUCA Petition at 2.

[151] *AT&T Price Cap Order,* 4 FCC Rcd at 3295-3307 (paras. 881-895).

[152] US Sprint Petition at 19-21; US Sprint Reply at 9-10.

[153] *AT&T Price Cap Order,* 4 FCC Rcd at 3033 (para. 328)

[154] *Id.* at 3035 (para. 331) and 47 C.F.R. § 61.44(c).

[155] *See* Section 61.49(g) of the Commission's Rules, 47 C.F.R. §61.49(g) (providing cost support for new services). *See also AT&T Price Cap Order*, 4 FCC Rcd at 3033 (para. 327)(excluded services are subject to conventional tariff review).

[156] NTN Petition at 3-5; NTN Reply at 4-5.

[157] *See* Ad Hoc Petition at 13-15; Maryland/NASUCA Petition at 3-4.

[158] *AT&T Price Cap Order,* 4 FCC Rcd at 3143 (para. 561).

[159] Cable & Wireless argues that since AT&T will be evaluated based on earnings levels, opportunities and incentives for inefficient pricing have not been eliminated. As the Commission stated in the *AT&T Price Cap Order,* this is partially true. 4 FCC Rcd at 3141 (para. 558). In fact, the selection of a relatively lengthy four-year review cycle was structured in response to concerns about minimizing the effect of price caps earnings monitoring on AT&T's investment and expense decisions.

[160] Ad Hoc Petition at 11-13; US Sprint Reply at 9-10.

[161] Ad Hoc Petition at 13 n.8.

[162] American Telephone and Telegraph Co., Manual and Procedures for the Allocation of Costs, 84 FCC 2d 384 (1980), *recon.* 86 FCC 2d 667 (1981), *aff'd sub nom.* MCI Telecommunication v. FCC, 675 F.2d 408 (D.C.Cir. 1982), *modified* 94 FCC 2d 1118 (1983). Pursuant to a subsequent waiver issued by the Common Carrier Bureau, AT&T was permitted to combine the MTS and WATS categories, pending Commission action on a petition to amend the ICAM. American Telephone and Telegraph Co., 2 FCC Rcd 4044 (Com.Car.Bur. 1987).

[163] *AT&T Price Cap Order,* 4 FCC Rcd at 2924-25 (paras. 105-06).

[164] *Id.* at 3132-34 (paras. 537-41).

[165] NCTA Petition at 4; Hawaii Opposition at 1-4.

[166] TLD Petition at 6-10.

[167] *AT&T Price Cap Order*, 4 FCC Rcd at 3133 (para. 539).

[168] Consistent with our decision to extend the notice period for above-band and above-cap filings to 120 days, we also decide that filings proposing to geographically deaverage rates would likewise be subject to the full notice period authorized by statute.

[169] Recasting of mileage band prices is not an issue unique to price caps. *See* AT&T Communications, Tariff F.C.C. Nos. 9, 10 and 11, 3 FCC Rcd 4579, 4590 (1988)(terminating an investigation of an increase in private line short haul rates).

[170] Maryland/NASUCA Petition at 4-5; Cable & Wireless Petition at 7.

[171] *Id.* at 2961 (para. 170).

[172] *Id.* at 2927 n.183. Since adoption of the *AT&T Price Cap Order,* additional states have adopted incentive regulation of AT&T. For example, Michigan has adopted price cap regulation for AT&T for a four-year period, while Oregon now classifies AT&T as a "competitive telecommunications provider," regulating AT&T in a manner similar to its competitors.

[173] *AT&T Price Cap Order,* 4 FCC Rcd at 2951-57 (paras. 148-61).

[174] DC PSC Petition at 4-5, and n.13.

[175] *AT&T Price Cap Order,* 4 FCC Rcd at 2956 (para. 159).

[176] Good cause exists to make this rule change effective in advance of 30 days following Federal Register publication so that pending AT&T tariff transmittals involving promotions may be evaluated under the price caps rules as reflected in this Memorandum Opinion and Order. AT&T was on notice that the Commission might clarify its price cap plan with respect to treatment of promotions upon filing of petitions for reconsideration on this subject, well before the filing of the pending tariff transmittals. AT&T participated fully in this proceeding, and our decision was made after consideration of its views. Accordingly, we believe it is appropriate and fair to apply the clarification regarding promotions immediately upon publication in the Federal Register.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-9

In re Applications of

CATALINA RADIO, A CALIFORNIA LIMITED PARTNERSHIP	File No. BPH-860529MC
CRESCENT RADIO LIMITED PARTNERSHIP	File No. BPH-860530MG

For Construction Permit
for New FM Station, Channel 224A,
Avalon, California

ORDER

Adopted: January 29, 1991 **Released: February 6, 1991**

By the Review Board: MARINO (Chairman), BLUMENTHAL, and ESBENSEN.

1. On November 16, 1990, Crescent Radio Limited Partnership filed with the Review Board an Emergency Appeal from various rulings made by the presiding Administrative Law Judge, as well as a Motion for Stay of the hearing proceedings. Thereafter, both parties entered into a joint settlement agreement which was subsequently approved by the Presiding Officer in *Memorandum Opinion and Order*, FCC 90M-4062, released December 26, 1990. This action effectively moots the Crescent Radio pleadings pending before the Board.

2. ACCORDINGLY, IT IS ORDERED, That the Emergency Appeal, filed November 16, 1990, as supplemented November 26, 1990, and the Motion for Stay, filed November 16, 1990, by Crescent Radio Limited Partnership ARE DISMISSED as moot.

FEDERAL COMMUNICATIONS COMMISSION

Eric T. Esbensen
Member, Review Board

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Application of

Pacific Bell File No. W-P-D-354

To discontinue channel service
on its broadband cable distribution
facilities in and around the City
of Palo Alto, California, and
request for limited waiver.

MEMORANDUM OPINION, ORDER AND AUTHORIZATION

Adopted: January 18, 1991; Released: January 22, 1991

By the Commission:

I. INTRODUCTION

1. Before the Commission is the application and petition for limited waiver of Pacific Bell (Pacific or Applicant), a subsidiary of Pacific Telesis, filed pursuant to 47 U.S.C. § 214 and 47 C.F.R. §§ 63.56, 63.62(f) and 63.505. Pacific asserts that grant of its application will allow it to (1) discontinue providing channel service to Cable Communications Cooperative of Palo Alto, Inc. (CCC) over approximately 471 route miles of broadband cable distribution facilities and associated equipment passing 50,000 locations in and around Palo Alto and serving about 18,000 homes;[1] (2) pursuant to the Purchase Agreement, sell the channel facilities to CCC, the nonexclusive cable television franchisee for the area since October 1986; (3) continue to maintain the facilities for one year from date of transfer; and (4) provide such pole line and conduit space licenses as CCC requests from Applicant for the service area. Announcement of the filing appeared in the Public Notices of May 30, 1990 of the Domestic Facilities Division, Common Carrier Bureau (Report No. D-542), and interested persons were afforded 30 days in which to file comments or petitions.

2. Comments were filed by the National Cable Television Association, Inc. (NCTA) and the California Cable Television Association (CCTA), to which Pacific, CCC, the Consumer Federation of America (CFA), and the City of Palo Alto replied. Thereafter, Pacific filed Amendments Nos. 1, 2 and 3 to the Purchase Agreement, and CCC submitted supplemental information in support of Pacific's application, to which CCTA responded. On November 20, 1990, pursuant to staff request, Pacific furnished copies of (1) the Agreement dated March 17, 1986 between Pacific and CCC for the Provision of Broadband Distribution Facilities (Lease), (2) a "Standstill Agreement" between Pacific and CCC, dated October 18, 1989, and extension thereof, and (3) Memorandum of Understanding between the parties and first and second amendments thereof. CCC also submitted greater detail about its proposed financial restructuring and the role it hoped Pacific would be permitted to take in those plans. On November 28, 1990, NCTA furnished for consideration by the Commission proposed language for resolving certain of the controversies in this proceeding, and on December 5, CCTA submitted additional proposed language in clarification of its position, to which Pacific responded.

3. For the reasons explained herein, we grant the application and waiver petition subject to conditions.

II. BACKGROUND

4. On March 9, 1984, Pacific applied for authority to construct and operate a broadband distribution system in Palo Alto and nearby communities, intending to lease channels for the provision of cable television service (File No. W-P-C-5384). The application was opposed by CCC and by Century Federal, Inc. (Century) a local cable television system. On October 19, 1984, Pacific asked that the Commission defer action until a decision was reached between itself and a cable franchisee. On October 29, 1984, the Chief, Domestic Facilities Division, dismissed the application, without prejudice, as incomplete because the applicant did not demonstrate that there was a subscriber for the proposed facilities.

5. Thereafter, Pacific applied for, and was granted, authority to construct and maintain broadband cable distribution facilities in and around Palo Alto for the exclusive use of CCC. *Pacific Bell*, Memorandum Opinion and Order (MO&O) in File W-P-C-5753 adopted July 14, 1986, 60 Rad. Reg. 2d (P&F) 1175 (Comm. Car. Bur., 1986). As economic justification for its proposal, Pacific estimated its costs of constructing the system would be $11.7 million, with annual revenues approximating $2.8 million. The grant was subject, *inter alia*, to affirmation by CCC that: it had secured a loan agreement with the National Consumer Cooperative Bank which provided for contingent financing to supplement CCC's projected operating income; that CCC would be bound by its obligation to pay Pacific's rates as set forth in its tariff; and that grant of Pacific's application would create nothing more than a normal carrier-customer relationship, and not a debtor-creditor arrangement. On reconsideration, the Commission affirmed the Bureau's order, but required Pacific to amend its tariff "to eliminate the provisions regarding rescheduling of use payments and deferred payments of electrical costs." *See Pacific Bell* (recons.), 2 FCC Rcd 265, 267 (1987), *aff'd Century Federal, Inc. v. F.C.C.*, 846 F.2d 1479 (D.C. Cir. 1988) (*Pacific Bell*).[2]

III. APPLICATION

6. Pacific filed the subject application to discontinue channel service and to request limited waiver of the Commission's affiliation standards (47 C.F.R. § 63.54, n.1) to permit it to enter into a Purchase Agreement with CCC for sale of the channel facilities to CCC for $18.7 million and to continue to maintain the facilities for CCC for one year. The purchase offer, explains Pacific, was initiated by CCC

> in the belief that ownership of the Facilities would enhance CCC's ability to obtain financing. Without such financing, CCC was uncertain that it would be able to continue to provide, must less improve, the level of cable television services. In addition to owning the Facilities, CCC wished to use new fi-

> nancing to maintain and improve its existing cable service and cannot afford to exhaust that financing in payment for the Facilities.

Application at 12-13.

Pacific asserts that its sale of the facilities will not adversely affect the present or future public convenience or necessity because all facilities currently provided under long-term lease to CCC are not used by Pacific to provide services to any other customer, and because as a result of the transfer of facilities, CCC will continue to provide existing services to the service area pursuant to its current franchise obligation. *Id.* at 8. Moreover, Pacific states,

> [i]n the unique circumstances of this transaction where, unlike other affiliation related waiver requests, Applicant seeks to cease providing channel service, application of the Note 1 affiliation standard would eliminate a solution required by CCC's business needs and its desire to continue to provide cable television service to its customers.

Id. at 12.

7. Subsequent to the filing of its application, Pacific revealed that on October 18, 1989, CCC and Pacific had entered into the Standstill Agreement which provides that Pacific will not take action against CCC with respect to nonpayment of certain payments due under the Lease. The Standstill Agreement discloses that CCC, "due to operational and financial constraints," failed to make monthly payments under the Lease for the months of May through September 1989 in the amount of $515,015.61. It was agreed that CCC would pay Pacific $53,126.50 (which the parties calculated as being 50% of the use and maintenance payments otherwise due in the month of October) on or before October 31, 1989, and thereafter to resume making monthly use and maintenance payments in full by the end of the month in which they come due in accordance with the terms of the Lease.

IV. PURCHASE AGREEMENT

8. The parties entered into the Purchase Agreement effective as of April 20, 1990, portions of which were replaced or amended by Amendment No. 1, entered into as of July 31, 1990, Amendment No. 2, effective September 28, 1990, and Amendment No. 3, effective November 30, 1990. Pacific is required also to complete construction of certain cable plant at an estimated cost of $463,500, an expense reflected in the purchase price. Purchase Agreement, para. 8.8 as amended by Amendment No. 2, and Exhibit B at p.2. The purchase price is (a) $18.67 million; (b) approximately $1.44 million "constituting all amounts due and owing to Pacific under the Lease Agreement as of August 1, 1990, including but not limited to past due payments, construction charges, and late charges . . . [including] additional late charges from August 1, 1990, to Closing . . . ; and (c) the total of the regular monthly payments under the Lease accruing after August 1, 1990, prorated to the date of Closing (the "Additional Lease Amount") . . . ." At closing, CCC will pay to Pacific (a) $4.47 million as part of the purchase price and settlement amount and (b) the additional lease amount, and deliver to Pacific its promissory note in the principal amount equal to the balance of the purchase price and settlement amount. The cash payment will be allocated first to the additional lease amount, second to the settlement amount and third to maintenance inventory, easements, permits and plant in that order. Purchase Agreement, para. 3.1, as replaced by Amendment No. 1, para. 3.1.

9. The total of CCC's promissory note to Pacific calculated as of an August 1, 1989 closing date is $15,636,360.36. Purchase Agreement, Exhibit C. No interest will be due and payable on the note until 7-1/2 years after closing. Commencing with the first interest date, CCC will pay current interest only on the outstanding balance of the note, due and payable monthly in arrears. The entire principal balance and all unpaid and accrued interest on the note (including all interest accrued prior to the interest payment date) will be due and payable on the eighth anniversary of closing. The Purchase Agreement also provides that CCC obtain from one or more banks, insurance companies or other financial institutions commitments to fund at least $19,000,000 in the aggregate, at Closing. Purchase Agreement, para. 6.5 as replaced by Amendment No. 1. CCC shall advise Pacific monthly on the status of its efforts to obtain senior debt financing. Purchase Agreement, para. 5.

10. Paragraph 5, Amendment No. 3 of the Purchase Agreement establishes a closing date of January 14, 1991.

V. WAIVER

11. Pacific concedes that the financial and business relationship proposed between itself and CCC, specifically its loan agreement and maintenance agreement, would violate the affiliation proscription of 47 C.F.R. § 63.54, n.1. [3] However, Pacific argues, a waiver is justified because the proposed relationship will provide substantial benefit to the public without undermining the purpose of the cross-ownership rule or the affiliation standard of 47 U.S.C. § 533(b), and pleads that a waiver is appropriate based on the public interest and need showings endorsed by the Commission in both its *Clarification and Notice of Proposed Rule Making*, 69 F.C.C. 2d 1097 (1978) at para. 22, and *Sugar Land Telephone Company*, 76 F.C.C. 2d 230 (1980) at para. 7. Application at 11-12. Pacific reasons that the Cable Act requires ownership and/or control of the cable entity by the carrier for a prohibited affiliation to occur (citing 47 U.S.C. §§ 533(b), 602(1), and 613(b)), whereas note 1 to 47 C.F.R. § 63.54 exceeds that definition by deeming affiliation to occur whenever cable and telephone companies interact as other than a carrier or user. Pacific asserts that

> [t]he Commission has recognized that Note 1 unnecessarily limits the permissible interaction between cable and telephone companies and has tentatively concluded that adoption of an affiliation standard for cable/telephone cross ownership similar to those standards for cable/broadcast cross ownership (which are based on ownership or control) would serve the public interest.

Application at 14-15 and n.12, citing *Further Notice of Inquiry and Notice of Proposed Rule Making* in CC Docket 87-266, 3 FCC Rcd 5849, 5866 (1988). Pacific says that it will continue to maintain books of account for the costs, expenses and revenues from the sale and maintenance of the facilities separate from books of account for its telephone facilities. *Id.* at 17.

VI. PLEADINGS

12. In its pleading of June 29, 1990, CCTA states that while it does not wish to deprive the citizens of Palo Alto of service or to delay unnecessarily transfer of the facilities, it does urge the Commission to review the separate books of account it required Pacific to maintain so as to determine whether cross-subsidy has occurred (*see Pacific Bell* at para. 13); to publicly disclose the results; and to allow full opportunity for public comment. Moreover, CCTA questions whether Pacific's continuation of service after CCC defaulted in payments violated the cross-ownership rules, and recommends the Commission determine how long the amounts aggregating approximately $1.44 million have been outstanding and the circumstances under which Pacific continues to provide service. CCTA also questions the impact of the security interest Pacific proposes to retain if the purchaser defaults, and recommends the Commission question Pacific further on how that interest would operate and, when documented, have it filed for public review. CCTA claims to have been told by various sources that Pacific's estimated construction cost of the system substantially exceeded its estimate of $11.7 million, and notes that the tariff rate was never revised to reflect any change in underlying cost. CCTA argues that permitting a video supplier on a "video dial tone" system to defer transport payments would create an unfair cost advantage and set a very dangerous precedent. Finally, CCTA states that its proposal for an audit is independent of the decision to grant authority for Pacific's discontinuance of service and transfer of the facilities to CCC, and suggests that any revenue reallocation or other sanctions on Pacific would be independent of the transaction contemplated by Pacific's application. CCTA states that it does not wish the audit to hinder the Commission's consideration and approval of Pacific's request, since CCTA wishes to do nothing which would hinder Pacific exiting the cable business in Palo Alto and elsewhere.

13. In its pleading of July 12, 1990, CCC supports Pacific's application for waiver to permit Pacific "(a) to provide financing for [CCC's] purchase of [Pacific's] channel distribution service facilities . . . and (b) to maintain the Cable Plant for a one-year period following the purchase." CCC emphasizes that there would be no reasonable possibility for it to finance the purchase unless the waiver sought is granted. CCC relates that it has entered into loan commitment agreements (and is in the process of negotiating loan agreements) with two senior lenders for an aggregate commitment of $21 million, $2 million of which is to be set aside as reserved, unavailable funds. CCC claims that these loans will be used to make partial payment for purchase of the cable plant, repay existing debt obligations, acquire converters, repay miscellaneous fees, and for other general corporate purposes. The total uses of funds are expected to be approximately $37 million. "Based upon numerous prior applications to other banks, credit institutions, and insurance companies, [CCC] would not be able to secure the additional funds from other lenders. Therefore, a condition of the senior debt financing is the receipt of the necessary funding from [Pacific]. Unless [Pacific] is allowed to provide the requested financing, [CCC] will not be able to purchase the Cable Plant." CCC contends that its inability to borrow the balance of the necessary funds from other sources is attributable to general conditions in the credit markets and the fact that a great many lending institutions have indicated reluctance to make loans to CCC because of its consumer cooperative structure.

14. CCC judges Pacific's application as a unique opportunity presented to the Commission to benefit CCC and the member-subscribers it serves in more than 18,000 homes in the Palo Alto area, and pleads that delay in Commission approval of the application may jeopardize the transaction and senior financing arranged.

15. CFA supports Pacific's application for waiver and believes that cooperative ownership over the long term may provide substantial advantages in dealing with many of the concerns that have been raised about the cable industry in recent years. Because of the unique situation in which a limited waiver can sustain an experiment in cooperative ownership of a cable system, CFA believes that a limited waiver, with appropriate control limitations over Pacific's daily operation and programming, should be granted. If CCC cannot obtain comparable financing from other sources, grant of the limited waiver would be in the public interest, states CFA.

16. The City of Palo Alto also supports Pacific's request for waiver and relates that "[CCC] was awarded the franchise to serve Palo Alto and surrounding areas in part because it promised to ensure local control of the cable television system by a democratically elected board of directors." The city believes that CCC's purchase of the facilities will be in the public interest, and understands that ownership of the channel distribution service facilities will enhance CCC's financial condition. The city also understands that CCC does not have other realistic opportunities to finance the acquisition without the partial financing provided by Pacific, and believes that CCC's purchase of the facilities will benefit the consumers served by the system.

17. In its reply, Pacific argues that it has established good cause for granting the waiver in that more than mere general public benefit will result from the proposed relationship. "Absent approval of this limited waiver, the continued viability of the sole cable TV provider in the Palo Alto area is in serious jeopardy," states Pacific at p.3. Pacific declares that it will not sell the facilities to CCC without appropriate payment and the only possible structure for payment requires Pacific to partially finance CCC's purchase. *Id.* at n.2. Pacific contends that its security interest establishes it as a preferred creditor: in the event of default under the senior obligations, its interest will be subordinate to the interests of senior lenders, whereas, in the event of CCC's default on its obligation to Pacific, then Pacific would have the right to foreclose and force the sale of CCC's assets. *Id.* at pp. 4-5. As to its maintenance during a one-year transition period, Pacific alleges that CCC will not be able initially to provide maintenance for itself on a cost-effective basis. According to Pacific, if the Commission believes that tariffing is required, Pacific is willing to comply. *Id.* at pp. 5-6.

18. Pacific classifies as red herrings both CCTA's plea for an audit, and the "hypothetical effect" on video dial tone which is not remotely related to the channel distribution services provided to CCC. *Id.* at p.7 and n.13. Most significant to the issue of cross-subsidy, states Pacific, is the fact that the costs of facilities have not been included in the calculations for either interstate or state revenue requirements; thus, there is no opportunity for cross-subsidization by telephone ratepayers. Pacific states that it intends to account for the revenue from sale of the

system in the same books of account maintained for the facilities. *Id.* at pp. 7-8. As a provider of services to the public, Pacific alleges that it frequently is required to work out payment arrangements with customers in special circumstances to minimize detriment to either the customer or carrier. Pacific states that CCC was unable to meet the sales and revenue objectives of its business plans and its cash flow was insufficient to keep its payments to Pacific current; therefore, consistent with Pacific's usual business practices for any large customer with financial difficulty, the parties discussed the problem, and CCC's purchase of the facilities evolved as a potential solution.

19. Initially, NCTA did not oppose the Section 214 application, but did oppose Pacific's request for waiver as being unsupported. On November 28, 1990, NCTA submitted an additional pleading in which it offered proposed language which the Commission could utilize in granting a waiver herein. NCTA states in essence that highly unusual circumstances exist in this case in that Pacific seeks to discontinue the provision of video distribution facilities in Palo Alto instead of seeking an initial authorization to finance a cable system which it is constructing, and notes that the record is undisputed that CCC has attempted to obtain a portion of its financing from sources other than Pacific but that Pacific is the only source available. In addition, NCTA notes that because CCC is a not-for-profit cooperative, it faces constraints on its ability to raise equity capital not experienced by for-profit cable systems. NCTA concludes that unless the cross-ownership rules are waived to permit the financing relationship proposed by Pacific, CCC will not be able to provide video programming services in Palo Alto.

VII. DISCUSSION

20. In *National Cable Television Association, Inc. v. FCC*, 914 F.2d 285 (D. C. Cir. 1990), *rehearing denied*, No. 89-1517, December 4, 1990 (*Cerritos*), the court of appeals reviewed the Commission's grant of a waiver request of the prohibition against telephone companies providing video programming in their telephone service areas through an affiliated cable company. In granting a petition for review, the court noted the Commission's policy statement that in considering a particular waiver request the Commission would take explicit notice of the benefits that could flow from joint operation of cable television and telephone facilities if a waiver were granted.[4] The court noted that, before the Commission could grant waiver, "[t]he Cable Act requires the Commission to make a finding that the waiver is 'justified by the particular circumstances demonstrated by the petitioner, taking into account the policy of this subsection.' 47 U.S.C. § 533(b)(4)."[5] The "policy of this subsection" the court stated, is the prohibition of a telephone company's cross-ownership of a cable facility absent a finding that a community would not otherwise be served by cable or because a waiver is justified by good cause. In *Cerritos*, the court found that the Commission had failed to explain why GTE California Incorporated could not realize the advantages proposed in its application by affiliating with an unrelated contractor, thereby eliminating the cross-ownership problem.

21. In the instant case, we find that the following facts are undisputed:

a. Pacific's waiver request arises as part of its application to discontinue the provision of video distribution facilities in Palo Alto.

b. Pacific, the lessor of the facilities, is proposing to sell the facilities to its lessee, CCC, the cable franchisee in Palo Alto.

c. CCC has attempted to obtain financing from sources other than Pacific for its purchase of the cable facilities, but no alternative to the present financing proposal has been forthcoming.

d. In the event that Pacific is not permitted to partially finance CCC's purchase, the purchase will not occur, and CCC's continued viability as a cable TV provider in the Palo Alto area would apparently be in serious jeopardy, to the possible detriment of cable subscribers in Palo Alto.

22. Based on the foregoing facts, we conclude that grant of a limited, one-year waiver to Pacific would be consistent with the public interest because without that waiver, there would be a substantial likelihood of interruption in service to the community for a significant period of time. Under these circumstances, the advantages to be derived from a waiver cannot be realized in some other manner that avoids the need for a waiver.

23. Initially, we note that Pacific's application seeks authorization to discontinue the provision of channel services to CCC, and ultimately to disengage completely from involvement in the provision of cable television service in the Palo Alto area. Thus, we find that granting Pacific's application would have the ultimate effect of eliminating any opportunity that Pacific might have to take advantage of its control of the conduits and/or telephone poles that are required for the transmission of video programs to cable subscribers. *See General Telephone Co. of the Southwest*, 449 F. 2d 846, 850-851 (5th Cir. 1971).

24. Moreover, we are persuaded by the undisputed facts in this case that our failure to grant a short-term waiver herein would result in an immediate threat to CCC's continued viability, and thus to the continuity of cable service in this area. Given CCC's unsuccessful attempts to obtain alternative financing and the absence of any indication in the record that such financing is available, we are convinced that CCC's viability is in fact in serious jeopardy. While the possibility exists that CCC's demise might result in its replacement with a more financially stable cable television company, there is no evidence that any other cable company is interested in this franchise. Indeed, since May 30, 1990, the date Pacific's application went on Public Notice, no other cable television company has participated in this proceeding. Further, neither of the two major trade associations for cable television companies, NCTA and CCTA, opposes Pacific's waiver request. Thus, the evidence strongly supports a finding that no other cable company is immediately prepared to provide service to Palo Alto if CCC fails, with the result that disruption of cable television service will almost certainly follow, to the detriment of the subscribing public in Palo Alto.

25. We conclude that a temporary waiver is necessary in this case to ensure that subscribers in Palo Alto are not abruptly deprived of cable service in the event CCC fails for lack of financing. However, we believe that Pacific's request for an eight year waiver period would involve

Pacific in an unnecessarily lengthy debtor-creditor relationship of the type specifically barred by § 63.54, n.1. Therefore, we will not grant a waiver of our rules for such a lengthy period. Instead, we will require Pacific to terminate its debtor-creditor relationship with CCC no later than one year from the adoption date of this order. During this one year period, we will require Pacific to come into compliance with our rules. We urge Pacific to move with dispatch in achieving compliance, because we do not intend to grant any extension of the one year period. We are also persuaded by Pacific's argument that its expertise is required for a one year transitional period to provide maintenance for the facilities, and we concur in its position that this non-common carrier offering need not be tariffed. These steps will avoid disruption of service to the subscribers of the Palo Alto cable television system while assuring that the fundamental objectives of our cross-ownership rules are maintained.

26. Thus, "taking into account the policy" of subsection 613(b) of the Cable Act, we conclude that good cause exists to grant Pacific's application and its waiver request, as limited above, to avoid the disruption, and possible deprivation, for an indefinite period of time, of cable television service to subscribers in the Palo Alto area. In these circumstances, we believe that grant of the waiver request as described would be fully consistent with Section 613 (b)(4) of the Act and with the court's guidance in *Cerritos*. We emphasize, moreover, that our waiver is limited, in scope, to Pacific's proposal as set forth in its application and is for a one year duration. Any additional involvement by Pacific in the provision of cable television service in Palo Alto which is prohibited by the rules will be met with the appropriate administrative sanctions. As before, we will require Pacific to maintain separate books of account for the sale and maintenance of the facilities to CCC.

27. One final matter requires discussion. Serious allegations have been raised in this proceeding by CCTA that Pacific's continuation of service after CCC defaulted in payments amounts to a violation of the cross-ownership rules. We are also concerned that any such action by Pacific may have constituted a violation of its tariff as well as the specific conditions in *Pacific Bell*, *supra*.[6] Because of the apparent urgency of CCC's plight and the need for immediate action on our part on the pending application and waiver request, we will not, at this time, address in this order these complex matters as well as any other possible violations by Pacific that may have occurred in this case. These matters, and appropriate remedial action, if any, will be examined later.

VIII. CONCLUSION

28. We have considered the arguments presented in this proceeding and find that the public interest, convenience and necessity will be served by grant of the application and waiver of our telephone company/cable television cross-ownership rules for one year and that good cause exists for such a waiver. We find that for purposes of the Cable Act and our rules, absent the subject proposal, cable television subscribers would likely face disruption of service for an indefinite period of time in the Palo Alto, California area. In order to assure that any cross-subsidization between Pacific and CCC is readily revealed, we will require Pacific to follow the accounting rules adopted in CC Docket No. 86-111. No costs associated with the construction, operation, use, maintenance or disposition of the Palo Alto cable system shall appear in any Pacific service rate base or as a regulated expense.

IX. ORDERING CLAUSES

29. Accordingly, IT IS ORDERED, that Sections 63.54, 63.55, 63.56, 63.62 and 63.505 of our rules ARE HEREBY WAIVED, as limited above, to permit Pacific Bell to sell and maintain the broadband coaxial cable transport facilities as described herein.

30. IT IS FURTHER ORDERED, that the application of Pacific Bell for authorization under Section 214 of the Communications Act of 1934, as amended, to discontinue the provision of channel service to Cable Communications Cooperative of Palo Alto, Inc., IS GRANTED.

31. IT IS FURTHER ORDERED, that grant of the application and waiver petition provided for herein ARE SUBJECT TO THE CONDITIONS set forth in paragraphs 25, 26 and 28, *supra*.

32. IT IS FURTHER ORDERED that, pursuant to 47 C.F.R. § 1.103(a), this order is effective upon adoption.

33. Pacific Bell is afforded thirty-one days from the release date of this order to decline this authorization, as conditioned. Failure to respond within that period will constitute formal acceptance of this authorization, as conditioned.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] The reported populations of communities in the service area comprising 130,332 persons are: City of Palo Alto, 57,000; City of East Palo Alto, 18,850; City of Menlo Park, 28,200; City of Atherton, 7,950; unincorporated areas of San Mateo County, 6,732; and Stanford University (unincorporated area of Santa Clara County), 11,600. *See* Agreement of Purchase and Sale between Pacific and CCC (Purchase Agreement) at Exhibit 3.

[2] Pacific stated it would recover its fully distributed costs for construction and maintenance of the proposed facilities through recurring charges, and expected to yield a rate of return on investment slightly greater than 12.75%. MO&O at para. 4. The Commission reported in n.9 of the *Reconsideration* that on September 12, 1986, Pacific amended its application, decreasing its rate of return estimate from 12.75% to between 10 and 11%.

[3] Section 63.54, n.1 provides in pertinent part that:

> . . . [T]he terms "control" and "affiliate" bar any financial or business relationship whatsoever by contract or otherwise, directly or indirectly between the carrier and the customer, except only the carrier-user relationship.

[4] This policy was enunciated by the Commission in *Revision of the Processing Policies for Waivers of the Telephone Company-Cable Television " Cross Ownership Rules, "* 69 FCC 2d 1097, 1110 (1978).

[5] Section 613 of the Cable Act, 47 U.S.C. § 533, provides in relevant part as follows:

> (b)(1) It shall be unlawful for any common carrier, subject in whole or in part to title II of this Act, to provide video programming directly to subscribers in its telephone service area, either directly or indirectly through an affiliate owned by, operated by, controlled by, or under common control with the common carrier.
>
> * * * * *
>
> (b)(4) In those areas where the provision of video programming directly to subscribers through a cable system demonstrably could not exist except through a cable system owned by, operated by, controlled by, or affiliated with the common carrier involved, or upon other showing of good cause, the Commission may on petition for waiver, waive the applicability of paragraphs (1) and (2) of this subsection. Any such waiver shall be made in accordance with section 63.56 of title 47, Code of Federal Regulations (as in effect September 20, 1984) and shall be granted by the Commission upon a finding that the issuance of such waiver is justified by the particular circumstances demonstrated by the petitioner, taking into account the policy of this subsection.

[6] CCTA also questions the impact of the security interest Pacific proposes to retain if CCC defaults. We will not at this time address the consequences of a hypothetical default. Indeed, the final form of the security interest will not be defined until after senior financing is obtained. In any event, our grant of the waiver herein is premised upon the proposal as presented by Pacific. No material change in the nature of Pacific's participation may occur without prior Commission authorization.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

The Ameritech
Operating Companies
Transmittal No. 483

Revisions to Tariff
F.C.C. No. 2

MEMORANDUM OPINION AND ORDER

Adopted: January 28, 1991; Released: January 28, 1991

By the Chief, Common Carrier Bureau:

I. BACKGROUND

1. By the captioned filing, scheduled to become effective January 29, 1991, the Ameritech Operating Companies (Ameritech) would offer a 10-digit customer identification function as an option available with 800 Access Service. Ameritech states that this function is made possible through the Common Channel Signaling (CCS) network. The option would use CCS to perform a database query. The database of 800 numbers, housed in the Service Control Point (SCP), contains information identifying the carrier to which Ameritech should route an 800 call and may also include the standard network routable number. Customers would not directly access the database and customer access to the CCS network would not be required. Rather, Ameritech would use the CCS network internally to perform the 10-digit customer identification function. Ameritech Tr. 483, Description and Justification (D&J) at 1-2.

2. The Ameritech transmittal would establish separate Local Transport rate subelements to recover the added costs Ameritech would incur in providing this service. Ameritech would apply new recurring and nonrecurring charges in addition to the normal Feature Group D per minute charges it currently assesses for 800 usage. The recurring charge would be a flat per query charge for each query issued to the database to perform the 10-digit screening function which Ameritech calls the "Data Base Query Charge." Ameritech would also assess a nonrecurring "800 Number Activation Charge" for entering each individual 800 number into the database and an "800 Number Change Charge" to change routing or customer information associated with an 800 number. *Id.* at 2.

II. PLEADINGS

A. Petitions

3. On November 15, 1990, MCI Telecommunications Corporation (MCI) filed a petition to suspend and investigate Transmittal 483 which raises various cost issues. First, MCI contends, Ameritech has not stated what separations factors it used to allocate investment and expenses associated with this filing to the interstate jurisdiction. MCI Petition at 2-3. MCI also notes that in Transmittal 396 Ameritech would recover the costs of its Signal Transfer Point (STP) port through a flat monthly charge per port. In this transmittal, however, Ameritech would recover STP port costs in its per query charge. MCI contends that users of the same equipment will thus be charged different rates and that this violates the antidiscrimination provisions of Section 202 of the Communications Act, 47 U.S.C. § 202. *Id.* at 3-4.

4. In addition, MCI argues that the cost support information Ameritech has provided is insufficient to demonstrate that the unit costs derived for this service are just and reasonable. Moreover, MCI contends, according to Ameritech's demand and revenue estimates Ameritech will recover less than 5 percent of the annual costs of the service. MCI asserts that Ameritech appears to be projecting demand of 1.8 billion queries over some unspecified period of time but has not justified this projection. *Id.* at 4-5. Finally, MCI contends that Ameritech does not demonstrate that the costs of services performed under the SCP contract are reasonable.[1] *Id.* at 5-6.

5. Allnet, in a petition to investigate Transmittal 483 filed November 15, 1990, asserts that Ameritech's tariff does not contain all relevant terms and conditions of the proposed service. Allnet argues that this constitutes a violation of Sections 202(a) and 203 of the Communications Act, 47 U.S.C. §§ 202(a), 203. Allnet Petition at 1-2. Allnet also contends that lower nonrecurring charges should apply when an interexchange carrier (IC) interacts directly with the Service Management System (SMS), as it is entitled to do, to perform these functions. *Id.* at 2-3. In any event, Allnet argues that Ameritech has provided no cost support for its nonrecurring charges. *Id.* at 3. Allnet also urges us to disallow $1.5 million in costs associated with SMS operation that Allnet claims represents Ameritech's payment to Bell Communications Research. *Id.* at 3-5.

6. Allnet further contends that it is unreasonable for Ameritech to assess the same charge per query when it does not perform 800 number translation as when it does. Allnet estimates that the cost of simply performing carrier identification is only .305 percent of the cost of a query including number translation. *Id.* at 5-6. Finally, Allnet asserts that Ameritech's query cost development fails to set forth the quantities and unit costs associated with the various cost inputs. Allnet concludes that this is a violation of Section 61.38 of the Commission's Rules, 47 C.F.R. § 61.38. *Id.* at 6.

B. Carrier Reply

7. Ameritech filed its opposition on November 26, 1990, responding that its cost support data are adequate. First, Ameritech notes, although it does not specifically state the separations factors it used in developing the rates for this service, it followed the Commission's cost accounting and separations rules. Ameritech further explains that it used a seven-year period to "levelize" costs and demand in setting rates. This process, Ameritech argues, results in a rate that will be more stable over time. Ameritech Reply at 2-4. Ameritech further notes that the costs of the SCP operator contract that it has included in its query charge are the costs associated with maintaining the national data base and updating local SCPs. *Id.* at 4-6.

8. Ameritech also dismisses petitioners' arguements. First, Ameritech states, the 800 data base query charge recovers costs of STP ports that are internal

to Ameritech's network. In contrast, the flat charge for STP access recovers costs of ports that are dedicated to one customer. Hence, Ameritech concludes, no discrimination arises from the two different cost recovery schemes. *Id.* at 6-7. Ameritech also argues that it does not discriminate against customers that do not require number translation because it incurs the same costs whether it performs number translation or not. *Id.* at 7-8.[2] Finally, Ameritech insists that it has included all relevant terms and conditions in its tariff and that agreements it has negotiated with ICs are merely intended to streamline the service ordering process, not to impose conditions on the use of the service. *Id.* at 8-10.

III. DISCUSSION

9. We reject the captioned transmittal because Ameritech has failed to provide adequate information to comply with Section 61.38 of the Commission's Rules. On the record before us, Ameritech has established no relationship between costs and its rates.

10. The critical deficiency in Ameritech's cost support is its lack of demand projections. Ameritech states that, initially, demand for 800 Access Service with the 10-digit identification function is likely to be rather small. Ameritech states that only about 20 NXXs will be able to use 10-digit customer identification while between 700 and 800 NXXs already have been assigned to ICs. Ameritech D&J at 3-4. Ameritech, however, provides no explanation or data regarding the estimates of demand underlying the unit costs it displays, its anticipated increases in demand or the specific effects of increasing demand over time. [3] For example, Ameritech provides no information concerning the number of 800 Service end users that are likely to rearrange their existing service arrangements in order to take advantage of this new option or of the amount of new demand for 800 Service using the 10-digit customer identification function that it anticipates. Nor does Ameritech provide any estimate of the number of database queries it expects to process. Presumably, Ameritech has performed some analysis that shows increasing demand over time in order to compute its "levelized" rate. None of this information is included in Ameritech's filing, however.[4] Section 61.38 of the Commission's Rules applies to this filing and requires carriers to submit estimates of the effect of tariff revisions on the carrier's traffic and revenues. Ameritech has not complied with this requirement in this case. We therefore find the captioned filing does not comply with applicable rules.

IV. ORDERING CLAUSES

11. Accordingly, IT IS ORDERED that the Ameritech Operating Companies Tariff F.C.C. No. 2, Transmittal No. 483 IS REJECTED.

12. IT IS FURTHER ORDERED that the petition to suspend and investigate filed by MCI Telecommunications Corporation and the petition to investigate filed by Allnet Communications Services, Inc. ARE DENIED.

13. IT IS FURTHER ORDERED that the Ameritech Operating Companies SHALL ISSUE revisions to their tariff no later than five business days from the release of this Order removing the rejected material and reinstating currently effective material. These revisions shall be scheduled to become effective on not less than one day's notice.

14. IT IS FURTHER ORDERED that Special Permission No. 91-074 is assigned and Sections 61.58 and 61.59 of the Commission's Rules, 47 C.F.R. §§ 61.58, 61.59, are waived for the purpose of issuing the above revisions.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Firestone
Chief, Common Carrier Bureau

FOOTNOTES

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[1] These functions include updating the SCPs throughout the nation. Ameritech D&J at 9.

[2] Moreover, Ameritech states, it will not apply a nonrecurring charge when customers interact directly with the SMS, so Allnet's concern in this regard is unfounded. *Id.* at 7.

[3] The annual unit costs of $6,483,797 provided by Ameritech, divided by the per query cost of 0.003614 suggest, as MCI notes, annual demand estimates of 1.8 billion. Ameritech, however, fails to provide an explanation for this extremely high level of demand except its statement that it expects a significant increase in demand when ICs must use its 800 database. The only demand data provided by Ameritech are in support of its estimated revenues and that data is inconsistent with of the per unit cost demand derivable from Exhibit 2 of its D&J.

[4] We note also that Ameritech has failed to develop properly its nonrecurring charges. Ameritech provides no information concerning the specific functions associated with the 800 database which presumably were identified in its study of nonrecurring costs. Nor does Ameritech derive specific costs from labor time.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

MCI COMMUNICATIONS CORPORATION.
Complainant,

v.

CINCINNATI BELL TELEPHONE COMPANY,	E-90-423
PACIFIC BELL TELEPHONE COMPANY,	E-90-424
NEVADA BELL TELEPHONE COMPANY,	E-90-425
SOUTHERN BELL TELEPHONE AND TELEGRAPH COMPANY,	E-90-426
SOUTH CENTRAL BELL TELEPHONE COMPANY,	E-90-427
NEW YORK TELEPHONE COMPANY	E-90-442
and NEW ENGLAND TELEPHONE AND TELEGRAPH COMPANY,	E-90-443

Defendants.

ORDER

Adopted: January 25, 1991; Released: February 7, 1991

By the Chief, Enforcement Division, Common Carrier Bureau:

1. On August 17, 1990, the U.S. Court of Appeals for the District of Columbia Circuit granted a petition for review of a Commission order[1] that codified the rules for calculating the rate base used to determine the interstate revenue requirement of dominant carriers.[2] Review was granted with regard to certain exclusions from the rate base mandated by the Commission, and these issues have been remanded for further consideration and explication.

2. In light of the issues raised by the Court's remand, the Commission will hold in abeyance the captioned proceedings until such time as the Commission acts upon the remand.

3. Pleading and discovery filing deadlines will also be held in abeyance.

4. This Order is effective upon adoption.

FEDERAL COMMUNICATIONS COMMISSION

Mary Beth Richards
Chief, Enforcement Division
Common Carrier Bureau

FOOTNOTES

[1] Amendment of Part 65 of the Commission's Rules to Prescribe Components of the Rate Base and Net Income of Dominant Carriers, *Report and Order*, 3 FCC Rcd 269 (1987), *recon.*, 4 FCC Rcd 1697 (1989).

[2] *Illinois Bell Tel. Co. v. FCC*, No. 88-1175 (D.C. Cir. August 17, 1990).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

CABLE & WIRELESS COMMUNICATIONS, INC.,
Complainant,

v.

NEW ENGLAND TELEPHONE AND TELEGRAPH COMPANY,	E-90-428
BELL TELEPHONE COMPANY OF PENNSYLVANIA,	E-90-429
THE CHESAPEAKE AND POTOMAC TELEPHONE COMPANIES,	E-90-430
THE CHESAPEAKE AND POTOMAC TELEPHONE COMPANY OF MARYLAND,	E-90-431
THE CHESAPEAKE AND POTOMAC TELEPHONE COMPANY OF VIRGINIA,	E-90-432
THE CHESAPEAKE AND POTOMAC TELEPHONE COMPANY OF WEST VIRGINIA,	E-90-433
THE DIAMOND STATE TELEPHONE COMPANY,	E-90-434
NEW JERSEY BELL TELEPHONE COMPANY,	E-90-435
NEW YORK TELEPHONE COMPANY,	E-90-436
CAROLINA TELEPHONE AND TELEGRAPH COMPANY,	E-90-437
INDIANA BELL TELEPHONE COMPANY,	E-90-439
MICHIGAN BELL TELEPHONE COMPANY,	E-90-440
OHIO BELL TELEPHONE COMPANY,	E-91-19
WISCONSIN BELL, INC.,	E-91-20
PACIFIC BELL TELEPHONE COMPANY,	E-91-21
NEVADA BELL TELEPHONE COMPANY,	E-91-22
SOUTHERN BELL TELEPHONE AND TELEGRAPH COMPANY,	E-91-23
SOUTH CENTRAL BELL TELEPHONE COMPANY,	E-91-24
SOUTHWESTERN BELL TELEPHONE COMPANY,	E-91-25
CINCINNATI BELL TELEPHONE COMPANY and	E-91-26
GTE SOUTHWEST, INC.,	E-91-27

Defendants.

ORDER

Adopted: January 25, 1991; Released: February 7, 1991

By the Chief, Enforcement Division, Common Carrier Bureau:

1. On August 17, 1990, the U.S. Court of Appeals for the District of Columbia Circuit granted a petition for review of a Commission order[1] that codified the rules for calculating the rate base used to determine the interstate revenue requirement of dominant carriers.[2] Review was granted with regard to certain exclusions from the rate base mandated by the Commission, and these issues have been remanded for further consideration and explication.

2. In light of the issues raised by the Court's remand, the Commission will hold in abeyance the captioned proceedings until such time as the Commission acts upon the remand.

3. Pleading and discovery filing deadlines will also be held in abeyance.

4. This Order is effective upon adoption.

FEDERAL COMMUNICATIONS COMMISSION

Mary Beth Richards
Chief, Enforcement Division
Common Carrier Bureau

FOOTNOTES

[1] Amendment of Part 65 of the Commission's Rules to Prescribe Components of the Rate Base and Net Income of Dominant Carriers, *Report and Order*, 3 FCC Rcd 269 (1987), *recon.*, 4 FCC Rcd 1697 (1989).

[2] *Illinois Bell Tel. Co. v. FCC*, No. 88-1175 (D.C. Cir. August 17, 1990).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

AMERICALL SYSTEMS
OF LOUISVILLE,
Complainant,

v.

CINCINNATI BELL TELEPHONE COMPANY,	E-91-006
SOUTH CENTRAL BELL TELEPHONE COMPANY,	E-91-007
SOUTHERN BELL TELEPHONE AND TELEGRAPH COMPANY,	E-91-008
SOUTHWESTERN BELL TELEPHONE COMPANY,	E-91-009
INDIANA BELL TELEPHONE COMPANY,	E-91-010
MICHIGAN BELL TELEPHONE COMPANY,	E-91-011
NEW YORK TELEPHONE COMPANY,	E-91-012
OHIO BELL TELEPHONE COMPANY,	E-91-013
BELL TELEPHONE COMPANY OF PENNSYLVANIA and	E-91-014
THE CHESAPEAKE AND POTOMAC TELEPHONE COMPANIES,	E-91-015

Defendants.

ORDER

Adopted: January 25, 1991; Released: February 7, 1991

By the Chief, Enforcement Division, Common Carrier Bureau:

1. On August 17, 1990, the U.S. Court of Appeals for the District of Columbia Circuit granted a petition for review of a Commission order[1] that codified the rules for calculating the rate base used to determine the interstate revenue requirement of dominant carriers.[2] Review was granted with regard to certain exclusions from the rate base mandated by the Commission, and these issues have been remanded for further consideration and explication.

2. In light of the issues raised by the Court's remand, the Commission will hold in abeyance the captioned proceedings until such time as the Commission acts upon the remand.

3. Pleading and discovery filing deadlines will also be held in abeyance.

4. This Order is effective upon adoption.

FEDERAL COMMUNICATIONS COMMISSION

Mary Beth Richards
Chief, Enforcement Division
Common Carrier Bureau

FOOTNOTES

[1] Amendment of Part 65 of the Commission's Rules to Prescribe Components of the Rate Base and Net Income of Dominant Carriers, *Report and Order*, 3 FCC Rcd 269 (1987), *recon.*, 4 FCC Rcd 1697 (1989).

[2] *Illinois Bell Tel. Co. v. FCC*, No. 88-1175 (D.C. Cir. August 17, 1990).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

CALL AMERICA INC.,
Complainant,

v.

PACIFIC BELL
TELEPHONE COMPANY,
Defendant.

File No. E-90-254

ORDER

Adopted: January 28, 1991; Released: February 7, 1991

By the Chief, Enforcement Division, Common Carrier Bureau:

1. On August 17, 1990, the U.S. Court of Appeals for the District of Columbia Circuit granted a petition for review of a Commission order[1] that codified the rules for calculating the rate base used to determine the interstate revenue requirement of dominant carriers.[2] Review was granted with regard to certain exclusions from the rate base mandated by the Commission, and these issues have been remanded for further consideration and explication.

2. In light of the issues raised by the Court's remand, the Commission will hold in abeyance the captioned proceedings until such time as the Commission acts upon the remand.

3. Pleading and discovery filing deadlines will also be held in abeyance.

4. This Order is effective upon adoption.

FEDERAL COMMUNICATIONS COMMISSION

Mary Beth Richards
Chief, Enforcement Division
Common Carrier Bureau

FOOTNOTES

[1] Amendment of Part 65 of the Commission's Rules to Prescribe Components of the Rate Base and Net Income of Dominant Carriers, *Report and Order*, 3 FCC Rcd 269 (1987), *recon.*, 4 FCC Rcd 1697 (1989).

[2] *Illinois Bell Tel. Co. v. FCC*, No. 88-1175 (D.C. Cir. August 17, 1990).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

EXECULINE OF
SACRAMENTO, INC.,
Complainant,

v.

NEVADA BELL and
PACIFIC BELL
TELEPHONE COMPANY,
Defendants.

File No. E-90-255
File No. E-90-256

ORDER

Adopted: January 28, 1991; Released: February 7, 1991

By the Chief, Enforcement Division, Common Carrier Bureau:

1. On August 17, 1990, the U.S. Court of Appeals for the District of Columbia Circuit granted a petition for review of a Commission order[1] that codified the rules for calculating the rate base used to determine the interstate revenue requirement of dominant carriers.[2] Review was granted with regard to certain exclusions from the rate base mandated by the Commission, and these issues have been remanded for further consideration and explication.

2. In light of the issues raised by the Court's remand, the Commission will hold in abeyance the captioned proceedings until such time as the Commission acts upon the remand.

3. Pleading and discovery filing deadlines will also be held in abeyance.

4. This Order is effective upon adoption.

FEDERAL COMMUNICATIONS COMMISSION

Mary Beth Richards
Chief, Enforcement Division
Common Carrier Bureau

FOOTNOTES

[1] Amendment of Part 65 of the Commission's Rules to Prescribe Components of the Rate Base and Net Income of Dominant Carriers, *Report and Order*, 3 FCC Rcd 269 (1987), *recon.*, 4 FCC Rcd 1697 (1989).

[2] *Illinois Bell Tel. Co. v. FCC*, No. 88-1175 (D.C. Cir. August 17, 1990).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

DIVERSIFIED OF
TENNESSEE, INC.,
Complainant,

v. File No. E-90-257

SOUTHERN BELL
TELEPHONE AND
TELEGRAPH COMPANY,
Defendant.

ORDER

Adopted: January 28, 1991; Released: February 7, 1991

By the Chief, Enforcement Division, Common Carrier Bureau:

1. On August 17, 1990, the U.S. Court of Appeals for the District of Columbia Circuit granted a petition for review of a Commission order[1] that codified the rules for calculating the rate base used to determine the interstate revenue requirement of dominant carriers.[2] Review was granted with regard to certain exclusions from the rate base mandated by the Commission, and these issues have been remanded for further consideration and explication.

2. In light of the issues raised by the Court's remand, the Commission will hold in abeyance the captioned proceedings until such time as the Commission acts upon the remand.

3. Pleading and discovery filing deadlines will also be held in abeyance.

4. This Order is effective upon adoption.

FEDERAL COMMUNICATIONS COMMISSION

Mary Beth Richards
Chief, Enforcement Division
Common Carrier Bureau

FOOTNOTES

[1] Amendment of Part 65 of the Commission's Rules to Prescribe Components of the Rate Base and Net Income of Dominant Carriers, *Report and Order*, 3 FCC Rcd 269 (1987), *recon.*, 4 FCC Rcd 1697 (1989).

[2] *Illinois Bell Tel. Co. v. FCC*, No. 88-1175 (D.C. Cir. August 17, 1990).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

LONG DISTANCE SERVICE
OF WASHINGTON, INC.,
Complainant.

v.

BELL TELEPHONE OF PENNSYLVANIA,	E-90-287
THE CHESAPEAKE AND POTOMAC TELEPHONE COMPANIES,	E-90-288
THE CHESAPEAKE AND POTOMAC TELEPHONE COMPANY OF MARYLAND,	E-90-289
THE CHESAPEAKE AND POTOMAC TELEPHONE COMPANY OF VIRGINIA,	E-90-290
THE CHESAPEAKE AND POTOMAC TELEPHONE COMPANY OF WEST VIRGINIA,	E-90-291
THE DIAMOND STATE TELEPHONE COMPANY,	E-90-292
NEW JERSEY BELL TELEPHONE COMPANY,	E-90-293
INDIANA BELL TELEPHONE COMPANY,	E-90-294
MICHIGAN BELL TELEPHONE COMPANY,	E-90-295
OHIO BELL TELEPHONE COMPANY,	E-90-296
NEW YORK TELEPHONE COMPANY,	E-90-297
NEW ENGLAND TELEPHONE AND TELEGRAPH COMPANY,	E-90-298
PACIFIC BELL TELEPHONE COMPANY,	E-90-299
SOUTH CENTRAL BELL TELEPHONE COMPANY, and	E-90-300
SOUTHERN BELL TELEPHONE AND TELEGRAPH COMPANY,	E-90-301

Defendants.

ORDER

Adopted: January 28, 1991; Released: February 7, 1991

By the Chief, Enforcement Division, Common Carrier Bureau:

1. On August 17, 1990, the U.S. Court of Appeals for the District of Columbia Circuit granted a petition for review of a Commission order[1] that codified the rules for calculating the rate base used to determine the interstate revenue requirement of dominant carriers.[2] Review was granted with regard to certain exclusions from the rate base mandated by the Commission, and these issues have been remanded for further consideration and explication.

2. In light of the issues raised by the Court's remand, the Commission will hold in abeyance the captioned proceedings until such time as the Commission acts upon the remand.

3. Pleading and discovery filing deadlines will also be held in abeyance.

4. This Order is effective upon adoption.

FEDERAL COMMUNICATIONS COMMISSION

Mary Beth Richards
Chief, Enforcement Division
Common Carrier Bureau

FOOTNOTES

[1] Amendment of Part 65 of the Commission's Rules to Prescribe Components of the Rate Base and Net Income of Dominant Carriers, *Report and Order,* 3 FCC Rcd 269 (1987), *recon.,* 4 FCC Rcd 1697 (1989).

[2] *Illinois Bell Tel. Co. v. FCC,* No. 88-1175 (D.C. Cir. August 17, 1990).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

TELESPHERE
NETWORK, INC.,
Complainant,

v.

NEW ENGLAND TELEPHONE AND TELEGRAPH COMPANY	File No. E-90-358
and	
NEW YORK TELEPHONE COMPANY Defendants.	File No. E-90-359

ORDER

Adopted: January 28, 1991; Released: February 7, 1991

By the Chief, Enforcement Division, Common Carrier Bureau:

1. On August 17, 1990, the U.S. Court of Appeals for the District of Columbia Circuit granted a petition for review of a Commission order[1] that codified the rules for calculating the rate base used to determine the interstate revenue requirement of dominant carriers.[2] Review was granted with regard to certain exclusions from the rate base mandated by the Commission, and these issues have been remanded for further consideration and explication.

2. In light of the issues raised by the Court's remand, the Commission will hold in abeyance the captioned proceedings until such time as the Commission acts upon the remand.

3. Pleading and discovery filing deadlines will also be held in abeyance.

4. This Order is effective upon adoption.

FEDERAL COMMUNICATIONS COMMISSION

Mary Beth Richards
Chief, Enforcement Division
Common Carrier Bureau

FOOTNOTES

[1] Amendment of Part 65 of the Commission's Rules to Prescribe Components of the Rate Base and Net Income of Dominant Carriers, *Report and Order*, 3 FCC Rcd 269 (1987), *recon.*, 4 FCC Rcd 1697 (1989).

[2] *Illinois Bell Tel. Co. v. FCC*, No. 88-1175 (D.C. Cir. August 17, 1990).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-642

In re Applications of

Silver King Broadcasting of New Jersey, Inc. For Renewal of License of Station WHSE-TV, Newark, New Jersey	BRCT-890119KG
and	
Arthur Liu For Construction Permit Newark, New Jersey	BPCT-890501KI

HEARING DESIGNATION ORDER

Adopted: November 16, 1990; Released: February 7, 1991

By the Chief, Video Services Division:

1. The Commission, by the Chief, Video Services Division, acting pursuant to delegated authority, has before it: (1) the above-captioned application for the renewal of license of Station WHSE-TV, Channel 68, Newark, New Jersey, filed by Silver King Broadcasting of New Jersey, Inc. (Silver King) and (2) the application of Arthur Liu (Liu) for a new commercial television station on Channel 68, Newark, New Jersey.

2. Liu is also the 100% owner of Multicultural Broadcasting, Inc., an applicant for a new FM station on Channel 290, Newark, New Jersey. Section 73.3555 of the Commission's Rules proscribes the ownership of a television station and a radio station in the same community. Liu has not requested a waiver. Accordingly, an appropriate issue will be specified.

3. Liu's proposed antenna is to be mounted on the tower of AM radio Station WNYC, New York, New York. Consequently, any grant of a construction permit to Liu will be conditioned to ensure that WNYC's radiation pattern is not adversely affected by the construction of the proposed station.

4. Liu proposes to operate from a site located within 250 miles of the Canadian Border with maximum visual effective radiated power (ERP) of more than 1000 kilowatts. The proposal poses no interference threat to United States television stations; however, it contravenes an agreement between the United States and Canada which limits the maximum visual ERP of the United States television stations located within 250 miles of Canada to 1000 kilowatts. Agreement Effectuated by Exchange of Notes, T.I.A.S. 2594 (1952). In the event of a grant of this application, the construction permit shall contain a condition precluding station operation with maximum visual ERP in excess of 1000 kilowatts, absent Canadian consent. South Bend Tribune, 8 R.R.2d 416 (1966).

5. Except as indicated by the issues specified below, the applicants are qualified to construct and operate as proposed. Since the applications are mutually exclusive, the Commission is unable to make the statutory finding that their grant will serve the public interest, convenience, and necessity. Therefore, the applications must be designated for hearing in a consolidated proceeding on the issues specified below.

6. Accordingly, IT IS ORDERED, That pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, to be held before an Administrative Law Judge at a time and place to be specified in a subsequent Order, upon the following issues:

> 1. In the event that Multicultural Broadcasting, Inc. is the ultimate permittee in MM Docket No. 84-131, to determine whether the application of Arthur Liu is consistent with Section 73.3555 of the Commission's Rules and, if not, whether circumstances exist which would warrant a waiver of the rule.
>
> 2. To determine which of the proposals would, on a comparative basis, better serve the public interest.
>
> 3. To determine in light of the evidence adduced pursuant to the foregoing issues, which of the applications should be granted.

7. IT IS FURTHER ORDERED, That, in the event of a grant of the application of Liu, the construction permit shall be conditioned as follows:

> Prior to construction of the tower authorized herein, permittee shall notify AM Station WNYC so that, if necessary, the AM station may determine operating power by the indirect method and request temporary authority from the Commission in Washington, D.C. to operate with parameters at variance in order to maintain monitoring point field strengths within authorized limits. Permittee shall be responsible for the installation and continued maintenance of detuning apparatus necessary to prevent adverse effects upon the radiation pattern of the AM station. Both prior to construction of the tower and subsequent to the installation of all appurtenances thereon, a partial proof of performance, as defined by Section 73.154(a) of the Commission's Rules, shall be conducted to establish that the AM array has not been adversely affected and, prior to or simultaneous with the filing of the application for license to cover this permit, the results submitted to the Commission.

8. IT IS FURTHER ORDERED, That, in the event of a grant of the application of Arthur Liu, the construction permit shall be conditioned as follows:

> Subject to the condition that operation with effective radiated power in excess of 1000 KW is subject to the consent of Canada.

9. IT IS FURTHER ORDERED, That to avail themselves of the opportunity to be heard, the applicants and party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for the hearing and present evidence on the issues specified in this Order. Each applicant shall attach to its notice of appearance a remittance of $6,760.00 as a hearing fee as required by Section 1.1104 of the Commission's Rules.

10. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

Barbara Kreisman, Chief
Video Services Division
Mass Media Bureau

FOOTNOTE

[1] Liu's application for FM channel 290 was designated for hearing, along with five competing applications, in MM Docket No. 84-131 (1984), 49 Fed. Reg. 6994 (1984). Mr. Liu was not the preferred applicant under either the initial decision or the subsequent Review Board decision. On April 28, 1989, a settlement agreement and a related petition was filed with the Commission proposing to resolve the matter. The Commission approved the settlement agreement on March 14, 1990, in which Liu's application was dismissed. *See Las Americas Communications, Inc.*, 5 FCC Rcd 1634 (1990). However, on April 16, 1990, Liu filed a "petition For Reconsideration and Restoration of Application to Hearing Status." Liu's petition and similar petitions from several of the other applicants are pending before the Commission.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-641

In re Applications of

WPIX, Inc.	File No. BRCT-890201LL

For Renewal of License of
Station WPIX(TV), New York, New York

and

CHALLENGERS OF NEW JERSEY, INC.	File No. BPCT-890501KH

For Construction Permit
New York, New York

HEARING DESIGNATION ORDER

Adopted: November 29, 1990; Released: February 7, 1991

By the Chief, Video Services Division:

1. The Commission, by the Chief, Video Services Division, acting pursuant to delegated authority, has before it the above-captioned application for the renewal of license of station WPIX(TV), New York, New York, filed by WPIX, Inc., and the mutually exclusive application of Challengers of New Jersey, Inc. (Challengers) for a new commercial television station to operate on Channel 11, New York, New York.

2. William McCreary, holds a 20% equity interest in Challengers. Mr. McCreary is a host, executive producer and vice president of television station WNYW, New York, New York. Mr. McCreary's position as a officer in WNYW raises a multiple ownership question. However, Mr. McCreary has represented to the Commission that he will terminate all connection with WNYW if Challengers is the successful applicant. Accordingly, any grant of a construction permit to Challengers will be conditioned upon Mr. McCreary's severance of all connection with station WNYW, New York, New York.

3. Challengers indicates in its application that it is in the process of obtaining financing. However, as of this date, Challengers has not amended its application to provide the required financial certification. Accordingly, Challengers will be given 20 days from date of release of this order to review its financial proposal in light of Commission requirements, to make changes that may be necessary, and if appropriate, to submit a certification to the Administrative Law Judge in the manner called for in Section III, Form 301, as to its financial qualifications. If Challengers cannot make the required certification, it shall so advise the Administrative Law Judge who shall then specify an appropriate issue.

4. Except as indicated by the issues specified below, the applicants are qualified. Since the applications are mutually exclusive, the Commission is unable to make the statutory finding that their grant will serve the public interest, convenience, and necessity. Therefore, the applications must be designated for hearing in a consolidated proceeding on the issues specified below.

5. Accordingly, IT IS ORDERED, That pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, to be held before an Administrative Law Judge at a time and place to be specified in a subsequent Order, upon the following issues.

> 1. To determine which of the proposals would, on a comparative basis, better serve the public interest.
>
> 2. To determine, in light of the evidence adduced pursuant to the foregoing issues, which of the applications should be granted.

6. IT IS FURTHER ORDERED, That in the event of a grant of Challengers of New Jersey, Inc.'s application, the construction permit shall be conditioned as follows:

> Prior to the commencement of operation of the television station authorized herein, permittee shall certify to the Commission that William McCreary has severed all connection with the licensee of television station WNYW, New York, New York.

7. IT IS FURTHER ORDERED, That Challengers of New Jersey, Inc. shall, within 20 days of the release of this Order, submit a financial certification in the form required by Section III, FCC Form 301, or advise the Administrative Law Judge that the certification cannot be made, as may be appropriate.

8. IT IS FURTHER ORDERED, That to avail themselves of the opportunity to be heard, the applicants herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for the hearing and present evidence on the issues specified in this Order. Each applicant shall attach to its notice of appearance a remittance of $6,760 as a hearing fee as required by Section 1.1104 of the Commission's Rules.

9. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a) (2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

Barbara A. Kreisman
Chief, Video Services Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-638

In re Applications of

LEIBENSPERGER FM, INC. (hereafter "Leibensperger")	File No. BPH-880812MV
SBM COMMUNICATIONS, INC. (hereafter "SBM")	File No. BPH-880816MM
HOMEWOOD ASSOCIATES (hereafter "Associates")	File No. BPH-880816MN
HOMEWOOD FM BROADCASTING (hereafter "Homewood FM")	File No. BPH-880816MV
HEIDI DAMSKY (hereafter "Damsky")	File No. BPH-880816MW
GEORGE W. BARBER, JR. (hereafter "Barber")	File No. BPH-880816MY
ROXY COMMUNICATIONS, INC. (hereafter "Roxy")	File No. BPH-880816NB
GEORGE I. O'REAR (hereafter "O'Rear")	File No. BPH-880816NL
CARTER-SIGMON, INC. (hereafter "Carter")	File Bo. BPH-880816NP
WEDA, LTD. (hereafter "WEDA")	File No. BPH-880816NR
WILLIE HUFF, DEBORAH HUFF AND ADRIENNE F. LEE, A PARTNERSHIP, d/b/a HOMEWOOD PARTNERS (hereafter "Partners")	File No. BPH-880816NU
SOUTHERN BROADCASTING LIMITED PARTNERSHIP (hereafter "Southern")	File No. BPH-880816NW
HOMEWOOD COMMUNITY BROADCASTERS, LTD. (hereafter "Homewood Community")	File No. BPH-880816OQ
PAMELA R. JONES (hereafter "Jones")	File No. BPH-880811MJ (PREVIOUSLY RETURNED)
WYSE BROADCASTING LIMITED PARTNERSHIP (hereafter "WYSE")	File No. BPH-880816MP (DISMISSED HEREIN)

For Construction Permit
for a New FM Station on
Channel 247A in
Homewood, Alabama

HEARING DESIGNATION ORDER

Adopted: December 27, 1990; Released: February 7, 1991

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.

2. *Preliminary Matters.* On August 11, 1988, Jones tendered an application on Channel 247A to serve Homewood, Alabama. That application was returned as unacceptable for filing by staff letter of April 27, 1990, for failure to fully comply with the Commission's multiple ownership and inconsistent application rules, 47 C.F.R. §§ 73.3555(a) and 73.3518.

3. On May 29, 1990, Jones timely filed a petition for reconsideration of our action returning her application. Therein, Jones asserts that the staff failed to acknowledge her contemporaneous divestiture commitment, which thus precluded dismissal of any of the applications she filed on August 11, 1988 for being in violation of the multiple ownership and inconsistent application rules. In her application for a new FM station in Lexington, Kentucky, filed on the same date as the Homewood, Alabama application, Jones made a divestiture promise to divest herself of her "minority" interest in a pending Carlsbad, New Mexico application, filed by Carlsbad Communications Partners ("Carlsbad"), *if* her application for a new station in Lexington, Kentucky was granted. Jones further asserts that: (i) the staff failed to note that her interest in the Carlsbad, New Mexico application is in the nature of a "minority" partnership interest; and (ii) by failing to note the divestiture promise and the "minority" nature of Jones' interest in Carlsbad, the staff wrongly concluded that Jones' Homewood, Alabama application, which she

filed as a sole proprietor, and the Carlsbad, New Mexico application, in which she is a "minority" general partner, were inconsistent within the meaning of *Big Wyoming Broadcasting Corp.* 2 FCC Rcd 3493 (1987). Jones also claims that her Homewood, Alabama application and the Carlsbad, New Mexico application are not "inconsistent" within the meaning of Section 73.3518 of the Commission's rules because---by definition---two applications are "inconsistent" only if one may not be granted; and there is no violation of that Section if a timely promise to divest an interest will prevent any potential multiple ownership rule violation.

4. Initially, we note that Jones' argument that her timely promise to divest interest cured any potential multiple ownership rule violation is misplaced. Her promise to divest interest in the Lexington, Kentucky application was clearly a contingent promise to divest. Such an equivocal promise to divest interest in a pending application does not cure the violation of the inconsistent application rule occasioned by the filing of the Homewood application. We reaffirm our conclusion that Jones' filing of the instant application is in violation of the Commission's multiple ownership and inconsistent application rules, 47 C.F.R. §§ 73.3555(a) and 73.3518, as they have been applied under our current FM "hard look" processing procedures. *See Report and Order* in MM Docket No. 84-750, 50 Fed. Reg. 19936, 19940 (May 13, 1985). Paragraph 24 of the *Report and Order* in MM Docket No. 84-750, *supra*, indicates that:

> As an additional component of our "hard look" approach, we reiterate our position with respect to multiple applications. Applicants will not be permitted to "flood the Commission's processing line and hearing docket with multiple applications, many of which could not be granted under our multiple ownership rules." *Storer Broadcasting CO.*, 43 FCC 1254, 1256 (1953). Accordingly, we shall regard Section 73.3555 as establishing the maximum number of applications acceptable for filing by an applicant. Applications tendered in excess of this number shall be considered inconsistent with Section 73.3518 and returned as unacceptable for filing. In this regard, we note that stations in which the applicant currently holds a *cognizable* interest would be taken into account in determining the maximum number of acceptable applications. [27] (emphasis supplied)
>
> [27] In the event that multiple applications exceeding the prescribed limits are filed on the same day, the Commission will sequentially consider them in whatever order they are reached on the processing line until the multiple ownership limit is reached. Any remaining applications will be returned.

It is clear from the above statement that the Commission intended that under the "hard look" processing criteria no applicant having a cognizable, *i.e* attributable, interest in either existing facilities or pending applications will be permitted to file any additional applications which would exceed the multiple ownership rule attributable limit.

5. We realize that pre- "hard look" policies as set forth in *Big Wyoming* and the cases cited therein enabled FM applicants to file in excess of the multiple ownership rule limits so long as the pertinent party held less than a majority of the voting stock in applications above the allowable limit. However, we believe it clear that the Commission, under the "hard look" processing standards, intended to close this loophole, which enabled applicants holding an attributable interest in more than 12 applications to have others pending without triggering the inconsistent application and multiple ownership rules. Jones' interpretation, taken to its logical extreme, would mean that she could have filed as a 49% general partner in each of the nearly 1400 filing windows opened since the inception of the hard look processing standards. This is a patently absurd result.

6. It is well established that the Commission may change a prior policy or standard if a reasoned analysis for such change is provided.

> An agency's view of what is in the public interest may change either with or without a change in circumstances. But an agency changing its course must supply a reasoned analysis indicating that prior policies and standards are being deliberately changed, not casually ignored, and if an agency glosses over or swerves from prior precedents without discussion it may cross the line from the tolerably terse to the intolerably mute.

Greater Boston Television Corporation v. FCC, 444 F. 2d 841, 852 (D.C. Cir. 1983). The reasoned analysis for the changes wrought by the "hard look" processing system has been often stated:

> First, the reduction of frivolous and speculative applications will enable [the Commission] to expedite the processing of applications tendered by serious candidates who are "ready, willing and able" to rapidly bring service to the public. Secondly, streamlining our processing procedures will minimize the Commission's administrative costs, enabling us to make more efficient use of our limited staff and other resources. These benefits are critical to making the window filing and "first come/first serve" process work smoothly and with minimal delay in processing large numbers of applications. *Report and Order*, 50 Fed. Reg. at 19940.

Star Signal Corporation, 1 FCC Rcd 450, 451 (1986). Processing numerous applications which are not grantable under the multiple ownership rules disserves each of these "hard look" goals.

7. The United States Court of Appeals for the District of Columbia Circuit in an analogous context has stated:

> The Commission, in an intervening proceeding, has determined that the policy previously applied in cases like this one no longer serves the public interest, convenience and necessity, and therefore will not be applied henceforth. We hold that in such circumstances an agaency cannot be required to apply a policy it has rejected. Such a requirement would amount to a command to the agency to disregard its statutory mandate: it would have to employ a policy that, by its own determination, did not serve the public interest.

Washington Association for Television and Children v. FCC, 665 F. 2d 1264, 1268 (D.C. Cir. 1981) (footnote omitted); *see also*, *Arnold L. Chase* (*WTIC-TV*), 5 FCC Rcd 1642, 1646 (1990) (application of a subsequently adopted waiver standard). We believe that the court's rationale is equally applicable in this case. *Big Wyoming* did not interpret the Commission's multiple ownership rules in light of the attribution standards adopted in *Attribution of Ownership Interests*, 97 FCC 2d 997 (1984), *reconsidered in part* 58 RR 2d 604 (1985), *further reconsidered*, 1 FCC Rcd 802 (1986).[1] Neither did *Big Wyoming* purport to interpret the "hard look" processing standards in this regard. Rather, *Big Wyoming* spoke only to policies which were in effect at the time (1983) of the filing of the applications in question. Thus, the cases cited by Jones to substantiate her claim that she was not in violation of the inconsistent application rule do not support that contention. When Jones filed the Homewood, Alabama application, she had cognizable interests in 12 other applications.[2] Therefore, this application, her thirteenth, must be dismissed pursuant to Paragraph 24 of the *Report and Order* in Docket 84-750. Accordingly, Jones' petition for reconsideration will be denied.

8. On February 27, 1990, WYSE filed a notice of voluntary dismissal of its application. WYSE also provided the staff with a declaration, dated February 4, 1990, made under penalty of perjury, that neither WYSE, nor any of its general or limited partners have been paid or promised any money or any other consideration whatsoever in connection with the voluntary dismissal of its application for Homewood, Alabama. Because WYSE has complied with 47 U.S.C. § 311(c)(3) and 47 C.F.R. § 73.3525(a), its application will be dismissed herein.

9. Homewood Community's application proposes facilities of 1.60 kW effective radiated power (ERP) at an antenna height above average terrain (HAAT) of 153 meters. However, the staff's engineering review indicates that this ERP/HAAT combination exceeds the 3.0 kW ERP/100 meter HAAT limit for a class A station.[3] For the proposed 153 meter HAAT, the staff has determined that the ERP must be limited to 1.30 kw in order to achieve facilities equivalent to 3.0 kw ERP/100 m HAAT. In this case, the discrepancy is neither a tenderability nor an acceptability defect insofar as the the minimal nature of the defect appears attributable to the imprecision inherent in manually asertaining from the Commision's propagation curves that exact radiation value corresponding to the maximum permitted under the rules. Accordingly, Homewood community must amend its application within 30 days of the release of this *Order* to specify an effective radiated power of 1.30 kW.

10. *Roxy*. An engineering study of Roxy's application reveals a discrepancy in the tower height above ground level (AGL) and above mean sea level (AMSL), in Section V-B, Item 7. The application shows the overall tower height to be 91 meters AGL and 402 meters AMSL. The Commission's records show the tower height to be 121.3 meters AGL and 432.2 meters AMSL. Since this is an existing tower on file with the Commission, the discrepancy is neither a tenderability nor an acceptability defect. Accordingly, Roxy will be required to correct the AGL and AMSL values listed in Section V-B, Item 7.

11. Homewood FM does not indicate whether its main studio will be inside or outside the proposed 3.16 mV/m contour, as required by 47 C.F.R. § 73.1125. Accordingly, an issue will be specified.

12. Information before the Commission indicates that Leibensperger was organized and is affiliated with Sonrise Management Services ("Sonrise"). Sonrise has been the subject of numerous "real party-in-interest" issues added by presiding Administrative Law Judges in a number of mutually exclusive proceedings. For example, issues concerning Sonrise have been designated in each of the following proceedings:

City/State	Docket No.
Solona, Florida	87-464
Rockledge, Florida	87-556
Silver Springs, Florida	88-119
East Ridge, Tennessee	88-122
Des Moines, Iowa	88-238
Nags Head, North Carolina	88-277
Tyler, Texas	88-280
Raleigh, North Carolina	88-306
Sedona, Arizona	88-335
Mableton, Georgia	88-400
Evansville, Indiana	88-403
Swanton, Ohio	88-432
Atlantic City, New Jersey	88-433

Identical issues were specified in each of these proceedings: whether or not Sonrise was a real party-in-interest in the subject applicant, whether or not the applicant's organizational structure was a sham, and the effect thereof on the applicant's qualifications to be a Commission licensee. In each of the proceedings listed above, the Sonrise-affiliated applicant has dismissed its application rather than resolving these issues. These unresolved issues call into question Leibensperger's qualification to be a Commission licensee. Therefore, such issues will be specified and tried against Leibensperger's in this proceeding.

13. Debra Ann Brennan, sole principal of Roxy, is a marketing consultant for Radio station WKXX(FM), Birmingham, Alabama. Birmingham and Homewood are in close enough proximity that Ms. Brennan's ownership interest in this facility and her management interest in WKXX(FM) could violate the Commision's cross-interest policy. However, Ms. Brennan has indicated her intent to terminate her relationship with station WKXX(FM) in the event of grant of the referenced application. Accordingly, in the event of grant of Roxy's application, Ms. Brennan will be required to sever connections with station WKXX(FM), Birmingham, Alabama prior to the commencement of program test authority.

14. *Financial*. The material submitted by the applicants below does not demonstrate their financial qualifications. Accordingly, an issue will be specified concerning the following deficiencies.

APPLICANT	DEFCIENCY
WEDA	Applicant certifies that it is not financially qualified, but will secure such a committed source and will amend its application at the appropriate time to reflect this fact. No amendment was filed.
Partners	Applicant certifies that it is not financially qualified, but is in the process of obtaining appropriate financing and will amend this application when the process is complete. No amendment was filed.

15. It should be noted that due to the late tenderability period opened on May 7, 1990 by applicant Homewood Community, various amendments filed by the competing applicants, which otherwise would have been late-filed, will be considered filed as of right, and therefore will be afforded full comparative advantage. *See Memorandum Opinion and Order*, reconsideration in Docket 84-750, 50 Fed. Reg. 43517 (1985).

16. Attempts to obtain FAA clearance through the Commission's Antenna Survey Branch, Homewood FM, Roxy, and Carter-Sigmon have been unsuccessful. Accordingly, since no determination has been received as to whether the antennas proposed by Homewood FM, Roxy, and Carter-Sigmon would constitute a hazard to air navigation, an issue with respect to each applicant will be included and the FAA made a party to the proceeding.

17. Section II, Item 4 (old form) of FCC Form 301 (October 1986) requires that an applicant specify its address (number, street, city, state) as well as the home address of each of its principals. SBN has not completed Item 4 correctly. SBM's application gives a post office box number as the residence address for William G. Brown, Clifton G. Moor and James E. Martin, Jr. Accordingly, SBM must submit an amendment which gives all the information required by Section II, Item 4 to the presiding Administrative Law Judge after this Order is released.

18. Data submitted by the applicants indicate there would be significant difference in the size of the areas and populations which would receive service from the proposals. Consequently, the areas and populations which would receive FM service of 1 mV/m or greater intensity, together with the availability of other primary aural services in such areas, will be considered under the standard comparative issue for the purpose of determining whether a comparative preference should accrue to any of the applicants.

19. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

20. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine whether Sonrise Management Services, Inc. is an undisclosed party to the application of Leibensperger.

2. To determine whether Leibensperger's organizational structure is a sham.

3. To determine, from the evidence adduced pursuant to Issues 1 through 2 above, whether Leibensperger possesses the basic qualifications to be a licensee of the facilities sought herein.

4. To determine, with respect to WEDA and Partners, whether the applicants are financially qualified.

5. To determine, pursuant to Section 73.1125, whether good cause exists for the proposed location of its main studio outside the station's 3.16 mV/m contour by Homewood FM.

6. To determine whether there is a reasonable possibility that the tower height and location proposed by Homewood FM, Roxy, and Carter-Sigmon would constitute a hazard to air navigation.

7. To determine which of the proposals would, on a comparative basis, best serve the public interest.

8. To determine, in light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

21. IT IS FURTHER ORDERED, That the petition for reconsideration filed by Pamela R. Jones IS DENIED.

22. IT IS FURTHER ORDERED, That the application of WYSE is hereby DISMISSED.

23. IT IS FURTHER ORDERED, That in accordance with paragraph 10 hereinabove, Roxy shall submit the corrected information to the presiding Administrative Law Judge within 30 days of the release of this Order, with a copy to the Chief Audio Services Division.

24. IT IS FURTHER ORDERED, That Homewood Community shall file an amendment specifying an effective radiated power of 1.30 kW with the presiding Administrative Law Judge within 30 days of the release of this Order.

25. IT IS FURTHER ORDERED, That in the event of grant Roxy's application, Debra Ann Brennan shall divest herself of all interests in and sever all connections with Station WKXX(FM), Birmingham, Alabama, prior to the commencement of program test authority.

26. IT IS FURTHER ORDERED, That the Federal Aviation Administration IS MADE A PARTY to this proceeding with respect to the air hazard issue only.

27. IT IS FURTHER ORDERED, That SBM shall submit an amendment which contains the information required by Section II, Item 4 (old form) of FCC Form 301, to the presiding Administrative Law Judge within 30 days after the release of this Order.

28. IT IS FURTHER ORDERED, That a copy of each document filed in this proceeding subsequent to the date of adoption of this Order shall be served on the counsel of record in the Hearing Branch appearing on behalf of the Chief, Mass Media Bureau. Parties may inquire as to the identity of the counsel of record by calling the Hearing Branch at (202) 632-6402. Such service shall be addressed to the named counsel of record, Hearing Branch, Enforcement Division, Mass Media Bureau, Federal Com-

munications Commission, 2025 M Street, N.W., Suite 7212, Washington, D.C. 20554. Additionally, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall also be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Federal Communications Commission, Room 350, 1919 M Street, N.W., Washington, D.C. 20554.

29. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

30. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

FOOTNOTES

[1] We must point out that the *Attribution* orders did not alter the Commission's treatment of general partnership intersts, which traditionally have been attributable under the multiple ownership rules. 97 FCC 2d at 1022. However, paragraph 24 of the *Report and Order* in Docket 84-750 for the first time makes the application of the inconsistent application and multiple ownership rules hinge on attribution rather than majority control of corporations.

[2] These were: Modesto, California (BPH-880301OY); Carlsbad, New Mexico (BPH-880323MK); Fort Wayne, Indiana (BPH-880421MR); Olathe, Kansas (BPH-880421NK); Macon, Georgia (BPH-880421NL); Virginia Beach, Virginia (BPH-880505NR); Bixby, Oklahoma (BPH-880602OK); Roanoke, Virginia (BPH-880602OL); Brownsburg, Indiana (BPH-880725MF); Ellettsville, Indiana (BPH-880725ML), Dismissed August 2, 1990; Lexington, Kentucky (BPH-880811MG); and Bethalto, Illinois (BPH-880811MP), Dismissed May 17, 1990.

[3] At the time of filing, 47 C.F.R. § 73.211 did not permit a Class A station to exceed the equivalent of 3.0 kw ERP/100 m HAAT. The *Second Report and Order* in Docket 88-375, 4 FCC Rcd 6375 (1989) mofified the maximum Class A limit to 6.0 kw ERP/100 m HAAT for those Class A Stations meeting increased spacing restrictions adopted for 47 C.F.R. § 73.207. However, this application is not entitled to be considered under the revised rules (due to a new 3.2 km short-spacing that would be created to construction permit BPH-860903MI, held by WKZM, Dadeville, Alabama) and is therefore limited to maximum facilities of 3.0 kw ERP/100 m HAAT per 47 C.F.R. § 73.213(c).

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: February 7, 1991

CINCINNATI BELL FILES REVISIONS TO ITS COST ALLOCATION MANUAL

PUBLIC COMMENT INVITED

On January 2, 1991, Cincinnati Bell filed proposed revisions to the cost categories of its permanent cost allocation manual for the separation of regulated and unregulated costs. Parties may file comments on the proposed revisions to the cost manual no later than **March 1, 1991.** Replies should be filed by **March 18, 1991.** A copy of each pleading should be sent to Ed Dashkin, FCC, Common Carrier Bureau, 2000 L Street, N.W., Room 812, Washington, D.C. 20554 and to Downtown Copy Center (DCC), 1114 21st Street, N.W., Washington, D.C. 20036, (202) 452-1422. Copies are available for public inspection and copying in the Accounting and Audits Division public reference room 2000 L Street, N.W., Room 812, Washington, D.C. Copies are also available from DCC.

For further information contact Ed Dashkin, (202) 634-1861.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

PR Docket No. 90-205

In the Matter of

Amendment of Part 80 of the Rules to recognize the North Pacific Marine Radio Council (NPMRC) as the frequency coordinator for the Puget Sound Area and to establish procedures for recognizing frequency coordinators in the future.	RM No. 6886

REPORT AND ORDER

Adopted: January 22, 1991; Released: February 7, 1991

By the Commission:

I. INTRODUCTION

1. This Report and Order amends the Maritime Services Rules, 47 C.F.R. Part 80, to recognize the North Pacific Marine Radio Council (NPMRC) as the frequency coordinating committee for very high frequency (VHF) private coast stations located in the Puget Sound area and establishes procedures for recognizing frequency coordinators in the future.

II. BACKGROUND

2. On April 10, 1990, we adopted a *Notice of Proposed Rule Making* in the above captioned proceeding, 5 FCC Rcd 2461, which proposed recognizing NPMRC as the frequency coordinator for the Puget Sound area. Marine VHF frequencies in areas with significant boating activity are congested. Congestion in these areas is especially heavy on frequencies available for private coast stations because these frequencies are available on a shared basis, are limited in number, and are used by a large group of eligibles.[1] The Commission's Rules allow for the recognition of frequency coordinating committees to assist applicants for private coast stations in requesting frequencies that will result in the least amount of interference to other proposed and existing stations.[2] Further, while there is no general coordination requirement for licensing private coast stations, applicants desiring to locate in an area served by a Commission recognized frequency coordinating committee must submit with their license applications a report indicating the degree of probable interference. The report may be based on their own field studies or on statements from the frequency coordinating committee. [3]

3. Under the current rules, organizations desiring to be recognized as frequency coordinating committees must submit their requests to the Commission. Such requests must describe the composition of the committee, the area to be coordinated, and how the organization is representative of all persons who are eligible for VHF private coast stations in the area in question.[4] To date, the Commission has recognized one such coordinating committee, the Southern California Marine Radio Council (SCMRC), for the heavily congested Southern California area.[5]

III. DISCUSSION

4. NPMRC filed the only comments received in this proceeding. No reply comments were filed. NPMRC points out that the private coast station channels in the Puget Sound area are heavily congested, with approximately 400 private coast stations currently licensed in the area. The benefits of employing frequency coordinating committees to minimize interference in areas where many users operate on shared frequencies, as is the case here, are well recognized. Our experience with coordinating private coast stations in the Marine Services supports employing such committees in the frequency selection process in other congested areas.[6] Further, we have NPMRC's showing, which indicates that NPMRC is representative of private coast station users in the area.[7] Finally, applicants have an alternative to going through a frequency coordinator. In lieu of submitting its application through NPMRC, an applicant may at its option submit a report, based on a field study, indicating the degree to which a grant of its application would cause interference to existing stations operating in the area.[8] For these reasons, we are amending Section 80.514 of the Rules, 47 C.F.R. § 80.514, to specify NPMRC as the marine VHF frequency coordinating committee for private coast stations operating in the following counties in the State of Washington: Clallam, Island, Jefferson, King, Kitsap, Mason, Pierce, San Juan, Skagit, Snohomish, Thurston, and Whatcom.

5. We are also adopting new procedures for recognizing coordinating committees. If the demand for private coast stations continues to increase, we anticipate receiving additional requests from organizations for recognition as frequency coordinating committees. In fact, the rapidly increasing demand for marine communications coupled with the increasing sophistication in technology may make coordination in the future more necessary if licensees are to continue operating in an efficient manner. Because coordinating committees can provide valuable assistance in the licensing process, and because applicants will have an alternative method of meeting coordination requirements (*i.e.*, a field study), we see no need to conduct a rule making proceeding for every request for recognition as a frequency coordinating committee for private coast stations. We are, therefore, establishing procedures for processing future requests for recognition as frequency coordinating committees. We will place all such requests on public notice and allow thirty days for comments. If the organization meets the provisions of Section 80.513(c)(2) and no substantive issues are raised in comments, a notice and comment proceeding will be considered unnecessary. The Chief, Private Radio Bureau, may, under delegated authority, issue an order adding the organization to the list of recognized coordinating committees under Section 80.514. Section 0.331 of the Commission's Rules will be amended to permit such action under delegated authority. If, however, substantive issues or novel questions of policy or law are raised in the public notice period, the matter will be referred to the

full Commission. Because this amendment relates to agency organization and procedure, notice and comment procedures are unnecessary. *See* 5 U.S.C. § 553(b)(3)(A).

IV. FINAL REGULATORY FLEXIBILITY ANALYSIS

6. Pursuant to the Regulatory Flexibility Act of 1980 (Pub. L. 96-354), our final analysis is as follows:

7. *Reasons for Action.* This action is being taken to coordinate VHF frequency assignments of private coast stations in the Puget Sound area.

8. *Objectives.* This action will reduce interference to new and existing private coast stations.

9. *Legal Basis.* The proposed action is authorized under Sections 4(i) and 303(f) and (r) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 303(f) and (r).

10. *Reporting, Recordkeeping and Other Compliance Requirements.* Private coast station applicants are now being required to include in their applications for new or modified stations a field study or a statement from the recognized frequency coordinating committee. Currently, frequency coordination is not required in the Puget Sound area.

11. *Federal Rules which Overlap, Duplicate, or Conflict with this Rule.* None.

12. *Description, Potential Impact, and Number of Small Entities Involved.* The only impact of this action will be on private coast station applicants and licensees. While the requirement is an incremental addition to the application, the Commission expects the proposals to be beneficial to small entities in light of the reduced interference potential. There are currently approximately 400 licensees providing private coast station service in the Puget Sound area.

13. *Any Significant Alternatives Minimizing the Impact on Small Entities and Existing Licensees and Consistent with the Stated Objective.* The applicant will have the option of submitting a field study report as an alternative to obtaining a frequency coordination recommendation from a recognized frequency coordinating committee.

14. The rules contained herein have been analyzed with respect to the Paperwork Reduction Act of 1980 and found to impose no new information collection requirements on the public and will not increase or decrease burden hours imposed on the public.

V. ORDERING CLAUSES

15. Accordingly, IT IS ORDERED that, effective **March 22, 1991,** Parts 0 and 80 of the Commission's Rules, 47 C.F.R. Parts 0 and 80, ARE AMENDED as set forth below. Authority for this action is found in Sections 4(i) and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i) and 303(r).

16. IT IS FURTHER ORDERED that a copy of this Report and Order be sent to the Chief Counsel for Advocacy of the Small Business Administration.

17. IT IS FURTHER ORDERED that this proceeding is TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX

Part 0 of Chapter 1 of Title 47 of the Code of Federal Regulations is amended as follows:

PART 0 - COMMISSION ORGANIZATION

1. The authority citation for Part 0 continues to read as follows:

AUTHORITY: Secs 5, 48 Stat. 1068, as amended; 47 U.S.C. 155.

2. Section 0.331(a)(1) is amended by adding a new sentence at the end to read as follows:

§ 0.331 Authority delegated.

(a) * * *

(1)*** Also, the addition of new Marine VHF frequency coordinating committee(s) to Section 80.514 of the Rules need not be referred to the Commission if they do not involve novel questions of policy or law.

* * * * *

Part 80 of Chapter 1 of Title 47 of the Code of Federal Regulations is amended as follows:

PART 80 - STATIONS IN THE MARITIME SERVICES

1. The authority citation for Part 80 continues to read as follows:

AUTHORITY: Secs. 4, 303, 48 Stat. 1066, 1082, as amended; 47 U.S.C. 154, 303, unless otherwise noted. Interpret or apply 48 Stat. 1064-1068, 1081-1105, as amended; 47 U.S.C. 151-155, 301-609; 3 UST 3450, 3 UST 4726, 12 UST 2377, unless otherwise noted.

2. Section 80.514 is amended by adding a new paragraph (b) to read as follows:

§ 80.514 Marine VHF frequency coordinating committee(s).

* * * * *

(b) The North Pacific Marine Radio Council serves the following counties in the State of Washington: Clallam, Island, Jefferson, King, Kitsap, Mason, Pierce, San Juan, Skagit, Snohomish, Thurston, and Whatcom.

FOOTNOTES

[1] Private coast stations serve the operational, maritime control, and business needs of ships by providing a ship-to-shore communications service. They are not open to public correspondence. *See* Section 80.5 of the Rules, 47 C.F.R. § 80.5.

[2] The functions of such coordinating committees are purely advisory and any recommendations are not binding on either applicants or the Commission. *See* Section 80.513(c)(2) of the Rules, 47 C.F.R. § 80.513(c)(2).

[3] *See generally* Section 80.513 of the Rules, 47 C.F.R. § 80.513.

[4] 47 C.F.R. § 80.513(c)(2).

[5] 47 C.F.R. § 80.514(a).

[6] For example, the Southern California Marine Radio Council is the Commission-recognized coordinator for private coast stations in the Southern California area. We are not aware of any serious problems resulting from its coordination efforts.

[7] In the past the Commission has placed special emphasis on coordinating committees being representative of the end users. *See* Report and Order, PR Docket 83-737, 51 Fed. Reg. 14993 (April 22, 1986).

[8] *See* Section 80.513(a) of the Rules, 47 C.F.R. § 80.513(a).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-11

In re Applications of

James W. Johnson (hereafter "Johnson")	File No. BPH-890927MD
Jo-Lo Broadcasting (hereafter "Jo-Lo")	File No. BPH-890927MF
Richard H. Riggs and Charles H. Hutchinson (hereafter "Riggs")	File No. BPH-890928ME
James E. Browne (hereafter "Browne")	File No. BPH-890928MG
Englewood Broadcasting, Inc. (hereafter "EBI")	File No. BPH-890928MH
The CrossChannels Group, Inc. (hereafter "CrossChannels")	File No. BPH-890928MI
LC Communications Group, Inc. (hereafter "LC Communications")	File No. BPH-890928MK
Voice For Christ Interdenonimational Church (hereafter "Christ")	File No. BPH-890928ML
Central Broadcasting Company, A Limited Partnership (hereafter "Central")	File No. BPH-890928MM
Knight Radio, Inc.	File No. BPH-890927ME (HEREIN DISMISSED)

For Construction Permit
for a New FM Station
on Channel 233A (94.5 MHz)
in Englewood, Ohio

HEARING DESIGNATION ORDER

Adopted: January 25, 1991; Released: February 7, 1991

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.

2. *Knight*. Knight asked for dismissal of its application pursuant to a request dated May 1, 1990. The request included a declaration, as provided for in Section 73.3525(c) of the Commission's Rules, 47 C.F.R. Section 73.3525(c), that no consideration has been promised or received by Knight in connection with its withdrawal. Accordingly, Knight's application will be dismissed pusuant to Section 73.3568 of the Rules, 47 C.F.R. Section 73.3568(a).

3. *Riggs*. Riggs indicated in its application, Section III, Item 2, that it estimates the total funds necessary to construct and operate the requested facility for three months without revenue at $180,000. In response to Item 3, Riggs indicated that the Huntington National Bank, Lima, Ohio, is the source of $100,000 of such funds. Riggs did not account for the source of the additional $80,000. Exhibit 8 to the application, a copy of a letter from the referenced bank, indicated (1) that one of Riggs' principals, Charles Hutchinson, had an unsecured line of credit for an undisclosed amount and (2) that the other principal, Richard Riggs, has a $60,000 line of credit.

4. The Commission has strengthened its financial certification requirements in the context of its *Report and Order* in General Docket No. 88-328 to insure that applicants have carefully considered their financial qualifications. *In the Matter of Revision of Application for Construction Permit for Commercial Broadcast Station (FCC Form 301)*, 4 FCC Rcd 3853 (1989). In so doing, the Commission amended Section II of Form 301, asking applicants (1) to state the total estimated funds necessary to construct and operate for three months without revenue and (2) to state the source of such funds. 4 FCC Rcd at 3859. At the same time, the Commission directed its staff to designate an appropriate issue against an applicant to be resolved in the hearing process in situations where there exists a "facial quantitative deficiency," such as "failing to identify adequate funding sources to cover the estimated costs." 4 FCC Rcd at 3859. Accordingly, insofar as Riggs fails to identify funding sources for the stated estimated costs of construction and operation, an issue will be designated.

5. The applicants below have petitioned for leave to amend their applications on the dates shown. The accompanying amendments were filed after the last date for filing amendments as of right. Under Section 1.65 of the Commission's Rules, the amendments are accepted for filing. However, an applicant may not improve its comparative position after the time for amendments as of right has passed. Therefore, any comparative advantage resulting from the amendments will be disallowed.

APPLICANT	AMENDMENT FILED
Johnson	December 18, 1990
CrossChannels	June 5, 1990

6. *EEO*. In response to Section VI, FCC Form 301, Jo-Lo and Central indicated that they will employ five or more full-time employees. Pursuant to 47 C.F.R. § 73.2080(c), each applicant is required to submit an Equal Employment Opportunity (EEO) Program in compliance with the provisions of the rules as set forth in FCC Form 396A, the five-point Model EEO Program. The EEO programs submitted by Jo-Lo and Central are deficient in that they fail to identify at least one female-oriented and one minority recruitment source, respectively.[1] Accordingly, Jo-Lo and Central will be required to file amended EEO programs with the presiding Administrative Law Judge within 30 days of the release of this Order.

7. Since no determination has been received from the Federal Aviation Administration as to whether the antennae proposed by Johnson, by Jo-Lo, by Browne, by LC Communications, or by Christ would constitute a hazard to air navigation, an issue with respect thereto will be included and the F.A.A. made a party to the proceeding.

8. Data submitted by the applicants indicate there would be significant difference in the size of the areas and populations which would receive service from the proposals. Consequently, the areas and populations which would receive FM service of 1 mV/m or greater intensity, together with the availability of other primary aural services in such areas, will be considered under the standard comparative issue for the purpose of determining whether a comparative preference should accrue to any of the applicants.

9. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

10. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

> 1. To determine whether there is a reasonable possibility that the tower height and location proposed by Johnson, by Jo-Lo, by Browne, by LC Communications, or by Christ would constitute a hazard to air navigation.
>
> 2. To determine with respect to Riggs, whether the applicant is financially qualified.
>
> 3. To determine which of the proposals would, on a comparative basis, best serve the public interest.
>
> 4. To determine, in light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

11. IT IS FURTHER ORDERED, That the application of Knight Radio, Inc. IS DISMISSED.

12. IT IS FURTHER ORDERED, That the petitions for leave to amend filed by Johnson and CrossChannels ARE GRANTED, and the corresponding amendments ARE ACCEPTED to the extent indicated herein.

13. IT IS FURTHER ORDERED, That within 30 days of the release of this Order, Jo-Lo and Central shall submit Section VI information in accordance with the requirements of Section 73.2080(c) of the Commission's Rules to the presiding Administrative Law Judge.

14. IT IS FURTHER ORDERED, That the Federal Aviation Administration IS MADE A PARTY to this proceeding with respect to the air hazard issue only.

15. IT IS FURTHER ORDERED, That a copy of each document filed in this proceeding subsequent to the date of adoption of this Order shall be served on the counsel of record in the Hearing Branch appearing on behalf of the Chief, Mass Media Bureau. Parties may inquire as to the identity of the counsel of record by calling the Hearing Branch at (202) 632-6402. Such service shall be addressed to the named counsel of record, Hearing Branch, Enforcement Division, Mass Media Bureau, Federal Communications Commission, 2025 M Street, N.W., Suite 7212, Washington, D.C. 20554. Additionally, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall also be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Federal Communications Commission, Room 350, 1919 M Street, N.W., Washington, D.C. 20554.

16. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

17. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

FOOTNOTE

[1] An organization which Jo-Lo lists as a recruitment source, the Ohio State Administrative Services Division of Equal Employment-Minority Business Office, Central State University, Wilberforce, Ohio, is unfamiliar to the staff as a source of female recruitment. Organizations listed by Central, the Nat. Media Coalition, Central State University, and Professional Women's Organization, are unfamiliar to the staff as sources of minority recruitment. In the event that these organizations satisfy the female and minority recruitment requirements, Jo-Lo and Central may amend their EEO programs to describe them.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

National Exchange Carrier Association, Inc. — Transmittal No. 425

Revisions to Tariff F.C.C. No. 5

ORDER

Adopted: January 29, 1991; Released: January 29, 1991

By the Chief, Common Carrier Bureau:

I. INTRODUCTION

1. On November 1, 1990, National Exchange Carrier Association, Inc., filed Transmittal No. 425, to revise its carrier common line (CCL) rates through June 30, 1991. On November 16, 1990, MCI Telecommunications Corporation (MCI) filed a petition to reject or, in the alternative, suspend and investigate Transmittal 425. On November 16, 1990, American Telephone and Telegraph Company (AT&T) filed a petition regarding the January 1, 1991 Access Tariff Revisions and Transmittal No. 425. NECA filed its reply on November 29, 1990. Transmittal 425 is scheduled to become effective on January 30, 1991. For the reasons discussed below, we reject Transmittal 425.

II. BACKGROUND

2. NECA states that the CCL rate increases reflect higher common line (CL) cost trends not anticipated by NECA in its recent Annual Filing.[1] Description and Justification, Transmittal 425, at 1. This transmittal would result in increases of $1.5 million in NECA pool carrier common line charges and $33.9 million in Long Term Support. The basis for the revised cost projections is the submission of cost company revenue requirement estimates for the 1989 past year cost of service (PYCOS), and for the July 1990 through June 1991 test period forecasts. At the time NECA submitted its Annual Filing it did not have final settlement data for 1989, and relied on 1988 cost studies. *Id.* at 3. Since that time NECA has received over two hundred 1989 cost studies. According to NECA, the new studies show that the Annual Filing underestimated both the 1989 PYCOS cost company revenue requirements and the 1990 and 1991 forecasted growth rates and cost levels. *Id.* at 4. The filing also reflects revised estimates for other billing and collection (OB&C) expenses assigned to the CL element for 1989, 1990, and 1991. *Id.* at 5.

3. According to NECA, factors contributing to the increased costs shown in the 1989 studies include higher depreciation expenses, telecommunications infrastructure improvements, and higher costs of employee benefits. *Id.* at 2. In addition, the filing includes a larger allocation of OB&C expenses to the CL element, due to the introduction of user counts to calculate the allocation. *Id.* at 5. NECA claims that without the revised CCL rates to reflect changes in cost company revenue requirements, earnings based on the Annual Filing data will be 10.32 percent. *Id.* at 6.

III. PLEADINGS

A. Petitions

4. AT&T argues that Transmittal 425 should be rejected, or in the alternative, suspended and investigated, on the grounds that NECA has not provided the cost support to justify these rate increases. AT&T Petition at 12.

5. MCI presents three arguments for rejection or suspension of Transmittal 425. First, MCI argues that NECA has failed to supply all of the studies needed to evaluate the reasonableness of the proposed rate increases. MCI Petition at 3. For example, MCI complains that the NECA data for plant specific, plant non-specific, and marketing expenses show large increases in 1989 with no explanation. *Id.* Second, MCI contends that NECA's forecasted increase in OB&C payments is unsupported. MCI argues that the NECA revision must be due to a change in the separations rules,[2] but NECA does not quantify the change in OB&C due to this rule change. *Id.* at 4. Third, MCI argues that NECA has not explained the increased forecast for corporate operation expenses. *Id.* at 5. In addition, MCI questions the overall veracity of NECA's data given the Commission's recent audit of NECA and the ongoing independent audit. *Id.* at 5-6.

B. NECA Reply

6. NECA responds that the forecasts from its Annual Filing need to be updated because of the receipt of more current information on costs to its member companies. NECA states that it used February 1990 pool settlement data for the Annual Filing. NECA Reply at 9 n.26. Since then companies have been incorporating 1989 cost study data in their settlements and NECA now has data through August 1990, which it used for this filing. *Id.* at 9-10.

7. Regarding MCI's challenges on specific cost items, NECA argues that it is inappropriate to focus on the changes for each Tariff Review Plan (TRP) line item (*e.g.*, marketing, plant specific and non-plant specific expenses) since the cost data reported to NECA for pooling are at an aggregate level, and NECA must then break the data into TRP item entries. *Id.* at 6-7. NECA claims it used the same methodology to develop costs for Transmittal 425 it used in its Annual Filing. *Id.* at 7-8. NECA further argues that there is no connection between the Commission's audit of NECA and the data used in Transmittal 425. *Id.* at 15.

8. Finally, NECA argues that it should be allowed to employ a user count methodology for calculating allocations of OB&C costs associated with the billing and collection of subscriber line charges. NECA had been using a 5 percent allocation limit until September 1990, when it began allowing pooling companies to allocate based on user count methodology. According to NECA, the change from a 5 percent allocation to one based on user counts results in an increase in OB&C expenses allocated to End User Common Lines (EUCL) of $14.4 million in 1989 and $15.1 million for the 1990/1991 test period. *Id.* at

13-14. NECA argues that reliance on user counts is appropriate since the Commission's Rules are silent on the means that can be used to develop the EUCL portion of OB&C.[3] *Id.* at 13. NECA further argues that the rules do not limit OB&C to 5 percent, and that user count methodology fulfills the requirement for carriers to support OB&C expenses over 5 percent. *Id.* at 13-14 nn. 39 & 40.

IV. DISCUSSION

9. The Bureau has previously considered and denied claims that local exchange carriers (LECs) may allocate more than 5 percent of their Other Billing and Collection expenses to the CL element. This issue was most recently raised in regard to the LECs' 1990 Annual Access Tariff filings. In the *1990 Access Order*, the Bureau reiterated that a 5 percent allocation is the applicable standard, and ordered disallowances of all OB&C costs above a 5 percent allocation in ten study areas.[4] Specifically, the Bureau stated:[5]

> While the LECs argue the Commission's Part 69 rules do not prescribe a 5 percent limit on the amount of these billing and collection expenses that can be assigned to the Common Line element, we believe that the burden is on the carriers adequately to support projections that are above the industry standard.

In reviewing the cases presented by the LECs in that proceeding, the Bureau found that none of them had provided sufficient justification for deviating from the industry standard, and thus did not accept their proposed OB&C allocations.

10. After reviewing Transmittal 425 and the reply comments of NECA, we do not believe that NECA has met the burden for allocating more than 5 percent of OB&C expenses to the Common Line Element. NECA's only stated justification for the proposed change in OB&C allocations is a single sentence, in a footnote in its reply, that "[u]pon review of [the *1990 Access Order*], the current Part 36 rules and the pre-1988 procedures in use within the Industry, NECA decided in September 1990 that the user count study methodology fulfills this requirement." NECA Reply at 14 n. 40. There is no explanation of this statement or the rationale used by NECA in reaching that conclusion. Indeed, the balance of NECA's arguments regarding the OB&C allocation issue center on the appropriateness of employing user count methodology for calculating the allocation. We conclude that this statement, by itself, does not provide the type of showing which would be necessary to justify an allocation of OB&C expenses above 5 percent to Common Line.

11. NECA has stated that increased expenses reflected in the 1989 PYCOS, due to the change in OB&C allocations and other factors, led it to revise upward its 1990-1991 growth rate. Since we are rejecting NECA's method of allocating OB&C expenses, we cannot accept the growth rate in costs presented by NECA in this transmittal.

V. ORDERING CLAUSES

12. Accordingly, IT IS ORDERED that National Exchange Carrier Association, Inc., Tariff F.C.C. No. 5, Transmittal No. 425 IS REJECTED.

13. IT IS FURTHER ORDERED that National Exchange Carrier Association, Inc., SHALL ISSUE revisions to the tariff no later than five business days from the release of this Order removing the rejected material from its tariff. These revisions shall be scheduled to become effective on not less than one day's notice.

14. IT IS FURTHER ORDERED that Special Permission No. 91-078 IS ASSIGNED and Sections 61.58 and 61.59 of the Commission's Rules, 47 C.F.R. §§ 61.58, 61.59, ARE WAIVED for the purposes of issuing the above revisions.

15. IT IS FURTHER ORDERED that the petitions against National Exchange Carrier Association, Inc., Tariff No. 5, Transmittal No. 425, filed by American Telephone and Telegraph Company and MCI Telecommunications Corporation, ARE GRANTED to the extent discussed herein, and otherwise ARE DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Firestone
Chief, Common Carrier Bureau

FOOTNOTES

[1] National Exchange Carrier Association, Inc., Annual 1990 Access Tariff Filing, Transmittal No. 397, filed Apr. 2, 1990 ("Annual Filing").

[2] *See* Section 36.380(b) of the Commission's Rules, 47 C.F.R. § 36.380(b).

[3] *See* Section 36.380 of the Commission's Rules, 47 C.F.R. § 36.380.

[4] Annual 1990 Access Tariff Filings, CC Docket No. 90-320, Memorandum Opinion and Order, 5 FCC Rcd 4177, 4216 (Com.Car.Bur. 1990) (*1990 Access Order*).

[5] *Id.*

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 87-504

In re Applications of

ANCHOR BROADCASTING LIMITED PARTNERSHIP	File No. BPH-860917MD
SELBYVILLE BROADCASTING CO., INC.	File No. BPH-860918MB
GALAXY COMMUNICATIONS, INC.	File No. BPH-860918NY
SUSAN M. BECHTEL	File No. BPH-860918OV

For a Construction Permit for
a new FM Station on Channel
250A in Selbyville, Delaware

MEMORANDUM OPINION AND ORDER

Adopted: January 25, 1991; Released: February 8, 1991

By the Commission:

1. This Memorandum Opinion and Order overturns a Review Board Decision, *Anchor Broadcasting Limited Partnership*, 5 FCC Rcd 2432 (Board Chairman Marino dissenting), which granted the application filed by Galaxy Communications, Inc. for a new FM Station at Selbyville, Delaware, and instead reinstates the ALJ's grant of the application filed by Anchor Broadcasting Limited Partnership. *Anchor Broadcasting Limited Partnership*, 4 FCC Rcd 5687 (ALJ 1989). Now before the Commission are Applications for Review filed May 30, 1990 by Anchor, Selbyville Broadcasting Company (SBC) and Susan M. Bechtel;[1] and a Contingent Application for Review, filed May 31, 1990 by Galaxy.[2] The Applications for Review filed by SBC, [3] Bechtel[4] and the Contingent Application for Review filed by Galaxy will be denied.

2. Anchor is a limited partnership. It claims 100 per cent credit for the integration of its general partner, Dr. Herman Stamps. Stamps and Anchor's three limited partners, Dr. Ridgley C. Bennett, R. Kenneth Mundy and Dr. Francis L. Smith, each own a 25 per cent equity interest in the applicant. The ALJ credited Stamps' integration proposal. 4 FCC Rcd at 5691 ¶¶ 40-41. The Board, however, found that Anchor's limited partners would not be insulated from involvement in the management of the applicant; that there was a variance from the terms of the limited partnership agreement; that other evidence raised questions concerning the reliability of Stamps' pledge to move to Selbyville and be integrated into the mangement of the proposed station; and that no credit was warranted for Anchor's integration proposal. 5 FCC Rcd at 2432-37 ¶¶ 5-27. As set forth below, we find that the Board erred in refusing to credit Anchor's integration proposal, and we grant Anchor's application.

3. *Anchor's Integration*: The Board found that Anchor's limited partners would not be insulated from the conduct of the station's business by its general partner. The Board cited the involvement of Anchor's principals as equal partners in an application for an FM facility in Washington D.C.[5] and it found that the change in the organizational format from a full partnership in the *WOOK* proceeding to a limited partnership in the instant proceeding, was a "paradox" and not "cogently explained." 5 FCC Rcd at 2433 ¶ 9 and 2436 ¶ 23. The Board also cited the friendship between the partners: Stamps' testimony concerning how he would treat the insulation requirements; and testimony from Mundy that he was unaware of any restriction on discussing station business with Stamps. 5 FCC Rcd at 2433-44 ¶¶ 10-12.

4. The ALJ concluded that Anchor's limited partners would be insulated from involvement in the management of the applicant. We agree with that conclusion. The fact that Anchor's principals used a different organization in the WOOK proceeding is not significant. Anchor's principals explained why they adopted the limited partnership arrangement in this case. Stamps testified that he is the general partner because he is retired and has time to manage the station. He further explained that he has acquired a library on broadcasting and visited stations to develop a personal knowledge of broadcasting, whereas the limited partners are actively pursuing their professions, have not developed the same expertise in broadcasting, and do not have the same amount of time to devote to a broadcast station. Stamps also testified that the limited partnership allows Anchor to earn full integration credit, and that because he has authority to manage the applicant, the other principals chose to limit their liability by becoming limited partners. Tr. 160-61. Stamps' testimony was confirmed by Mundy. Mundy testified that Anchor's principals formed a limited partnership because Stamps is retired while he, Bennett and Smith are still fully involved with their professions and that Stamps has a greater interest in ("appetite for") broadcasting. Tr. 270-73.

5. The Board found that Stamps was reluctant to testify concerning how the relationship between the partners would work, and that this raised questions concerning the reliability of Anchor's integration commitment. 5 FCC Rcd at 2433-34 ¶¶ 11-12 and 2437 ¶ 23; Tr. 151-153. However, the Board took Stamps' testimony out of context and it failed to consider that, although Stamps recognized that the relationship between the partners made it difficult to insulate them from the proposed station's business, he will adhere to the insulation requirements. Tr. 150-153. Stamps testified that:

> Q. And you expect to remain friends of the other partners after Anchor is awarded the permit for this station?
>
> A. I hope so.

> Q. And you would still expect to be able to talk with them about the business of the station?
>
> A. In the language of the agreement. I understand I am not supposed to accept their consultation or seek it, or anything else that concern (sic) day to day matters of the station. . . .
>
> Q. Well, what is your expectation about how the actual partnership among the partners is going to work?
>
> A. Well, I am afraid to answer that question because I know what is expected of me by law. Now, when you say talk about, well, you know, like somebody might yell down the street or something and that might constitute talking about it. So I don't know how to answer that question according to the law.
>
> I mean there's a real world, and then there's this. Right here I am going by this.
>
> Q. But in the real world you expect that you probably will have - -
>
> A. I would not admit that any darn way.
>
> Q. Excuse me?
>
> A. I would never answer you on that one sir. (Tr. 150-151).

* * * *

> Q. But you intend to talk to him [Dr. Smith] about the business of the station, don't you?
>
> A. Not according to this, no. This says nor shall [there be] any communication between the general partner or the partnership on matters of day to day operations.
>
> Now, you can talk about the outside of the business but not day to day operations of this or any other media enterprise. I think I understand the restrictions. . . .
>
> Q. But realistically, given the relationship among the four of you, don't you expect there are going to be some conversations about the station . . . ?
>
> A. I don't know which amendment there is about self incrimination, but I certainly wouldn't answer "yes." I would stick to what this says. I always have control of the second side of communication. (Tr. 152-153).

* * * *

> A. Well, when I signed . . . this document I signed myself to live under this provision. I don't see a restriction here as awkward as it may apparently be [as] any different from SEC's regulations dealing with inside trading or anything else. A lot of these things must be controlled by laws I have to subscribe to. This is what I want. I can live with them. (Tr. 154-155).

6. The ALJ after listening to this testimony found that Anchor's partners were aware of and would adhere to the insulation requirements of the limited partnership agreement. 4 FCC Rcd at 5688 ¶ 10. The testimony establishes that Stamps was candid and recognized that because of his friendship with the limited partners it would be difficult to adhere to the insulation requirement. However, Stamps testified that in spite of the those difficulties he would adhere to the insulation requirements. Thus, we find that the record as a whole supports a finding that Stamps will adhere to the insulation requirements.

7. It is also clear that the other partners accepted the restrictions imposed on the involvement of limited partners in station affairs. Although Mundy testified that he was unaware of a written prohibition against discussing station matters with Stamps (Tr. 266), he also testified that he will not talk about station business with Stamps and that he will not get involved in the day to day operation of the station. Tr. 269-70. Smith and Bennett testified that they understand the terms of the partnership agreement and will adhere to them. Tr. 298-99 and 314-15. We find that Anchor's limited partners have demonstrated that they understand their obligations and intend to remain insulated from involvement in the management of its proposed station.[6]

8. Galaxy argues that Stamps will not be integrated on a permanent basis. In reply to a question from the ALJ, Stamps testified that he intended to be integrated for the foreseeable future. Tr. 127. Subsequently, Stamps testified that the foreseeable future was two to three years. Tr. 133. Galaxy seizes upon this testimony to argue that Stamps' commitment is too temporary in nature to be credited.

9. We do not agree. It is clear from Stamps' testimony that he did not view the future as capable of being foreseen beyond a period of two to three years, rather than stating an intention that his commitment would expire at the end of that time period. The clear import of Stamps' testimony was that his integration commitment has no fixed duration. Thus, Stamps testified:

> A. My expectations are to continue to work the station and develop it.
>
> Q. But you are not necessarily going to be bound to eight hours a day everyday forever, are you?
>
> A. Why not? Within reason. I mean within reason of retirement or sickness, health. Have no reason not to.
>
> Q. When do you think you would be likely to retire from this position?
>
> A. I have no idea.
>
> Q. So it could really happen at any time, couldn't it?

> A. You can drop dead in five minutes.
>
> Judge Chachkin: But barring illness or death, do you intend -- it is your intention to remain as general manager for the forseeable future?
>
> A. Yes, sir.

Tr. 126-127. When specifically asked about his commitment to work at the station, Stamps indicated that there was no reason not to expect him to be at the station indefinitely. Thus, the preponderance of the evidence establishes that he does not intend to limit his integration commitment to two to three years.

10. *Local Residence*: Stamps owns residences in Washington, D.C., Ladysmith, Va. and Cape Cod, Mass. and a yacht at Baltimore, Md. Stamps testified that he maintains the residence at Ladysmith as a tax domicile. Finding no intention by Stamps to forsake his Virginia "tax domicile," and citing testimony that Stamps plans to "be pretty much in the capital area" and that he does not want to commute on weekends, the Board refused to credit Stamps' pledge to move to Selbyville. Tr. 71-72; 5 FCC Rcd at 2434-35 ¶¶ 14-25.

11. In direct testimony Stamps clearly and unequivocally stated that he intends to reside in Selbyville. Thus, he testified that:

> I will be the full-time General Manager of Anchor's proposed station . . . I will devote a minimum of forty (40) hours per week, Monday through Friday, and additional time if needed . . . I will reside in Selbyville or within Anchor's proposed city grade contour . . . .

Anchor Ex. 2, pp.2-3.

12. The cross examination cited by the Board was taken out of context and did not undermine Stamps' testimony. Thus, Stamps testified:

> Q. Now I notice in your exhibit . . . you state that you will reside in Selbyville or within the proposed city grade contour, Monday through Friday. . . . *Where do you intend to be on your weekends if not on your boat* ?
>
> A. . . . it is presumptive as to where I would be on Saturday and Sunday. I might be totally in residence in the Selbyville area. I don't know.
>
> Judge Chachkin: Well lets put it more bluntly. Will you maintain a residence *somewhere else beside the Selbyville area* ?
>
> A. I don't know. I have several residences now, and what -- and whether I would confine my living -- I don't see commuting, going up and down the road every weekend, so that I have a place in Virginia, a place in D.C. I have a place in Maryland, and I have a place in Delaware. I think I would probably be pretty much in [the] capital area. I think other areas would be visitation.

Emphasis added. Tr. 71-72. The testimony relied on by the Board related to what Stamps would do on weekends, and does not contradict his testimony that he will reside in Selbyville in connection with his full-time management of the station. Moreover, Stamps testified that he no longer uses his house at Cape Cod or his yacht, and that he will sell the yacht and "get a boat more suitable for the water around Selbyville . . . " (Tr. 74-75) and he reaffirmed his commitment to move to Selbyville. Tr. 140-141.

13. Nor is Stamps' intention to move to Selbyville called into question by the statement that his "principal residence for tax purposes is Virginia." Tr. 72. As the Board noted, Stamps admitted that Ladysmith, Virginia is his *current* domicile, and that for Virginia law he must be there for "six months and a day." Tr. 74. That statement about his domicile was in response to a question concerning whether his *current* principal residence is in Washington, D.C. Nowhere, however, has Stamps indicated any hesitancy about changing that domicile. Thus, while the Board took official notice of the differing tax rates, and Galaxy argued that the differing tax rates are significant, there is nothing in the record that would support a finding that those tax rates are so significant that they would affect Stamps' commitment to move to Selbyville, or that Stamps intends to continue living in Ladysmith for at least six months a year after a license is granted. Any suggestion that Stamps' future residence will be determined by state tax rates is based on speculation in light of the record support for the finding that Stamps will move to Selbyville. *See* 4 FCC Rcd at 5689 ¶ 15.[7]

14. *Variance from the Limited Partnership Agreement*: The terms of Anchor's Limited Partnership Agreement limits the financial responsibility of Anchor's limited partners, and the agreement further provides that it represents the entire agreement between the parties, unless the agreement is subsequently amended by a written agreement. At the time that the applicant certified its financial qualifications, Anchor's principals entered into a separate oral agreement to provide additional funding for financing the construction and operation of its proposed station. Galaxy argues that the agreement for additional financing is inconsistent with the Limited Partnership Agreement, and is evidence that Anchor's principals will be willing to disregard other terms of the agreement, including the provisions insulating the limited partners from involvement in the management of the applicant. The Board said that, although there is an "apparent variance," that variance is entitled "to only slight evidentiary weight as regards Anchor's 'integration' proposal." 5 FCC Rcd at 2435 ¶ 19.

15. The limited partnership agreement strictly limits the liability of Anchor's limited partners to their initial investments of $21,250 per partner. That commitment alone, is insufficient to finance Anchor's proposal. While the limited partners could not be required to increase their contributions to the partnership, nothing in the agreement prevents them from voluntarily increasing their contributions. Thus, the fact that the principals agreed to additional capital contributions for construction and operation of the proposed station, beyond those required by the limited partnership agreement, does not warrant a finding that the partners cannot be relied on to fulfill their partnership obligations. Because of the need for additional funds, the fact that the partners might have entered into an additional agreement without specifically

putting that agreement in writing is not probative of whether Anchor's partners can be relied on to adhere to the terms of the limited partnership agreement.

16. *The Comparative Evaluation*: Galaxy and Anchor are comparatively superior to the other applicants because of their integration proposals. Bechtel does not claim integration credit and SBC has not shown that its principal can be relied on to fulfill her integration commitment. Galaxy and Anchor are each credited with 100 percent integration. Anchor's proposal is preferred because the enhancement for its minority ownership and future residence outweigh the very slight credit awarded Galaxy for local residence and civic activities[8] and for its coverage proposal.[9]

17. ACCORDINGLY IT IS ORDERED, That the Application for Review filed May 30, 1990 by Anchor Broadcasting Limited Partnership IS GRANTED.

18. IT IS FURTHER ORDERED, That the Applications for Review filed May 30, 1990 by Selbyville Broadcasting Company and Susan M. Bechtel, the Contingent Application for Review filed May 31, 1990 by Galaxy Communications, Inc., and the Request for leave to file briefs, filed May 30, 1990 Susan M. Bechtel ARE DENIED.

19. IT IS FURTHER ORDERED, That the Review Board's Decision, 5 FCC Rcd 3432, IS MODIFIED as reflected herein; that the Applications filed by Selbyville Broadcasting Co., Inc. (File No. BPH-860918MB), Galaxy Communications, Inc. (File No. BPH-860918NY) and Susan M. Bechtel (File No. BPH-860918OV) ARE DENIED; and that the Application (File No. BPH-860917MD) filed by Anchor Broadcasting Limited Partnership IS GRANTED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

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[1] Bechtel requests leave to file a brief pursuant to 47 C.F.R. § 1.115(f). Bechtel has not presented a basis for review and is not entitled to further briefing.

[2] Oppositions were filed June 21, 1990 by Anchor, SBC and Galaxy.

[3] In denying SBC's Application for Review, we need not reach, and thus we are not relying on, the Board's findings with respect to Ms. Capobianchi's family obligations and child care arrangements.

[4] While Bechtel will serve about 7115 (21.33%) more people than Anchor, the entire area is well served by other broadcast media and we agree with the ALJ that Bechtel is entitled to only a very slight preference for her superior coverage. That preference is insufficient to overcome Anchor's preference for integration. 4 FCC Rcd at 5690-91 ¶ 39; 5692 ¶ 47; *Susan S. Mulkey*, 4 FCC Rcd 5520, 5521 ¶ 9 (1989); *Resort Broadcasting Co., Inc.*, 41 FCC 2d 640, 647 (Rev. Bd. 1973). Bechtel's remaining argument that the Commission's policy of awarding a preference for integration has been discredited and should not be applied in this proceeding is rejected. The record establishes that Anchor's principal is committed to fulfilling his integration commitment. Thus, Bechtel has not made a sufficient showing to establish that we should disregard the established comparative criteria in this proceeding. In any event, such a change in the comparative criteria would more appropriately be considered in a rule making proceeding.

[5] *United Broadcasting Company (WOOK)*, 100 FCC 2d 1574 (1985). The Board further noted that Anchor's principals withdrew their application in *WOOK*, in consideration of a payment of $1,275,000 and filed the instant application four months later. 5 FCC Rcd at 2433 ¶ 6. They withdrew their application in *WOOK*, however, only after an adverse decision by the Commission and the filing of an appeal. *United Broadcasting Company*, FCC 861-59, released May 7, 1986.

[6] Recently in *Royce International Broadcasting*, 5 FCC Rcd (1990), we articulated stricter and more comprehensive standards for the crediting of integration proposals. In this case, while the Board refused to credit Anchor's integration proposal, based on our review of the record we find that Anchor's principals were credible and that they explained how they would comply with the policy requiring the insulation of limited partnership interests. This determination is consistent with the *Royce* decision and should not be construed as either weakening or lessening our adherence to those standards.

[7] Although the Board seized upon Stamps' statement that he would have to make a diary of how much time he spends in Ladysmith, that statement was made in the context of testimony that he currently considers his yacht in Baltimore to be a residence, and that he has maintained residences in Cape Cod and Washington, and an admission that he does not know how much time he spends in Ladysmith. Tr. 72-73. Stamps has never retracted his pledge to move to Selbyville, and there is no basis in the record to conclude that his reference to keeping a diary of his time was intended to support a claim of a Virginia domicile *after* Anchor is granted a license.

[8] Galaxy's principal did not move to Selbyville until October, 1987 and his only civic activity of record is membership in the Lion's Club starting in 1988. Thus, Galaxy can only be awarded slight credit for its principal's relatively recent move to Selbyville and his minimal civic activities.

[9] Galaxy will serve about 6,400 more people than Anchor, but the populations to be served receive service from numerous other broadcast services. *See* n.3 *supra*.

Before the
Federal Communications Commission
Washington, D.C. 20554

GEN. Docket No. 89-89

In the Matter of

Imposing Syndicated Exclusivity
Requirements on Satellite Delivery
of Television Broadcast Signals
to Home Satellite Earth Station
Receivers

REPORT AND ORDER
(Proceeding Terminated)

Adopted: December 31, 1990; Released: February 8, 1991

By the Commission:

I. INTRODUCTION

1. In the Satellite Home Viewer Act of 1988 (SHVA),[1] Congress extended to satellite carriers of video programming intended for home viewing an interim compulsory copyright license and clarified the carriers' copyright responsibility for retransmitting television broadcast signals directly to home satellite dish (HSD) owners.[2] Congress took this action to ensure the continued availability of satellite-delivered video broadcast programming to home satellite earth stations in the face of legal doubt about the copyright liability of satellite carriers supplying distant broadcast station signals to HSD owners. Congress also directed the Commission to adopt rules subjecting satellite carriers to syndicated exclusivity similar to the rules governing cable systems if the Commission finds that such rules are feasible.

2. In response, we adopted a Notice of Inquiry and Notice of Proposed Rule Making (NOI/NPRM) on April 12, 1989, [3] requesting comment on whether it is technically and economically feasible to apply some form of syndicated exclusivity requirements to satellite carriers or to other program distributors that sell broadcast programming in the HSD market. We also inquired about the feasibility of alternatives, such as purchase by satellite carriers or satellite program distributors of national or local syndicated program rights.

3. We continue to believe in the necessity and desirability of protecting the exhibition rights of local broadcast stations, but after review of the comments received in this proceeding we conclude that application of exclusivity rules to the nascent HSD industry, which is still relatively small and rural, is infeasible at this time. Equipment to implement exclusivity protection is not currently available, and even if such equipment were developed, manufactured, and placed in service with all possible speed, its distribution in the marketplace would likely be incomplete when the interim compulsory copyright license that is the reason for protection expires at the end of 1994.[4] Accordingly, for the reasons set forth below, we find that currently it is technically infeasible to apply syndicated exclusivity regulation to the distribution of satellite signals to HSD owners, and therefore we decline to promulgate such rules for satellite carriers. Further, even if such rules were technically feasible, we find that economically they would be infeasible.

II. BACKGROUND

4. The SHVA was designed to foster a comprehensive regulatory scheme for programming delivered by satellite carriers to HSD owners. The SHVA seeks to join a statutory copyright compulsory license with Commission syndicated exclusivity regulations. Such a regulatory scheme originated with cable regulation in the 1970's. The Copyright Act of 1976[5] extended copyright protection to television broadcast programs retransmitted for cable viewing.[6] This copyright protection was tempered by freely permitting retransmission of broadcast signals within their coverage area and by allowing cable operators the choice of either purchasing the rights to the programs carried by the distant signals, or paying a statutory copyright royalty fee for a compulsory license to retransmit the programs. The cable compulsory license is explicitly conditioned upon this Commission's cable carriage regulations,[7] which at the time of enactment included syndicated exclusivity provisions adopted in contemplation of the Copyright Act's compulsory license for cable.[8]

5. The issue of satellite carrier copyright liability arose because the Copyright Act exempts retransmissions from copyright liability when made by a passive carrier.[9] Until passage of the SHVA there was uncertainty whether this exception applied to satellite carriers that are not "passive" insofar as they market retransmissions of broadcast signals to HSD owners.[10] Congress desired to ensure the continued availability of such programming to the HSD market.[11] Consequently, in the SHVA, Congress enacted a temporary compulsory copyright license for satellite carriers serving the HSD market.[12] Under the terms of this compulsory license such carriers must pay statutorily prescribed fees through 1992 or until they reach separate agreement on appropriate fees with program copyright owners. The SHVA instructs the Copyright Royalty Tribunal to initiate a process in 1991 designed to result in agreement on fees among the parties by voluntary negotiation or, if necessary, compulsory arbitration, for 1993 and 1994.[13] The compulsory license completely expires at the end of 1994. In this manner Congress sought to encourage the establishment of, and transition to, a marketplace copyright licensing mechanism for satellite carriers.[14]

6. In conjunction with enacting the interim compulsory license for satellite carriers serving the HSD market, Congress also instructed this Commission (1) to determine, with respect to delivery of syndicated programming delivered to HSD owners, whether imposing syndicated exclusivity rules similar to those applicable to cable is feasible; and (2) to adopt such rules if feasible.[15] Such rules would require satellite carriers of terrestrial broadcast signals, upon request from a local broadcaster owning exclusive rights to the program in his service area, to delete duplicative syndicated programs.[16] The legislative history indicates that the purpose of mandating adoption of feasible syndicated exclusivity rules was to establish in the near term "a level playing field between the cable television and earth station industries."[17] The legislative history also indicates that, in determining whether protection is

feasible, the Commission may not conclude protection is infeasible simply because rules would be "incrementally" more costly for satellite carriers than for cable systems.[18]

7. To assist us in determining whether applying syndicated exclusivity regulation to satellite carriers is feasible, we sought comment in the NOI/NPRM on the following issues:

> (1) whether existing technology would permit satellite carriers to selectively delete programming for specific geographic areas in which a broadcaster has asserted exclusivity rights against the carrier;
>
> (2) whether substitution of alternative programming is possible;
>
> (3) whether it is economically feasible for satellite carriers and the HSD industry to implement and comply with such regulation; and
>
> (4) whether there exist feasible alternatives to such regulation.

In addition, the NOI/NPRM asked for comment, in the event HSD syndicated exclusivity rules would be feasible, on the proper coverage and specific requirements of such rules.

III. DISCUSSION

8. Twenty three parties filed comments. Twelve commenters, including the Satellite Broadcasting and Communications Association (SBCA) and General Instrument Corporation (GIC), oppose our adopting syndicated exclusivity rules for satellite carriers. Eleven parties, including the Association of Independent Television Stations (INTV), the National Association of Broadcasters (NAB), and the Motion Picture Association of America (MPAA), filed comments in favor of such rules. INTV, NAB and MPAA also jointly commissioned and submitted a study and response by telecommunications consultants Richard S. Cooperman and Richard S. Gould (Cooperman/Gould Study and Cooperman/Gould Response) that assert the feasibility of implementing syndicated exclusivity using the VideoCipher II encryption technology. Fifteen parties filed reply comments, with 10 expressing opposition to the proposed rules.[19] SBCA, in its reply comments, included a study by consultants G. Gordon Apple and Ron D. Katznelson that finds implementation of syndicated exclusivity not to be technically or economically feasible now or in the foreseeable future.

A. Technological Feasibility

9. *Comments.* In discussing technological feasibility, many commenters discussed concerns related to the capability of General Instrument's VideoCipher II (VC II) and VideoCipher II Plus (VC II Plus) encryption systems to accommodate syndicated exclusivity protection of multiple programs in the more than 200 markets in which the most popular syndicated programs are aired.[20] The Cooperman/Gould Study notes, and opponents concede, that the VC II system currently has deletion capacity only for 32 different markets, and therefore satellite syndicated exclusivity could be implemented immediately only in this limited number of markets.[21]

10. The Cooperman/Gould Study concludes that syndicated exclusivity protection is currently feasible. According to the Study, full protection could be achieved through enhancements to the software and firmware of the VC II Plus system, which at the time comments were filed was believed to be still in development. Comments based upon the Cooperman/Gould Study estimate that modifications to accommodate protection of up to 480 geographic zones would be minor and would require approximately six months to complete, provided that the modifications were introduced during development (rather than after manufacture begins).[22] Based upon this Study, INTV, MPAA and NAB argue that a transition to full syndicated exclusivity protection is feasible in two phases, and propose that the first commence immediately in the 32 markets with the largest concentration of HSDs.[23] They propose that the second phase, to require deletion capability in all markets, commence approximately six months later when they predict that new equipment could be available.[24]

11. Other parties assert that using the currently available technology incorporated in the VC II system to accommodate full syndicated exclusivity protection is not technologically feasible. GIC, the developer and manufacturer of the VC II system, disagrees with the conclusion of the Cooperman/Gould study that modifications would be minor and require only six months to complete. GIC instead asserts that there would be significant degradation to signal acquisition times[25] that would affect all subscribers (not just those within the deletion region) and would be unacceptable to most of them. Even under ideal conditions (complete reception of the transmission on the first try), the acquisition delay would increase from a maximum of 7 seconds to a maximum of 105 seconds if, as proposed by the Cooperman/Gould Study, the current technology were expanded from 32 to as many as 480 geographic areas.[26]

12. GIC, SBCA, and others also state that use of the current technology is infeasible because of the imprecision inherent in a system that relies upon the location of the main post office within each three-digit postal zip code to define the geographic deletion areas. SBCA, for example, argues that the current system's imprecision would deny some HSD owners access to a syndicated program even though they are outside a broadcast station's zone of protection, and permit others within the zone still to receive it. GIC adds that a planned software upgrade to base exclusion zones on five-digit zip codes will refine the system's ability to target HSDs within the zone of syndicated exclusivity protection, but will still result in some subscribers located outside the protected zone having the signal deleted.[27] The Satellite Broadcasting and Communications Association (SBCA), American Home Satellite Association (AHSA) and GIC also note that some consumers may move and not notify the programmer, or may use a mailing address inside a protected zone but actually reside outside the zone.[28] Others, however, note that our cable syndicated exclusivity rules require a cable system to delete programming throughout its service area if any portion of the system is within the protected zone, and therefore some subscribers located more than 35 miles from the television station reference point do not receive the protected programming although they reside outside the protected area.[29] GIC and others respond that it is inappropriate to draw an analogy between zip code areas and cable system service areas, since

zip code areas can include large geographical areas where there is little over-the-air reception, especially sparsely populated areas, and these areas are where the HSD industry provides the most benefits to its subscribers, since over-the-air broadcasting is least available.[30]

13. *Analysis*. We conclude that implementing syndicated exclusivity for HSDs is not technically feasible before the end of 1994, when the interim compulsory copyright license for satellite carriers will expire. All parties agree that equipment capable of deleting programs in more than 32 areas is not currently in place. GIC presents an affidavit disclosing that the just-released improved VideoCipher decoder unit, VC II Plus, has the capability to handle deletions of 56 separate regions instead of the 32 regions of the older unit. But GIC states that both VideoCipher decoders are compatible with the encryption system being used on satellite signals, and therefore there is no plan to require retrofitting of older units (although an upgrade can be voluntarily purchased and installed). Therefore, GIC concludes, any exclusivity requirement to delete more than 32 regions will be ineffective in the relatively near-term because few subscribers will have the new VC II Plus decoders, and even in the long-term only 56 regions could be protected at those homes using the new decoder.

14. Our conclusion that implementing syndicated exclusivity for HSDs is not technically feasible before the end of 1994 is buttressed further by the fact that GIC has shipped 1.4 million VideoCipher units since 1986, but presently there are only 678,000 units being used for authorized reception.[31] SBCA states that while some decoders have been taken out of service, an estimated 500,000 units have been modified to receive encrypted signals without authorization.[32] It is unlikely that these units will be submitted voluntarily to GIC to be updated and to restore the encryption function. It was this problem with piracy, GIC notes, that occasioned the changes that resulted in the new VC II Plus unit.

15. GIC and SBCA present substantial evidence, including a total of three affidavits and the Apple/Katznelson report, that increasing the number of deletion regions would be a complicated and expensive upgrade of the VC II Plus system requiring at least 18 months to accomplish.[33] Even if this reasonable if somewhat ambitious time frame were realized, only the first decoders would be in place in 1992, contemporaneously with negotiations over a copyright fee implementing the second and final phase of the interim licensing scheme. Under any reasonable scenario for introduction of the new decoders, exclusivity protection would not reach a significant level until at least 1994, when the interim copyright license established by the SHVA expires. For instance, assuming that 1) the first units are available in July 1992, 2) decoder sales continue to average 25 to 30 thousand per month,[34] 3) all new decoders sold are used for authorized reception,[35] and 4) none of the approximately 678,000 currently authorized decoders[36] are replaced, the newer units capable of exclusivity protection nationwide would constitute less than 50% of the approximately 2.3 million authorized decoders at the end of 1994.[37] Even assuming that up to 50% of new decoder sales are to replace authorized decoders, it would be approximately July of 1994 before 50% of decoders would have exclusivity protection capability, and only approximately 60% of authorized decoders would have such capability when the compulsory license expires at the end of 1994.[38]

16. Several parties allude to the possibility that the compulsory license might be extended or made permanent, and therefore that exclusivity protection should be implemented with a longer time frame in mind.[39] We, however, must act upon the existing law as enacted by Congress. Based upon a two-phase "transition" to establish the fees to be collected pursuant to the compulsory license, and the specific expiration in 1994 of the license itself, we must assume that Congress does not intend to extend or re-enact this compulsory license. Therefore, in light of the time necessary to design, produce and sell to HSD owners new decoding equipment, including the VC II Plus unit as well as required new firmware and software, we conclude that substantial implementation of full syndicated exclusivity regulation during the limited time of the interim compulsory copyright license is not technically feasible.

17. Having found full implementation technically infeasible during this time frame, we considered mandating a more limited scheme requiring protection of 32 geographic areas for VC II owners and 56 or more areas for VC II Plus owners. We note, however, that rules requiring such limited protection would unfairly discriminate against unprotected stations, would afford only such limited protection that they appear to be economically infeasible, and would be substantially different from the cable syndicated exclusivity rules referred to in the SHVA. Therefore, we believe adoption of such rules is not mandated by the SHVA. *See* para. 21, *infra*.

18. Finally, several parties argue either that this protection is necessary to protect programs in the upcoming DBS (or quasi-DBS) environment, or that imposing the requirements would discourage implementation of DBS.[40] Our decision herein addresses the existing satellite carriers that deliver the signals of superstations and network stations to subscribers using HSDs. This is the system that Congress contemplated when it enacted the satellite carriers' temporary compulsory copyright license and directed us to consider the feasibility of extending syndicated exclusivity protection. As we noted in our recent report on the need for a universal encryption standard,[41] there are reports that new entities will begin offering additional satellite program service directly to homes. In addition to the plans of K Prime Partners and Sky Cable discussed in the encryption standard report, we note that a new entity, SkyPix, is planning to commence service in the summer of 1991.[42] According to media reports, both K Prime Partners and SkyPix are testing retransmissions of broadcast signals and, we believe, plan to use an encryption system that is different from GIC's VideoCipher technology. Although the temporary compulsory license is available to these enterprises, we have no information in the record upon which to base a conclusion on whether it would be technically or economically feasible for them to incorporate the technical means for complying with syndicated exclusivity requirements. In addition, whether any of the proposed systems will be successful in commencing full operations and obtaining sufficient subscribers before the compulsory license expires is unknown. Therefore we do not address the feasibility of adopting exclusivity for these proposed systems, but note that after 1994 they will join the other carriers in being fully liable for the copyrights to retransmitted program material.

B. Economic Feasibility

19. *Comments*. Commenters also addressed the economic considerations that would become relevant if implementation were technically feasible. If it occurred at the same time as the VC II Plus upgrade is designed and released, INTV, MPAA, and NAB, citing the Cooper/Gould Study, argue that implementation would only cost about $1.00 per decoder. However, GIC points out that the VC II Plus was almost finished when the notice in this proceeding was released, and we note that actual distribution of manufactured units commenced in January of 1990.[43] Therefore, GIC argues, it is not possible to link implementation of syndicated exclusivity rules with implementation of the VC II Plus system and save costs. Moreover, INTV, MPAA and NAB's analysis of economic feasibility has assumed that GIC would upgrade all existing VC II units in service to VC II Plus technology. GIC responds that the VC II and VC II Plus units are compatible and therefore that it is not requiring upgrade of all units, although individual consumers can elect to upgrade their decoders by purchasing the new firmware module for $130, not including installation. Were GIC to design an additional upgrade to accommodate 200 or more markets in order to comply with syndicated exclusivity requirements, GIC estimates that to retrofit all VC II units would cost somewhere between $50 and $100 per unit and that the earliest possible availability would be 18 months after initiating the project.

20. Superstar Connection (Superstar) and Southern Satellite Systems Inc. (Southern) focus upon the recurring costs to satellite carriers, and ultimately the HSD owners, of providing syndicated exclusivity protection. They note that satellite carriers, for each channel carried, would have the costly administrative burden of dealing with over 1,100 individual stations in over 200 markets concerning thousands of separate programs, and then applying this information on a subscriber by subscriber basis to initiate program deletion in those markets in which there is a conflict. Superstar compares this complex task with the much simpler task required of cable systems. Cable systems must deal with only a few local broadcasters rather than 1,100 commercial broadcasters nationwide, and must delete programming system-wide, rather than on a subscriber-by-subscriber basis.

21. *Analysis*. Because we already have concluded that syndicated exclusivity rules applied to satellite carriers are technically infeasible in the current environment, we need not reach the issue whether such rules would be feasible from an economic standpoint. Nevertheless, we have analyzed the comments and conclude that for the following reasons the cost for implementing and sustaining syndicated exclusivity for HSD owners would be significantly greater than it is for cable systems. First, equipment capable of performing the deletion and substitution function on cable already has been developed and is in use, whereas no such system has been developed for the HSD industry. Second, in cable's case syndicated exclusivity rules require only the single piece of equipment necessary to accomplish system-wide deletion, whereas, in the case of satellite signals, because of differences in technology, syndicated exclusivity rules would require both system wide and subscriber owned equipment necessary to accomplish deletion on a subscriber-by-subscriber basis. Third, unlike the cable industry, with its large established subscriber base of 53,900,000, the HSD market only has 678,000 subscribers from which to recover costs. Therefore, even if the total developmental costs for implementing exclusivity were equal for cable and satellite, the per-subscriber cost for satellite carriers would be significantly greater. Many of these subscribers live in rural areas and would not be subject to any deletion requirements, yet might have to share in the system's cost.[44] Finally, effective syndicated exclusivity could not begin when modified VC II or VC II Plus units capable of full syndicated exclusivity are first available in the marketplace, but rather, only when a significant number of such new units have been placed in service; the hardware, software, and firmware developed, tested, and implemented; and the logistics of obtaining syndicated information from the broadcast stations established. Based upon these considerations, particularly with respect to the minimal results that could be attained by 1994 when the compulsory license expires, we conclude that the cost of preventing viewing by a relatively few authorized HSD owners for a short period of time is more than incrementally greater than the cost of cable syndicated exclusivity and consequently, that promulgating rules for satellite carriers similar to those for cable is economically infeasible.

C. Other Issues

22. Several parties argue that syndicated exclusivity protection in this area is infeasible because satellite carriers would have a much more difficult and costly task if they were to substitute programming for that which was deleted.[45] Others, however, note the ability of the VC II units to display a message referring subscribers to alternate channels and explaining the deletion, or state that the ability to substitute is irrelevant to the issue under consideration.[46] They find it noteworthy that the permanent compulsory license for cable explicitly extends the compulsory license to programming substituted for duplicative programming deleted to protect exclusivity rights, but that the SHVA provisions before us do not. While we need not reach this issue here, we do believe that it would be significantly more difficult for satellite carriers than for cable because it would require access to another completely separate satellite channel with which to deliver alternative programming to subscribers subject to the deletion.

23. Other parties note that compared to cable, implementing syndicated exclusivity for HSD owners would be ineffective and would fail to prevent wide-scale viewing of the syndicated programs. First, a large number of "pirated" VideoCipher units already are in use that can receive programs without authorization. Second, the technology involved, satellite signal reception, readily permits viewing the same programs when they are transmitted unencrypted on satellite feeds to the stations purchasing them. Schedules of such feeds are widely published in viewing guides marketed specifically to HSD owners.[47] We need not reach this issue here.

24. Lastly, we note that some superstations, such as WTBS, have declared their intention to be "syndex proof" and thereby prevent deletion of their signal on cable systems. In the NOI/NPRM we inquired as to the feasibility of satellite carriers complying with their copyright liability in this manner, rather than through syndicated exclusivity rules. While the superstations and network stations might be able to obtain nationwide distribution rights and thereby eliminate the need for using the compulsory license by both cable operators and satellite car-

riers, it is the stations themselves, and not the satellite carriers, that are able to obtain such rights. This proceeding addresses the rights and liabilities of satellite carriers, not broadcast stations, and thus the WTBS approach is not a viable alternative for satellite carriers. This conclusion does not, however, affect our decision that syndicated exclusivity rules would be infeasible.

IV. CONCLUSION

25. The SHVA has as its principal purpose ensuring the continued availability of satellite-delivered video programming to HSD owners. Congress, also concerned with the copyright questions that raised these issues, enacted a temporary compulsory license and directed specific transitional steps to encourage negotiation among the parties on copyright fees. Although we continue to believe that the cable syndicated exclusivity regulations serve the public interest, application of syndicated exclusivity to the HSD industry is both technically and economically infeasible at this time.[48]

V. ORDERING CLAUSES

26. Accordingly, IT IS HEREBY ORDERED, That this proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX A

COMMENTS

1. ABC, CBS and NBC Affiliate Associations (Network Affiliates)
2. American Home Satellite Association (ASHA)
3. Association of Independent Television Stations, Inc. (INTV)
4. Capital Cities/ABC, Inc. (ABC)
5. CBS Inc. (CBS)
6. Corporation for Public Broadcasting (CPB)
7. Eastern Microwave, Inc. (Eastern Microwave)
8. Foundation for Educational Advancement Today (FEAT)
9. General Instrument Corporation (GIC)
10. GE American Communications, Inc. (GE Americom)
11. Hubbard Broadcasting, Inc. (Hubbard)
12. Motion Picture Association of America, Inc. (MPAA)
13. National Association of Broadcasters (NAB)
14. National Basketball Association and National Hockey League (NBA/NHL)
15. National Rural Telecommunications Cooperative (NRTC)
16. NEC Home Electronics (U.S.A.) Inc. (NEC)
17. Netlink USA (Netlink)
18. 97 TV Stations (Stations)
19. Primetime 24 (Primetime)
20. Public Broadcasting Service and National Assoc. of Public TV Stations (PBS/NAPTS)
21. Satellite Broadcasting and Communications Association of America (SBCA)
22. Southern Satellite Systems, Inc. (Southern)
23. Superstar Connection (Superstar)

REPLY COMMENTS

1. Association of Independent Television Stations, Inc. (INTV)
2. Eastern Microwave, Inc. (Eastern Microwave)
3. Foundation for Educational Advancement Today (FEAT)
4. General Instrument Corporation (GIC)
5. Hubbard Broadcasting, Inc. (Hubbard)
6. Motion Picture Association of America (MPAA)
7. National Association of Broadcasters (NAB)
8. National Rural Telecommunications Cooperative (NRTC)
9. NEC Home Electronics (U.S.A.) Inc. (NEC)
10. Netlink USA (Netlink)
11. 97 TV Stations (Stations)
12. Primetime 24 (Primetime)
13. Satellite Broadcasting and Communications Association of America (SBCA)
14. Southern Satellite Systems, Inc.
15. Superstar Connection (Superstar)

SUPPLEMENTAL COMMENTS

1. INTV, MPAA & NAB (joint)

FOOTNOTES

[1] Pub. L. No. 100-667, Title II, 102 Stat. 3949-3960 (1988).

[2] This interim license will expire on December 31, 1994.

[3] 4 FCC Rcd 3889.

[4] SHVA, *supra* note 1 at § 202, 102 Stat. 3949.

[5] 17 U.S.C. §§ 101 *et seq.* (1988).

[6] Copyright law did not protect syndicated programs carried by broadcast signals from being retransmitted to other markets before enactment of the Copyright Act of 1976, *see Teleprompter v. Columbia Broadcasting System*, 415 U.S. 394 (1974).

[7] 17 U.S.C. § 111; *See also* 17 U.S.C. § 801 (Copyright Royalty Tribunal authorized to adjust the statutory compulsory license fees to take into account, *inter alia*, changes in FCC carriage regulations).

[8] *See Cable Television*, Report and Order, 36 F.C.C.2d 143 (1972), including the 1971 industry "consensus agreement" set out at 284-287. *See also Geller v. F.C.C.*, 610 F.2d 973 (D.C.Cir 1979), holding, *inter alia*, that the Commission's promulgation of certain of the cable rules in 1972 was for the purpose of carrying out the industry consensus agreement of 1971 and thereby facilitating passage of related provisions in the Copyright Act. Thus

in the cable context no less than in the satellite carrier context, the statutory compulsory copyright license and the Commission's syndicated exclusivity rules, fashioned to balance the competing needs and interests of broadcasters and cable operators, are interrelated. We note that although syndicated exclusivity rules for cable were eliminated in 1980, 79 FCC2d 663 (1980), the rules were reimposed with certain modifications in 1990, 3 FCC Rcd 5299, *recon.*, 4 FCC Rcd 2711 (1989).

[9] 17 U.S.C. § 111(a)(3) (1988) provides in pertinent part that there is no copyright infringement if the carrier "has no direct or indirect control . . . over the particular recipients" and its activities "consist solely of providing wires, cables, or other communications channels for the use of others."

[10] In one case decided immediately before passage of the SHVA, a satellite carrier serving the HSD market was held to infringe the applicable copyright laws, *see Pacific & Southern Co. v. Satellite Broadcast Networks, Inc.*, 694 F. Supp. 1565 (N.D. Ga. 1988). *See also* Report of the House Committee on Energy and Commerce, H.R. Rep. No. 887, Part 2, 100th Cong., 2d Sess. 12-13 (House Commerce Committee Report) and the Report of the House Committee on the Judiciary, H.R. Rep. No. 887, Part 1, 100th Cong. 2d Sess. 13-14 (1988) (House Judiciary Committee Report).

[11] In 1984 amendments to the Communications Act, Congress adopted provisions to foster a marketing system for retransmissions of broadcast signals to HSD owners. *See* Pub. L. No. 98-549, 98 Stat. 2779, § 5, codified at 47 U.S.C. § 605 (1988).

[12] SVHA at § 202.

[13] A voluntary agreement may become effective before January 1, 1993, if the parties so agree.

[14] House Judiciary Committee Report at 23; House Commerce Committee Report at 15.

[15] The statute also required the Commission to prepare reports on whether an encryption standard for HSD programming should be established and whether satellite carriers unlawfully discriminate in prices charged those who market programming to HSD owners. We have decided not to mandate a national encryption standard. *See* 5 FCC Rcd 2710 (1990). Also, although we found no apparent general pattern of unlawful discrimination by satellite carriers among the various entities operating as distributors to HSD owners of superstation and network station programming, there is a disparity in rates charged to cable system operators and those charged to earth station distributors that was not justified by the limited information in the record on cost factors. We therefore issued a further notice of inquiry to develop a more comprehensive record on this issue. *See* 5 FCC Rcd 523 (1990).

[16] The local broadcaster would be protected from duplicative programs within a 35 mile radius of its location, *see* 47 C.F.R. § 73.658(m)(1) (applicable to cable).

[17] House Judiciary Committee Report at 28.

[18] House Commerce Committee Report at 27.

[19] Appendix A contains a list of those filing formal comments and reply comments, and sets forth the acronyms and abbreviations used for each party.

[20] GE American Communications (GE Americom) states that according to the Nielson Syndication Service, "Wheel of Fortune" was exhibited on 227 stations in the 1988-1989 season, and notes that even the twentieth most popular syndicated program, "Mama's Family," was exhibited by 184 stations. GE Americom also notes that there may be a few markets in which more than one station share syndication rights, implying that the 227 station figure may be slightly higher than the number of individual zones in which deletion would be required. GE Americom Comments at 8. GIC agrees that the most popular syndicated programs "may be sold in up to 200-250 markets or more," and therefore concludes that deletion capability would have to accommodate up to 250 regions. Affidavit of Dr. Jerrold Heller at 2, attached to GIC Comments. The Cooperman/Gould Study, prepared for INTV, MPAA, and NAB, states that in 1988 Arbitron defined 212 major ADI market areas, and that as a general rule a syndicated program will be sold exclusively to only one station in each ADI, and that the station's exclusive zone is limited to within a 35-mile radius of its city of license. Cooperman/Gould Study at 8.

[21] Cooperman/Gould Study at 11.

[22] Cooperman/Gould Study at 11-15.

[23] *See* INTV Comments at 8-9; MPAA Comments at 11; NAB Comments at 16.

[24] *See* Cooperman/Gould Study at 11.

[25] "Signal aquisition time" is the time it takes an HSD receiver to provide a viewable signal after it is tuned to a specific channel. During the time in which the signal is being "acquired," the viewer's television screen is blank.

[26] GIC Reply Comments at 16-20 and attached Affidavit of Dr. Jerrold Heller. *See also* SBCA Reply Comments, Exhibit A (Apple/Katznelson Study) at 7-8. Even using the VC II Plus technology, *see* GIC Reply Comments at 17, n.22, the acquisition time would increase from 3.5 seconds (for 32 markets) to 52.5 seconds (for 480 markets).

[27] GIC Reply Comments at 14-15, n.16.

[28] AHSA Comments at 3; GIC Comments at 5; SBCA at 14. GIC notes that using a different address is not unusual. Canadian subscribers, by using an address in the United States, obtain channels that otherwise would not be available to them. GIC Comments at 5.

[29] *See, e.g.*, INTV Comments at 10.

[30] *See, e.g.*, GE Americom Comments at 9.

[31] *See Satellite Business News*, August 8, 1990, pp. 1, 26. This figure includes authorizations through July, 1990.

[32] SBCA Comments at 7-9.

[33] *See* GIC Comments and Reply Comments; SBCA Reply Comments. GIC submitted an additional affidavit with their reply comments, accompanied by a request that it remain confidential pursuant to the Commission's rules. After INTV *et al.* filed a Freedom of Information Act (FOIA) request for the affidavit, GIC submitted a redacted affidavit without the precise information it wishes to protect, and this copy was served upon INTV *et al.* The outstanding FOIA request will be addressed separately. No party is prejudiced by inaction to date on the FOIA request as the Commission in this proceeding does not disclose or rely on information in the original affidavit. It appears that the principal difference in the original affidavit and the redacted one is that the former states how many "bits" accomplish which task within the VideoCipher architecture. We do not need this information in order to determine the state of technology, as explained in the record by comments and additional information submitted by GIC, SBCA, INTV, NAB, MPAA, and the other parties. INTV, MPAA, and NAB, in joint supplemental comments, also submit an additional study by Cooperman/Gould. This study, based upon information in the redacted affidavit, argues that implementation of a new firmware algorithm would permit application of syndicated exclusivity rules in all markets by using the new VC II Plus decoders. Even if the assertions contained in the report are assumed to be true, however, exclusivity protection likely would not reach a significant level until at least 1994 after time is

allotted for writing, testing, and implementing the necessary software changes and the projected distribution of VC II Plus decoders. *See* paras. 15 and 19, *infra*.

[34] *See* 5 FCC Rcd at 2712, ¶ 23.

[35] This assumption is unreasonable in light of estimated signal "piracy" rates on the order of 50-60%. *See* 5 FCC Rcd 2714, ¶ 39. However, as existing stocks of the compromised VC II decoder are sold, and sales of the as yet uncompromised VC II Plus decoder consequently begin to constitute a greater percentage of total sales, this assumption will become increasingly reasonable. In any event, the effect of any unreasonableness in this assumption would be an underestimation of the time needed to attain a significant level of installed decoders capable of providing exclusivity protection.

[36] *See Satellite Business News*, August 8, 1990, pp. 1, 26. This figure includes authorizations through July of 1990.

[37] The number of authorized decoders not capable of exclusivity protection would increase in the two years from July of 1990 to July of 1992 by 720,000 (24 X 30,000), to 1,398,000. In the two and one half years from July of 1992 to December of 1994, the number of authorized decoders capable of protection would increase from zero to 900,000 (30 X 30,000). Total decoders at the end of 1994 would be 2,298,000.

[38] The total number of authorized decoders would increase between July 1990 and December 1994 by 810,000 (54 X (.5)30,000), to 1,488,000. The number of decoders not capable of exclusivity protection would increase from 360,000 (24 X (.5)30,000), to 1,038,000, by July 1992. After July of 1992 the number of authorized decoders capable of exclusivity protection would increase from zero to 900,000 (30 X 30,000) by December of 1994.

[39] *See, e.g.*, INTV Reply Comments at 13-14.

[40] *See, e.g.*, SBCA Comments at 18; Foundation for Educational Advancement Today (FEAT) Comments and Reply Comments, generally.

[41] 5 FCC Rcd 2710 at 2711 ¶¶ 9-11. *See also* Communications Daily, Nov. 14, 1990 at p.3.

[42] *See* Satellite News, vol. 13, no. 33 at p. 1 (August 20, 1990); Satellite Week, Dec. 3, 1990 at p. 1.

[43] GIC Reply Comments at 6-10.

[44] A number of commenters noted that most HSD customers live in rural areas where there would be no deletion requirement even if exclusivity rules were adopted. For example, one satellite carrier, Netlink USA, states that it serves 110,000 subscribers (out of 637,000 total HSD subscribers at the time of its comments), of which 80,000 have no access to local television signals. Netlink Comments at 5.

[45] *See, e.g.*, Apple/Katznelson Study at 17; Southern Satellite Systems Comments at 3.

[46] *See, e.g.*, INTV Reply at 13.

[47] *See* SBCA Reply Comments at 13-14, Exhibit A, and Apple/Katznelson Study at 18-19 and Appendix B.

[48] Nothing in this Report and Order precludes voluntary agreements among parties concerning the copyright to the programs at issue, or otherwise affects the provisions of the Copyright Act of 1976 as amended by the SHVA, 17 U.S.C. §§ 101 *et seq*.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

AMERICAN TELEPHONE & TELEGRAPH CO.

File No. I-T-C-91-032

Application for authority to acquire and operate facilities in the Private Transatlantic Telecommunications Cable System for the provision of authorized common carrier service to the United Kingdom and beyond.

ORDER AND AUTHORIZATION

Adopted: January 25, 1991; Released: February 8, 1991

By the Chief, International Facilities Division:

1. The above-captioned application, filed on November 20, 1990 by American Telephone and Telegraph Co. (AT&T), requests authority pursuant to Section 214 of the Communications Act of 1934, as amended, to acquire and operate capacity in the Private Transatlantic Telecommunications Cable System (PTAT-1) for the provision of authorized common carrier services between the U.S. and the United Kingdom (U.K.), and points beyond. The application was placed on public notice on November 28, 1990. No comments were received.

2. AT&T is a common carrier engaged in the provision of interstate and foreign communications services. AT&T currently provides services to the U.K. via various satellites and cables now in existence, and proposes to supplement these facilities by use of the capacity in the PTAT-1 Cable System. AT&T has been authorized to acquire and operate a one-half interest in 51 E-1 circuits[1] in the PTAT-1 cable for service between the U.S. and the U.K.[2] It now proposes to acquire, on and Indefeasible Right of User (IRU) basis, a one-half interest in 21 E-1 circuits in the PTAT-1 cable for service to the U.K. For each of the IRU half-interests, AT&T will pay not more than $720,000 plus annual operations and maintenance charges of approximately $25,000.

3. The Commission stated in its *Private Submarine Cable Decision* [3] that it would require common carriers wishing to acquire capacity in PTAT-1 to file applications pursuant to Section 214 of the Communications Act.[4] Most recently, on August 22, 1989[5], we granted authority to six common carriers to acquire capacity in the PTAT-1 cable and to use this capacity to provide their authorized common carrier services between the United States and Bermuda, the Republic of Ireland, the U.K., and points beyond. We found that those applicants had provided all the information necessary for grant of the applications.[6] In addition, we found that the circumstances surrounding those applications did not raise an economic impact issue.[7] In the instant application, we find that AT&T's request fits into the same category as the above referenced applications granted on August 22, 1989. AT&T has filed all the information necessary under Section 63.01 of the Commission's Rules. Furthermore, AT&T states that it will be using the capacity in PTAT-1 to supplement existing facilities and the grant of this application will not adversely inpact other common carrier facilities for which AT&T has already been authorized.

4. Upon consideration of the application, we find that authorization of the requested services and facilities are required by the public convenience and necessity.

5. Accordingly, IT IS ORDERED that application File No. I-T-C-91-032 IS GRANTED, and AT&T is authorized to:

a. acquire, on an IRU basis, a one-half interest in 21 E-1 circuits in the PTAT-1 cable between the United States and the U.K.;

b. acquire appropriate domestic connecting facilities; and

c. operate such capacity for the provision of AT&T's authorized services between the U.S. and the U.K. and beyond.

6. IT IS FURTHER ORDERED that this authorization is issued subject to the terms and conditions of any license issued to PSI herein under the act entitled "An Act relating to the landing and operation of submarine cables in the United States" (47 U.S.C. §§34-39).

7. This order is issued under Section 0.291 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of the date of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International
Facilities Division
Common Carrier Bureau

FOOTNOTES

[1] An E-1 circuit is equivalent to a capacity of 2.048 Megabits per second (Mbps).

[2] *See* AT&T, 4 FCC Rcd 7005 (1989) and 5 FCC Rcd 2593 (1990).

[3] Private Submarine Cable Decision, 100 FCC 2d 1033 (1985).

[4] This requirement was restated in the *International Competitive Carrier* decision, where the Commission determined that it would require non-dominant carriers to file applications to acquire capacity from any future private cable sources. *International Competitive Carrier Policies*, 102 FCC 2d 812, 845 (1985). Information requirements for Section 214 applications are found in Section 63.01 of the Commission's Rules 47 C.F.R. §63.01.

[5] *See*, CICI, Inc. *et al*, File Nos. I-T-C-89-103 *et al.*, 4 FCC Rcd 6622 (1989).

[6] The Commission places no special burdens on any carrier making an application for private cable capacity. It requires carriers to provide the information required by the Commission's rules to be contained in a Section 214 application. *See* Pacific Telecom, Inc., Request for Clarification of Policies Concerning Use of Independent Cables, File No. ISP-89-002, 4 FCC Rcd 4454 (1989).

[7] The Commission stated that it has authority under its public interest mandate under Section 214 to consider *sua sponte* any economic impact issues, including traffic diversion issues, that may be raised in an application by a common carrier to acquire private cable capacity or to consider such issues when raised by third parties filing comments in response to an application. However, the Commission has stated that it does not anticipate that common carrier acquisition of private cable capacity will normally give rise to such issues. Even if an applicant seeks to acquire a substantial amount of private cable capacity and to offload capacity on a common carrier cable or change a prior commitment for use of capacity in planned common carrier facilities, the Commission stated that the presence of these factors would not be conclusive evidence of economic harm. The Commission further stated that the "[r]esolution of any economic impact issues that may arise, and a determination of whether grant of the application would serve the public interest, would be dictated by the circumstances of the particular case before us." *Id.* at 4456.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

US SPRINT COMMUNICATIONS COMPANY LIMITED PARTNERSHIP — File No. I-T-C-91-031

Application for authority to acquire and operate facilities for direct service between the U.S. and Hungary.

ORDER, AUTHORIZATION AND CERTIFICATE

Adopted: January 25, 1991; Released: February 8, 1991

By the Chief, International Facilities Division:

1. The above-captioned application, filed on November 20, 1990 by US Sprint Communications Company Limited Partnership (US Sprint), requests authority pursuant to Section 214 of the Communications Act of 1934, as amended, to acquire and operate facilities for direct service between the U.S. and Hungary. The application was placed on public notice on November 28, 1990. No comments were received. Upon consideration of the application, IT IS HEREBY CERTIFIED that the present and future public convenience and necessity require the provision of direct service between the U.S. and Hungary by US Sprint.

2. Accordingly, IT IS ORDERED that application File No. I-T-C-91-031 IS GRANTED, and US Sprint is authorized to:

a. lease from Comsat and operate 24 voice-grade satellite circuits between the Etam, West Virginia earth station and an appropriate satellite over the Atlantic Ocean, connecting with similar circuits between the satellite and an earth station in Austria furnished by Austrian PTT;

b. lease from AT&T and operate 24 voice-grade circuits in the Etam, West Virginia earth station;

c. lease from Austrian PTT capacity in an existing coaxial cable between the Austrian earth station and the border of Hungary;

d. lease and operate necessary connecting facilities between US Sprint's technical operating center in New York City and the Etam, West Virginia earth station; and

e. use the facilities in a, b, c and d above to provide US Sprint's regularly authorized services, including switched voice services, between the U.S. and Hungary and beyond;

3. The Commission retains jurisdiction over this matter to reallocate circuits in the satellite system among the various international common carriers and other authorized users as required to ensure nondiscriminatory use of, and equitable access to, the communications satellite system.

4. No material changes inconsistent with this or any other relevant Commission order shall be made before final execution of an operating agreement between US Sprint and its correspondent in Hungary and a copy of the agreement shall be filed with the Commission within 30 days of its execution.

5. IT IS FURTHER ORDERED that the applicant shall file a tariff pursuant to Section 203 of the Communications Act, 47 U.S.C. Section 203, and Part 61 of the Commission's Rules, 47 C.F.R. Part 61, for the service authorized in this Order.

6. IT IS FURTHER ORDERED that the applicant shall file the annual reports of overseas telecommunications traffic required by Section 43.61 of the Commission's Rules, 47 C.F.R. §43.61 (October 1, 1989).

7. IT IS FURTHER ORDERED that the applicant shall file semi-annual circuit reports pursuant to Section 63.10(b) of the Commission's Rules, 47 C.F.R. Section 63.10(b) (October 1, 1989).

8. This order is issued under Section 0.291 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of the date of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

QUALCOMM, INC. File No. 1132-DSE-MP/L-90
Call Sign E880423

Application for Modification of
Blanket Authority to Construct and
Operation an Additional 20,000
12/14 GHz Transmit/Receive Mobile
and Transportable Earth Stations

ORDER AND AUTHORIZATION

Adopted: January 30, 1991; Released: February 8, 1991

By the Chief, Domestic Facilities Division:

1. Qualcomm, Inc. (Qualcomm) requests authority to modify its authorizations for its OmniTRACS system to allow it to construct and operate an additional 20,000 very small aperture 12/14 GHz mobile and transportable transmit/receive earth stations. Qualcomm's system provides two-way satellite-based data communications between its customers' operation centers and its mobile users by using capacity on GTE Spacenet Corporation's 12/14 GHz GSTAR I satellite. Qualcomm is currently authorized to operate up to 20,600 mobile and transportable units in connection with its system.[1] It now seeks authority to construct and operate 20,000 additional, identical units. No comments or oppositions were filed with respect to Qualcomm's application. For the reasons discussed below, Qualcomm's application for modification is granted.

2. Qualcomm states that as of April 1990, it had delivered more than 7700 OmniTRACS units and had options under scheduled fleet orders that totalled nearly 3000 more. It states that the additional units are needed to allow it to meet anticipated future demand. Qualcomm further alleges that no incidences of harmful interference have been reported in conjunction with the operation of its system. It submits that increasing its authorization to include 20,000 additional units will not affect the technical parameters of the OmniTRACS system and will not increase the chances of harmful interference.

3. Grant of Qualcomm's unopposed application will serve the public interest, convenience and necessity. Authorizing additional units should not increase the potential for harmful interference provided that the units are operated in accordance with the conditions delineated in Qualcomm's initial authorization.[2] Further, grant should allow Qualcomm to meet its projected needs.

4. Accordingly, pursuant to Section 0.291 of the Commission's rules on delegations of authority, 47 C.F.R. § 0.291, IT IS ORDERED that Application File No. 1132-DSE-MP/L-90 IS GRANTED and Qualcomm, Inc. IS AUTHORIZED to construct and operate an additional 20,000 temporary-fixed and mobile earth stations in conjunction with its OmniTRACS system, subject to the same terms and conditions of its authorization in File Nos. 869-DSE-P/L-88 and 3073-DSE-ML-88 (Qualcomm, Inc., 4 FCC Rcd 1543 (1989)).

5. Qualcomm, Inc. is afforded thirty days from the date of release of this order to decline the authorization as conditioned. Failure to respond within that period will constitute formal acceptance of the authorization as conditioned.

FEDERAL COMMUNICATIONS COMMISSION

James R. Keegan
Chief, Domestic Facilities Division
Common Carrier Bureau

FOOTNOTES

[1] *See* QUALCOMM, Inc., 4 FCC Rcd 1543 (1989).

[2] *See id.* at para 22.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Application of

Eldon L. Hueber File No. 60341-CL-P-207-A-86
d/b/a Cellutech

For facilities in the Domestic Public
Cellular Telecommunications Radio
Service on Frequency Block A in
Market No. 207, Jackson, Michigan MSA

MEMORANDUM OPINION AND ORDER

Adopted: January 31, 1991; Released: February 8, 1991

By the Chief, Mobile Services Division:

I. INTRODUCTION AND BACKGROUND

1. Jackson Cellular, Inc. (JCI) was the tentative selectee for the non-wireline authorization for the Jackson, Michigan Metropolitan Statistical Area (Jackson MSA).[1] Subsequently, the Mobile Services Division (Division) dismissed JCI's application, because it did not have reasonable assurance of site availability at the time it filed its application, as required by Section 22.15(a)(1) of the Commission's rules. JCI filed a Petition for Reconsideration of that decision.[2] On June 19, 1990, the Commission issued a Public Notice, Report No. CL-90-226, announcing Cellutech, the third ranked applicant in the lottery, as the new tentative selectee for the non-wireline authorization in the Jackson MSA. On July 20, 1990, Cellutech filed an amendment to its application, pursuant to Section 1.65 of the rules, to change the name of the applicant to Eldon L. Hueber d/b/a Cellutech (Cellutech).[3] Cellutech also filed its financial exhibit pursuant to the requirements of Section 22.917(b) of the rules.

2. On August 6, 1990, JCI filed a Motion for Stay of Proceedings (Motion), requesting that further processing of Cellutech's application be stayed pending final resolution of its Petition for Reconsideration. On August 13, 1990, JCI filed a Petition to Dismiss or Deny (Petition) the captioned Cellutech application. Cellutech opposes the Motion and the Petition.[4]

II. REQUEST FOR STAY

3. *Contentions.* JCI argues that a stay of processing Cellutech's application should be granted because JCI has a substantial likelihood of prevailing on the merits of its Petition for Reconsideration. JCI also claims that it will suffer irreparable harm from the Commission's decision to dismiss its application and process Cellutech's application to grant unless a stay is granted. JCI asserts further that a grant of its motion for stay will not harm Cellutech. Moreover, JCI argues, the public interest will not be harmed by issuing a stay, because non-wireline service has not commenced, and there would be no disruption of the existing wireline service being provided in the Jackson MSA.

4. In its opposition, Cellutech submits that the Commission has previously denied a Motion like JCI's.[5] *U.S. Cellular, Inc.*, 5 FCC Rcd 4577 (Mob. Serv. Div. 1990), and JCI's Motion should be denied pursuant to the holding in that case. *Id.*

5. *Discussion.* To qualify for a stay, JCI must show that (1) it is likely to prevail on the merits; (2) it will be irreparably harmed unless a stay is issued; (3) issuance of the stay will not cause substantial harm to any other party; and (4) the public interest is best served by issuing a stay. *See Virginia Petroleum Jobbers Association v. FPC*, 259 F.2d 921, 925 (D.C. Cir. 1958). JCI has failed to show that it will suffer irreparable injury if the application of Cellutech, as amended, is granted. *See Wisconsin Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985) ("It is . . . well settled that economic loss does not, in and of itself, constitute irreparable harm."); *see also Washington Metropolitan Area Transit Commission v. Holiday Tours, Inc.*, 559 F. 2d 841 (D.C. Cir. 1977). Regulatory relief is available to JCI should it wish to challenge the grant of a construction authorization to Cellutech by filing a petition for reconsideration or an application for review. *Virginia Petroleum Jobbers*, at 925. Indeed, a grant of authorization may be vacated if the decision underlying the grant is reversed as a result of litigation. *See, e.g., Alianza Federal de Mercedes v. FCC*, 539 F.2d 732, 736 (D.C. Cir. 1976). Moreover, a subsequent construction authorization would be conditioned on the outcome of any pending proceeding regarding the dismissal of prior lottery winners. *U.S. Cellular, Inc., supra.* Therefore, there is no basis for JCI's assertion that the Commission would be unable to provide it with adequate relief should it ultimately prevail on the merits.

6. Finally, the grant of a stay would be inimical to the public interest because it would perpetuate the current cellular service monopoly in the Jackson MSA by unnecessarily delaying commencement of service by a competitive, non-wireline carrier. *See BellSouth Mobility, Inc.*, 3 FCC Rcd 6902 (Mob. Serv. Div. 1988). We therefore deny JCI's Motion. *U.S. Cellular, Inc., supra.*

III. PETITION TO DISMISS OR DENY

A. Financial Qualifications

7. *Contentions.* JCI contends that Cellutech is not financially qualified under Section 22.917(b) of the rules.[6] JCI asserts that because the estimated total costs of construction and operation for Cellutech's first year are $1,623,000, the commitment from Motorola totalling $1,430,000, ($1,100,000 in construction plus 30% of that cost for operation), is deficient by $193,000. JCI contends that the financial commitment for $350,000 that Mr. Hueber has obtained from Harris Bank of St. Charles, Illinois (Harris Bank) to compensate for this deficiency is defective because it specifies a loan term of only 90 days. JCI argues that Cellutech will have to consider the Harris Bank loan a current liability on its balance sheet, that Cellutech does not have sufficient net current assets to repay the loan after 90 days, and that there is no indication where Mr. Hueber will obtain the funds for repayment. The loan term of 90 days, says JCI, raises a question as to whether the letter is only an "accommodation" to an existing client, instead of a firm one year commitment.

JCI also claims that the letter does not indicate awareness by Harris Bank of Motorola's first security interest in the cellular system assets. JCI also claims that due to an existing secured obligation of $21,000 that Mr. Hueber has with the Harris Bank, as shown in his financial statement in Cellutech's July 20, 1990 amendment, there is no clear source of collateral for the loan. Moreover, maintains JCI, the loan is a personal commitment to Mr. Hueber, not a commitment to a partnership which Cellutech says it will form in the future, and Harris Bank does not indicate that it would make a loan to such a partnership. For these reasons, JCI argues, Cellutech's application should be dismissed, or designated for hearing on a financial qualification issue.[7]

8. Cellutech responds that it has not borrowed the funds from Harris Bank and therefore the funds are not yet current assets and the loan is not a current liability. Cellutech further responds that the 90 day period for the loan was a term requested by Mr. Hueber to meet his needs rather than a condition imposed by Harris Bank. Cellutech argues that JCI's contentions regarding the short term and repayment of the loan are incorrect, because there is no Commission requirement that an applicant demonstrate an ability to repay the loan for which the commitment is made. Cellutech asserts that JCI's contention regarding Cellutech's failure to demonstrate sufficient net liquid assets is inapplicable because the liquid assets test does not apply to an applicant, such as Cellutech, that is relying entirely on lender financing and not internal assets. Moreover, submits Cellutech, the Harris Bank letter makes the financial commitment for one year, not for the 90 day term of the loan as suggested by JCI. In addition, Cellutech says that the 1% loan fee to be paid by Mr. Hueber shows that the loan is not a mere accommodation by Harris Bank. Furthermore, Cellutech adds, Harris Bank was aware of how the loan monies would be used, relied solely on Mr. Hueber's current assets in committing to make a personal loan, and has knowledge, as indicated by its letter, of the collateral Mr. Hueber will use.

9. *Discussion*. For MSA markets beyond the top 120, Section 22.917(b) of the rules provides that a tentative selectee "shall . . . obtain a firm financial commitment necessary to construct and operate for one year its proposed cellular system . . . ." The rule further states that the amendment which a tentative selectee makes to its application to demonstrate this commitment ". . . shall also include the realistic and prudent costs of proposed construction and other initial expenses; estimated operating expenses for a period of one year; and a balance sheet current within 30 days of the date of filing of the amendment."[8] If the tentative selectee obtains financing from a recognized bank, the Commission further requires that the bank's commitment "evidence the lender's determination that it has assessed the creditworthiness of the loan applicant and that it is committed to providing the necessary financing . . . ." *See* Section 22.917(b)(1)(i) of the Commission's rules.

10. JCI's allegations regarding the inadequacy of a 90 day term for the loan and uncertainty in Mr. Hueber's repayment schedule are without merit. The Commission's policy in establishing a "firm commitment" standard was to require applicants to demonstrate the availability of funding for the proposed systems in order to deter applicants that were not capable of financing cellular proposals from submitting applications for speculative purposes. *Cellular Lottery Reconsideration Order*, 101 FCC 2d 577, 590 (1985). The firm commitment from the lender demonstrates the availability of financing to cover the costs of construction and operation for one year. *Id*. It is this commitment and not a specific period for repayment of the loan that satisfies the rule requirement. JCI's contention as to Mr. Hueber's net liquid assets is immaterial because Mr. Hueber is not relying on internal financing to show sufficient resources.[9] As shown in its letter, Harris Bank has determined Mr. Hueber's creditworthiness favorably and approved the loan. The letter from Harris Bank indicates that it was aware of Mr. Hueber's sources of collateral for the loan. For these reasons, we reject JCI's allegations that Cellutech is not financially qualified under Section 22.917 of the rules.

B. Compliance with Section 22.13 (a) (1)

11. *Contentions*. JCI argues that Cellutech's application is defective because it fails to comply with Section 22.13(a)(1) of the rules by not identifying the real parties in interest. JCI states that according to Cellutech's July 1990 Amendment, Cellutech is a prospective partnership which will consist of applicants that were parties to post-filing settlement agreements. JCI asserts that because Cellutech is treating the original settlement agreement as void and is attempting to create another settlement group,[10] Cellutech cannot identify the real parties in interest behind this application. According to JCI, Cellutech is thereby preventing the Commission from determining Cellutech's legal ownership.[11] JCI also asserts that because Cellutech has not accurately disclosed the holdings of Capital Cellular Corp. (Capital), which has acquired the minority interests of some settlement members resulting in an interest totalling at least 6.744%, the Commission cannot determine whether more information is needed regarding Capital's qualifications.

12. JCI asserts that although Cellutech reports in both its application and July, 1990 Amendment that it is a sole proprietorship owned by Eldon L. Hueber, the Amendment shows that a corporate entity is an owner of Cellutech's application. JCI submits that (1) Mr. Hueber's financial statement lists him as president of Cellutech Inc., which has minority interests in several MSAs; that (2) the Addendum to the post-filing agreement shows that it was entered into by Cellutech, Inc.; and that (3) Mr Hueber's letter of September 1, 1988, inviting settlement members to sign the Addendum, is from "Eldon Hueber President of Cellutech, Inc., applicant and third selectee for the Jackson, MI, MSA."[12] JCI concludes that Cellutech has not accurately identified its form of ownership.

13. Cellutech responds that JCI's argument concerning the qualifications of members of the settlement group is irrelevant to processing Cellutech's application because the members are not yet parties to Cellutech's application.[13] Cellutech contends that the proper time for addressing their qualifications will be when it files an application for assignment to the entity which it will form to hold the cellular authorization. Cellutech further asserts that its July 20, 1990 Amendment complies with Commission disclosure requirements by providing the names and addresses of the settlement group, and the settlement documents.

14. Regarding JCI's allegations as to its ownership Cellutech submits that its July 20, 1990 Amendment shows that it is still a sole proprietorship, as indicated in

the amended FCC Form 401 (Items 10 and 26). Cellutech submits that Cellutech, Inc. is a company wholly owned by Mr. Hueber that holds passive-minority interests in other MSAs. Cellutech adds that when Mr. Hueber offered the Addendum to members of both settlement groups he contemplated a change to corporate ownership, but he has not yet decided on what form of ownership Cellutech will take.

15. *Discussion.* Section 22.13(a)(1) of the rules requires that an applicant disclose fully the real party in interest engaged in the proposed cellular service, including a list of the applicant's subsidiaries, a list of affiliates, and a list of the names, addresses, citizenship, and principal business of any person with an interest of five percent or more in the applicant.[14] Commission policy calls for cellular applicants, except corporate entities, to disclose fully any interest in their applications, even those interests of less than 5 percent.[15] For MSAs 121-305, the Commission required non-wireline applicants to disclose fully the members to pre-filing and post-filing settlement agreements to show compliance with Section 22.13(a)(1), even when those interests were less than 1 percent.[16]

16. We find that Cellutech has complied with the Commission and Bureau guidelines regarding the disclosure of the interests of parties to partial settlement agreements. Cellutech has timely submitted its settlement agreements, including its Addendum Settlement Agreement. Further, it has submitted the identities of the persons and entities who are involved in the Addendum, *i.e.*, those who will receive minority interests when Cellutech forms its new ownership structure. According to the Addendum Settlement Agreement, each separate minority interest will constitute less than one percent.[17]

17. The Commission has established that Section 22.13(a)(1) of the rules does not require submission of information concerning subsidiaries or affiliates other than those which have financial interests in Part 22 licenses, permittees, or applicants, in the same geographical area.[18] The purpose of Section 22.13(a) is "to prevent an applicant from filing numerous applications in the same geographical area under different names." *PMRS*, *supra*, at n. 7. Therefore, Cellutech is not required to provide information on Capital, which is identified as having a right to a future minority interest, unless Capital were an applicant or owned by individuals or entities that were applicants for the Jackson MSA. A review of MSA 207 applicants does not reveal that Capital was an applicant,[19] nor has JCI alleged that there are ownership interests showing a violation of Section 22.921(b). It is sufficient that Cellutech has disclosed that Capital has a future interest. Therefore, we conclude that JCI's allegations regarding the qualifications of the holders of future ownership interests in Cellutech do not demonstrate that Cellutech is in violation of Section 22.13 (a) of the rules.

18. Finally, while the record shows that Cellutech has not decided upon the ownership structure it will finally use, we cannot find that its current structure is violative of any Commission rules or adversely affects its qualifications to be a cellular licensee. *See Jacksonville Cellular Telephone Corporation*, 2 FCC Rcd 6416, 6418 (Mob. Serv. Div. 1987); *affirmed* 3 FCC Rcd 5386 (1988). We expect that Cellutech will report the details of any subsequent organizational change and seek any necessary authority as required by the rules.

IV. ORDERING CLAUSES

19. Accordingly, IT IS ORDERED, That the Motion for Stay of Proceedings filed by Jackson Cellular, Inc. IS DENIED.

20. IT IS ORDERED, That the Petition to Dismiss or Deny filed by Jackson Cellular, Inc. IS DENIED.

21. IT IS FURTHER ORDERED That the application of Eldon L Hueber d/b/a Cellutech IS GRANTED, subject to the outcome of any pending proceeding regarding the dismissal of the applications of Jackson Cellular, Inc., File No. 49336-CL-P-207-A-86, and David W. Coffey, File No. 53094-CL-P-207-A-86. Further, Cellutech is on notice that in the event current or future MSA/RSA licensees encounter interference from any service extension Cellutech will have to change frequencies in those cells or reduce its 39 dBu contour to eliminate any interference due to an extension.

FEDERAL COMMUNICATIONS COMMISSION

Gregory J. Vogt
Chief, Mobile Services Division
Common Carrier Bureau

FOOTNOTES

[1] *See Public Notice*, Report No. CL-87-100 (released December 18, 1986).

[2] *See Roberts Cellular, Inc.*, 5 FCC Rcd 1357 (Mob. Serv. Div. 1990), *recon. pending*. The MSD also dismissed the application of David W. Coffey (Coffey), File No. 53094-CL-P-207-A-86, who was the second ranked applicant in the Jackson MSA lottery. *See* Letter to Coffey from Chief, Mobile Services Division (June 7, 1990), *recon. pending*.

[3] The initial application was filed as Cellutech, a sole proprietorship 100% owned by Eldon L. Hueber. The Section 1.65 amendment asserts that the ownership of applicant remains the same as it was when the application was first filed.

[4] In addition, JCI filed a Reply to Cellutech's opposition to the petition. Cellutech filed a Motion to Strike JCI's Reply on the ground that Section 1.823 (b) of the Rules provides that after the petition to deny and opposition reply pleading are filed, additional pleadings will not be accepted. In the instant case, we find that Section 1.823 (b) is applicable and will grant Cellutech's Motion to Strike.

[5] *See Roberts Cellular, Inc., supra.*

[6] Cellutech also contends that JCI does not have standing to file a Petition because the MSD order dismissing JCI's application was effective upon release pursuant to Section 1.102(b) of the rules, so that JCI is no longer an applicant in the Jackson MSA. In referring to *Committee to Save WEAM v. F.C.C.*, 808 F.2d 113 (D.C.Cir. 1986), Cellutech overlooks the Court's statement that the "'effective but not final' procedure did not deprive appellant of the opportunity to challenge the assignment [application], but merely prevented appellant from insisting on the maintenance of the status quo pending review." *Id.* at 119. Moreover, with a pending petition for reconsideration of the MSD's dismissal of its application, JCI is a party in interest in this proceeding. *See* para. 5, *supra*. Therefore, we conclude that JCI has standing.

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[7] JCI contends that Cellutech violated the Commission's *ex parte* rules when Cellutech failed to serve JCI with a copy of the Petition to Dismiss or Deny that Cellutech had filed on July 28, 1989 against JCI's application for the Jackson, Michigan MSA prior to the Division's dismissal. We have previously resolved this matter. *See Public Notice*, Report No. CL-90-7 (released October 5, 1989).

[8] 47 C.F.R. §22.917(b).

[9] *See* 47 C.F.R. § 22.917(b)(1)(ii); *American Cellular Corp.*, 103 F.C.C. 26, 44-46 (1986).

[10] After filing its application on April 22, 1986, Cellutech entered into a partial settlement agreement formed by Denman Resources, Inc. (Denman Agreement). *See* July 20, 1990 Amendment. Denman subsequently entered into a Joint Agreement with other parties who had formed similar partial settlement groups or alliances. In its July, 1990 amendment, Cellutech reports that certain conditions subsequent contained in both the Denman Agreement and Joint Agreement failed to occur and caused these agreements to terminate. Cellutech further reports that on September 1, 1988, it offered to members of both the Denman and Joint Agreements a new settlement agreement that it designated Addendum to Denman Agreement and Joint Agreement (Addendum Settlement Agreement).

[11] *See* 47 C.F.R. § 22.4(b).

[12] *See* July 20, 1990 Amendment of Cellutech.

[13] Cellutech asserts in its July 20, 1990 Amendment that there was insufficient time to draft, circulate, and sign a partnership agreement between the release of the Public Notice naming Cellutech as tentative selectee and the date for filing amendments. In its Amendment, Cellutech states that upon receiving an authorization it will form a partnership or some other entity that will include applicants who are included in the Addendum agreement, *see* note 10, *supra*, and also individuals or entities to whom minority interests were assigned. Cellutech says that it has advised settlement members assigning their minority interests that the transfers of those interests will not be recognized by Cellutech until after a grant of Cellutech's application. Cellutech further states that the majority controlling interest will remain with Mr. Hueber.

[14] 47 C.F.R. § 22.13(a)(1).

[15] *See* Public Notice, Report No. CL-86-148A (released May 22, 1986); Public Notice, Report No. CL-86-148, "Procedures Announced for Filing of Settlement Agreements in Cellular Markets 121-305" (released May 12, 1986); Public Notice, Report No. CL-291 (released April 10, 1985). *See also e.g.* Public Notice, Mimeo 366, "Common Bureau Issues Declaratory Ruling Concerning Disclosure of Partnership Interests by Cellular RSA Applicants" (released November 3, 1988).

[16] *Reconsideration of the Cellular Lottery Rule Making*, 58 Rad. Reg. 2d (P&F) 677, 684, and 685 n.29 (1985) (*Reconsideration*). The Commission allowed partial settlement agreements for nonwireline applicants but retained Section 22.921(b) of the rules prohibiting them from having more than 1 percent interest in other applications in the same MSA through such agreements. The Commission initially adopted that rule section for MSAs 91-120. *Cellular Lottery Rule Making*, 98 FCC 2d 175, para. 78 (1984). *See* 47 C.F.R. § 22.921(b).

[17] *See* note 13, *supra*. Cellutech also shows that controlling interest will remain with it after a grant of authorization and the transfer of minority interests.

[18] *Public Notice*, "Real Party in Interest Disclosure Requirements in the Public Mobile Services (PMRS)." Mimeo 1060, released November 26, 1982. *See Cellular One of Terre Haute*, 2 FCC Rcd 4752 (Mob. Serv. Div. 1987).

[19] *See* Lottery Notice for October 27, 1986 Lottery, Mimeo No 6830 (released September 19, 1986)

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 87-568

In the Matter of

AT&T COMMUNICATIONS

Revisions to Tariff F.C.C. No. 12

ORDER

Adopted: January 28, 1991; Released: February 1, 1991

By the Commission: Commissioner Duggan issuing a separate statement.

I. INTRODUCTION

1. On October 23, 1990, the United States Court of Appeals for the District of Columbia Circuit remanded this proceeding[1] to this Commission. *MCI Telecommunications Corp. v. FCC*, No. 89-1382 (D.C. Cir. Oct. 23, 1990). To assist us in resolving the issues before us on remand, we are now providing an opportunity for parties to comment on the issues specified in Section II, *infra*.

II. ISSUES FOR COMMENT

A. "Likeness" -- Integrated Service Packages and Tariffed Components

2. In the *Tariff 12 Order*,[2] the Commission concluded that the integrated service packages offered by AT&T Communications (AT&T) in its Tariff No. 12 are not "like" their tariffed component services for purposes of Section 202(a) of the Communications Act, 47 U.S.C. § 202(a), because integrated service packages are not functionally equivalent to the components. In paragraphs 50 through 52 of the *Tariff 12 Order*, the Commission also discussed certain cost and price characteristics of integrated packages which the court held were factors which should have been excluded from the likeness determination. The court ordered this Commission to resolve the likeness issue without regard to these factors. The court expressed no opinion as to the permissibility or validity of the other justifications the Commission gave for its finding on the likeness issue or whether, standing alone, they would be sufficient to support a determination that the services are not "like." To assist us in performing the analysis required by the court, we invite interested parties to address in their comments the following questions:

> A.1. Are integrated service packages "like" their tariffed components for purposes of Section 202(a) of the Communications Act? We specifically request interested parties to identify any characteristics and functionalities which distinguish integrated service packages from their tariffed components. Parties should describe such functionalities in detail, with an emphasis on customer perception. [3]
>
> A.2. Are the options before us in this investigation integrated service packages that are "unlike" their tariffed components?
>
> A.3. If integrated service packages are "like" their tariffed components, are any disparities between the prices for the options before us in this investigation and tariffed components unreasonably discriminatory under Section 202(a) of the Communications Act?

B. "Likeness" -- Differences Among Integrated Service Packages

3. In the *Tariff 12 Order*, the Commission briefly addressed the question of whether integrated service packages are "like" each other for purposes of Section 202(a), and concluded that they are "like" to the extent that the functionalities which distinguish integrated service packages from disaggregated tariffed components are intrinsic to all integrated packages. Therefore, customers of any one package receive some network functionalities which are the same as those available in all other packages. The Commission thus required the carriers to ensure that such packages are generally available to similarly situated customers who request substantially similar packages.[4] The Commission also found that differences in the terms and conditions under which customers take integrated service packages can account for differences among customers' bills or differences among packages in pricing and in availability to customers, but would not generally justify characterization of the service obtained by customers as "unlike." However, the Commission did not rule out the possibility that there may be functionalities which might make integrated service packages "unlike" each other. No party challenged this likeness finding, although the appellants did assert that the Commission erred in the remainder of its discrimination analysis. Nevertheless, the court interpreted this analysis as a finding by the Commission that all of the Tariff 12 integrated service packages before the Commission are "like" services with respect to each other and ordered us to address the question of whether any price differences among the integrated service packages before us in this investigation are reasonable. Accordingly, we request comment on the following questions:

> B.1. Are the integrated service packages before us in this investigation "like" each other for purposes of Section 202(a) of the Communications Act?
>
> B.2. Parties who argue that these packages are not "like" each other should identify the functionalities and characteristics cognizable under the *Ad Hoc* decision which they claim differentiate these packages from each other, rather than the functionalities that differentiate packages from their component services, with an emphasis on customer perception.
>
> B.3. If the packages are "like" each other, are any price disparities among the integrated service packages before us in this investigation unreasonably discriminatory under Section 202(a) of the Communications Act? We specifically request interested

parties to identify what characteristics or terms and conditions would make any price disparities not unreasonably discriminatory.

C. Remaining Designation Issues

4. In the *Tariff 12 Order*, the Commission found that the integrated service packages before us in this investigation were not "generally available" to all similarly situated customers because of geographic restrictions on their availability. The Commission required AT&T to refile its tariffs without these restrictions or withdraw the offerings. As a result, the Commission did not reach the question of whether they were unlawful on the other grounds designated for investigation. The court held this justification to be inadequate, and ordered us to either reach the issues designated for investigation or provide an adequate explanation for not doing so. Accordingly, we request comment on the following questions:

C.1. Is it necessary or desirable to reach any or all of the issues below, which were designated for investigation in this docket in AT&T Communications, Transmittal Nos. 1018 and 1102, Memorandum Opinion and Order, 3 FCC Rcd 995 (1988), and what is the basis for this conclusion?

C.2. Is AT&T obligated to make reasonable efforts to make the integrated service packages before us in this investigation as generally available as possible and, if so, has AT&T done that?

C.3. Do the integrated service packages before us in this investigation comply with this Commission's Private Line Guidelines?[5]

C.4. Do the integrated service packages before us in this investigation comply with this Commission's policy prohibiting restrictions on resale and shared use?[6]

III. PROCEDURES

5. Pleadings on these issues may be filed on or before March 4, 1991, should reference the docket number for this proceeding, and should be captioned "Comments on AT&T Tariff 12 Issues on Remand." Replies may be filed on or before March 25, 1991, and should be captioned "Reply to Comments on AT&T Tariff 12 Issues on Remand." All submissions must be organized to reflect the issues designated in this Order and must cross-reference by letter and number the issues in Section II, *supra*.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] The instant docket was initiated as an investigation under Section 204(a) of the Communications Act, 47 U.S.C. § 204(a), of AT&T Transmittal Nos. 1018, 1102, 1145, 1336, 1349, and 1409. The integrated service packages before us in this investigation were denominated in the transmittals as Virtual Telecommunications Network Service (VTNS) Options I, II, III, and IV. Sprint also filed a "Motion for Order to Govern Proceedings on Remand," in which it asked the Commission to expand the scope of its investigation on remand to include all Tariff 12 options on file. We deny Sprint's request to formally include all those options in this investigation. We do so as an exercise of our discretion to organize our proceedings in the most effective way. There are as of today some 77 Tariff 12 options on file at the Commission. To include all the options in this investigation would result in an unwieldy and almost impossible administrative proceeding. To add all the options to the investigation, moreover, would substantially impede our progress toward resolving important questions of lawfulness regarding Tariff 12. We recognize, however, that the other options may raise questions that the first four options raise.

[2] AT&T Communications, Revisions to Tariff F.C.C. No. 12, Memorandum Opinion and Order, 4 FCC Rcd 4932 (*Tariff 12 Order), recon. denied*, 4 FCC Rcd 7928 (1989), *rev'd & remanded sub* nom. MCI Telecommunications Corp. v. FCC, No. 89-1382 (D.C. Cir. Oct. 23, 1990).

[3] *See Ad Hoc Telecommunications Users Committee v. FCC*, 680 F.2d 790 (D.C. Cir. 1982) (*Ad Hoc)*.

[4] *Tariff 12 Order*, 4 FCC Rcd at 4937, paras. 54-55.

[5] *See* 47 C.F.R. § 61.40; Private Line Rate Structure and Volume Discount Practices, 97 FCC 2d 923 (1984).

[6] *See, e.g.*, Resale and Shared Use, 83 FCC 2d 167 (1980), *recon. denied*,86 FCC 2d 820 (1981).

SEPARATE STATEMENT
OF
COMMISSIONER ERVIN S. DUGGAN

In Re: AT&T Communications, Revisions to Tariff F.C.C. No. 12 (CC Docket No. 87-568)

I join my fellow Commissioners today in deciding to seek further comment on the questions we must address on remand in the investigation of AT&T's Tariff F.C.C. No. 12.

I think it important to stress, however, that the Commission faces questions about more than just the first four AT&T Tariff 12 options. AT&T's other Tariff 12 options--- some of which are already subject to complaints--- may raise questions of lawfulness as well.

As we go forward, I find myself somewhat concerned that the second major question in this Notice--- whether integrated service packages under Tariff 12 are "like" one another--- is confined to the first four options only. The danger is that in so limiting ourselves, we may not ensure a broad enough record, or find broad enough principles, to help us decide issues beyond the first four options.

The Commission is persuaded that to widen the remand proceeding would create almost insuperable administrative difficulties. I hope, nevertheless, that commenters will keep in mind our need to adduce broad principles that will guide us when we evaluate other Tariff 12 options. For it seems to me beyond question that Tariff 12 customers, companies that compete with AT&T, and the Commission itself will be better off if, at the end of the day, this proceeding makes it possible for us to resolve those Tariff 12 issues that lie beyond the first four options--- whether through complaint proceedings, or by initiating tariff investigations on our own motion.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

American Telephone and Telegraph Company — Transmittal No. 2690

Revisions to Tariff F.C.C. No. 12

ORDER

Adopted: January 31, 1991; Released: January 31, 1991

By the Chief, Common Carrier Bureau:

1. American Telephone and Telegraph Company (AT&T) has filed Transmittal No. 2690 to introduce Virtual Telecommunications Network Service (VTNS) Option 77 by which AT&T provides voice and data communications service among locations in the United States, Puerto Rico, the U.S. Virgin Islands, and specific international locations. Following substantially complete installation, the rates for Option 77 are stabilized for a five-year term. *See* AT&T Transmittal No. 2690 Description and Justification (D&J) at 1-4. The basic charge for Option 77 is $285,400 per month. It will be reduced by $10,000 for the first full month of service after the initial service date. *Id.* at 5. Transmittal No. 2690 is scheduled to become effective January 17, 1991.

2. US Sprint Communications Company Limited Partnership (Sprint), MCI Telecommunications Corp. (MCI), Williams Telecommunications Group, Inc. (Williams), and Competitive Telecommunications Association (CompTel) filed petitions to reject or suspend and investigate Option 77 on November 19, 1990. AT&T filed a reply to the petitions against Option 77 on November 30, 1990.

3. Sprint argues that Option 77 is "like" its component services and thus the rate disparities between them are not justified. Sprint also argues that even if Option 77 is not "like" its component services, its rates vary without justification from those of other Tariff 12 options. Sprint Petition at 4-7; *see also* MCI Petition at 2-4. Williams argues that Tariff 12 options are not generally available and that AT&T's cost support is inadequate. Williams Petition at 17-18; *see also* CompTel Petition at 4 n.2, 7-8. Williams also claims that Tariff 12 packages violate the Commission's resale policy and that they unlawfully bundle 800 Service with other services. Williams Petition at 21-22; 24-25.

4. AT&T replies that there is no unreasonable discrimination between the rates in Option 77 and rates in other VTNS options. *Id.* at 11-17. AT&T also asserts that Tariff 12 options are generally available. AT&T asserts that its cost support is not undermined by its reservation of the right to waive a customer's minimum quantity commitments for ports, DTCs, and VTCs, and that, when required by the Commission's rules, such changes would be subject to the Commission's tariff filing and review process. *Id.* at 17-18 & 17 n.**.[1]

5. The Common Carrier Bureau has reviewed AT&T Transmittal No. 2690, the petitions filed by Sprint, MCI, Williams, and CompTel, and related pleadings. We conclude that no compelling argument has been presented that this tariff is so patently unlawful as to warrant rejection.

6. On October 23, 1990, the U.S. Court of Appeals for the District of Columbia Circuit reversed and remanded the Commission's Order in CC Docket No. 87-568, AT&T Communications, Revisions to Tariff F.C.C. No. 12, Memorandum Opinion and Order, 4 FCC Rcd 4932, *recon. denied*, 4 FCC Rcd 7928 (1989). *See MCI Telecommunications Corp. v. FCC*, No. 89-1382, slip op. (D.C. Cir. Oct. 23, 1990). Although this transmittal does not present new questions that warrant investigation at this time, it could be affected by the Commission decision in the CC Docket No. 87-568 remand proceedings. Accordingly, Transmittal No. 2690 takes effect subject to the outcome of the remand proceedings in CC Docket No. 87-568.

7. Accordingly, IT IS ORDERED that the petitions to reject, or to suspend and investigate, American Telephone and Telegraph Company Tariff F.C.C. No. 12, Transmittal No. 2690, filed by US Sprint Communications Company Limited Partnership, MCI Telecommunications Corp., Williams Telecommunications Group, Inc., and Competitive Telecommunications Association, ARE DENIED.

8. IT IS FURTHER ORDERED that Transmittal No. 2690 takes effect subject to the outcome of remand proceedings in AT&T Communications, Revisions to Tariff F.C.C. No. 12, CC Docket No. 87-568.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Firestone
Chief, Common Carrier Bureau

FOOTNOTE

[1] Moreover, AT&T filed a revision to VTNS Section 7.2.9.I stating that any changes in the terms and conditions under which VTNS is provided will be filed in this tariff. *See* AT&T Transmittal No. 2873.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

National Exchange Carrier Association, Inc. — Transmittal No. 427

Revisions to Tariff F.C.C. No. 5

ORDER

Adopted: January 31, 1991; Released: January 31, 1991

By the Chief, Common Carrier Bureau:

1. On November 16, 1990, National Exchange Carrier Association, Inc., filed Transmittal No. 427, revising its projected revenue requirements for the Universal Service Fund (USF) and Lifeline Assistance (LA) program for January 1 through June 30, 1991, to $235.9 million and $40.9 million,[1] respectively. Description and Justification (D&J), at 2-3. On December 3, 1990, MCI Telecommunications Corporation (MCI) filed a petition to reject or, in the alternative, suspend and investigate, and American Telephone and Telegraph Company (AT&T) filed a petition to suspend and investigate. NECA filed its reply on December 13, 1990.

2. In the *Access Tariff Revisions Order*, the Bureau granted NECA permission to implement a portion of the increase.[2] This increase, of $27.6 million for LA and $50.1 million for USF, became effective on January 1, 1991. [3] The remainder of the USF increase (that portion not attributable to the scheduled transition) was deferred until February 1, 1991. Consequently, that portion of the rate increase -- from $0.2696 per month per pre-subscribed line to $0.3090, an increase of $60.0 million on an annual basis -- is still pending. According to NECA this pending increase reflects more current cost data from its members. D&J at 2.

3. AT&T complains that NECA has failed to describe any factors that justify the increase in USF rates. AT&T Petition at 3. AT&T also argues that the NECA data show that a disproportionate percent of the USF expense growth is attributable to growth in corporate overhead, rather than the direct costs of local loop plant. *Id.* at 3-4.

4. MCI states that it has conducted a study of the data NECA used to develop the revised non-transitional USF revenue requirement and believes that NECA has overstated the revenue requirement due to flawed data submitted by the carriers and miscalculations by NECA. More importantly, however, MCI states that the data supplied by the carriers to NECA contain unusually large increases in loop costs without commensurate increases in the number of loops. *Id.* at 5. MCI cites numerous examples of carriers which stated they had significant increases in costs but whose number of loops did not increase significantly. MCI alleges that these statistics show that many carriers are loading more costs into their loop accounts and that NECA is not adequately monitoring the cost reporting by those companies. *Id.* at 5-6. MCI also notes that carriers receiving USF payments have a substantially higher loop unit cost growth than companies which do not receive payments.[4] *Id.* at 7. MCI also questions the accuracy of the data presented by the carriers to NECA by noting the discrepancies between these data and the number of access lines and financial data the LECs reported to the Rural Electrification Administration (REA). *Id.* MCI is concerned that the large increase in loop costs may partially result from abuses of the Commission's Rules by the LECs. *Id.* at 11-12.

5. MCI also complains that NECA has not adequately explained the USF calculations for average schedule companies. *Id.* at 13-14. MCI also contends that the recent Commission audit of the NECA settlement process and Common Line pool raises questions about the accuracy of the NECA data. *Id.* at 15. In light of these concerns, MCI argues that the Commission should conduct a complete evaluation of the high cost fund, including an audit of NECA's procedures. *Id.* at 18.

6. In its reply, NECA argues that the USF is working as anticipated by the Joint Board and the Commission when USF was established, with approximately 84 percent of the monies going to small telephone companies -- those with less than 200,000 USF loops. NECA Reply at 5. NECA argues that the USF was established as an offset to reductions in interstate revenue requirements caused by the transition from subscriber plant factor (SPF) to a 25 percent allocator. According to NECA, while the reduction in SPF reduced the interstate assignment of loop costs $727 million, USF expenses have only reached $620.9 million. *Id.* at 8.

7. NECA also argues that the MCI analysis is inaccurate and the conclusions reached are misleading. One of the major flaws of the MCI analysis, according to NECA, was to compare costs between small and large companies. NECA contends that a more reasonable approach is to compare costs between similar sized companies. It states that, if the comparison is limited to small companies, the difference in increases between USF recipients and non-recipients is comparable. *Id.* at 7. NECA also claims that MCI used erroneous loop cost data in some of its examples and used different data for national average costs per loop than NECA. *Id.* at 13-14. NECA also alleges that MCI did not take into account cases of companies' changes in status from average schedule to cost, or cases involving mergers and acquisitions. NECA claims that most of the companies MCI cites as having the largest increases can be accounted for by those factors. *Id.* at 15-17.

8. NECA also complains that MCI's comparisons to REA data are misleading since the REA loops are not comparable to USF loops. NECA also states that REA has a specific disclaimer that its numbers are not verified. *Id.* at 17-21. NECA also explains the development of its algorithm for average schedule companies and how it verifies the data submitted to it by its members. *Id.* at 25-29.

9. The calculation of USF rates and of the USF payments to individual LECs is based upon actual historical costs. The Common Carrier Bureau has reviewed NECA Transmittal No. 427, the MCI and AT&T petitions, and NECA's reply. We conclude that no compelling argument has been presented that the calculation of those historical costs and of the resulting rates by NECA is so patently

unlawful as to warrant rejection, and no evidence of error sufficient to justify suspension or investigation of the USF rate.

10. At the same time, the goal of universal service is a matter of high priority to this Commission and the Common Carrier Bureau wishes to assure that the USF program is being implemented correctly. This includes assuring that the LECs are accurately reporting their costs to NECA, that NECA is computing accurate USF rates and distributing funds to the LECs, and that the LECs are applying those funds to achieve the goals of the program. To help monitor the implementation of the USF program by NECA and the LECs we accordingly have decided to direct NECA and individual LECs to provide additional information on their calculation of USF costs and rates. We are therefore in the process of preparing an information request that will permit more detailed scrutiny of the USF program, notably of LECs who report unusual increases in loop costs or in the allocation of costs to accounts used to compute USF payments.

11. Accordingly, IT IS ORDERED that the petitions against National Exchange Carrier Association, Inc., Tariff No. 5, Transmittal No. 427, filed by American Telephone and Telegraph Company and MCI Telecommunications Corporation. ARE DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Firestone
Chief. Common Carrier Bureau

FOOTNOTES

[1] NECA originally projected the LA revenue requirement to be $43.3 million, but subsequently revised it to $40.9 million after removing the revenue requirements associated with the LA programs in New Jersey and Wisconsin.

[2] Local Exchange Carriers' January 1, 1991 Access Tariff Revisions, Order, DA 90-1864, paras. 84 and 89, released Dec. 21, 1990 (Com.Car.Bur.) (*Access Tariff Revisions Order).*

[3] NECA, Tariff F.C.C. No. 5, Transmittal No. 434, filed Dec. 28, 1990.

[4] According to MCI, non-USF recipients have had an average annual growth of loop unit cost of 1.5 percent per year from 1987 to 1989, while USF recipients had a unit cost growth of 4.8 percent per year -- 282 percent higher than non-USF recipients. *Id.* at 7.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

AT&T Communications	Transmittal Nos. 2571, 2719, and 2868

Revisions to Tariff F.C.C. Nos. 1 and 2

ORDER

Adopted: January 31, 1991; **Released: January 31, 1991**

By the Chief, Common Carrier Bureau:

1. On September 17, 1990, AT&T Communications (AT&T) filed Transmittal No. 2571 to introduce new provisions to its Multi-Location Calling Plan (MLCP) offering. MLCP is an alternative pricing plan under which the customer pays various monthly charges depending on the number of locations or equivalent locations as specified in its service agreement with AT&T. On October 2, 1990, Mid-Com Consultants, Inc. (Mid-Com) filed a petition to reject Transmittal 2571, to which AT&T replied on October 12, 1990. On November 15, 1990, and on January 28, 1991, AT&T filed Transmittal Nos. 2719 and 2868, respectively, to revise further its MLCP offering.[1] These tariff transmittals are scheduled to become effective on February 2, 1991.

2. AT&T's MLCP offering gives the customer the option of paying one monthly charge per plan in exchange for receiving MEGACOM Service, PRO WATS III, PRO WATS, or WATS (provided under AT&T Tariff F.C.C. No. 2) at all designated locations at rates discounted from those under which these services are normally provided.

3. Presently, if the customer discontinues its MLCP to subscribe to AT&T's Software Defined Network (SDN) Service, no termination liability applies. Under Transmittal 2571, however, a customer who discontinues service prior to the completion of the service period remains responsible for the full monthly plan charge for each month remaining in the service agreement. Also under Transmittal 2571, a customer may avoid termination liability when transferring between service offerings only if it meets certain new conditions: (1) that the same customer subscribe to both AT&T offerings; (2) that the new plan have the same or a greater term commitment and revenue commitment as the commitment remaining in the MLCP being discontinued; and (3) that the same customer have initiated both the old plan and the new plan.

4. On November 15, 1990, AT&T filed Transmittal 2719 to revise Transmittal 2571. Those revisions allow customers who had their MLCPs in effect on September 17, 1990, and are within their initial 12-month service period, to cancel their MLCP during their initial 12-month service period without penalty in order to move their traffic to AT&T's SDN service. On January 28, 1991 AT&T filed Transmittal 2868 to further revise Transmittal 2571. These revisions withdraw two of the new requirements for avoiding termination liability when subscribing to a new service plan: that the same customer subscribe to both plans, and that the same customer initiate both plans. Also, AT&T restructured the original language regarding MLCP customers.

5. In its petition against Transmittal 2571, Mid-Com states that it is a traffic "aggregator" who benefits from AT&T's current tariff provisions. Mid-Com maintains that if the revisions in Transmittal 2571 become effective, then an MLCP customer of AT&T will not be able to switch to a Mid-Com-sponsored AT&T SDN aggregation plan without incurring a penalty in the form of the termination liability. That penalty would negate any benefit derived from the discount, according to Mid-Com, and discriminates unreasonably between customers of AT&T who purchase Mid-Com's services and Mid-Com customers who were not AT&T customers at the outset. Mid-Com Petition at 2-3.

6. The revisions filed under Transmittal 2868 moot mid-Com's contentions. In these circumstances we need not consider AT&T's reply.

7. The Common Carrier Bureau has reviewed AT&T Transmittal Nos. 2571, 2719 and 2868, the petition filed by Mid-Com, and AT&T's reply.[2] We conclude that no compelling argument has been presented that these tariffs as revised are so patently unlawful as to warrant rejection, or that an investigation is warranted at this time.

8. Therefore, IT IS ORDERED that the petition to reject or suspend AT&T Communications Tariff F.C.C. Nos. 1 and 2, Transmittal 2571, filed by Mid-Com Consultants, Inc., IS DENIED.

9. IT IS FURTHER ORDERED that the motion to accept a late-filed pleading filed by Mid-Com Consultants, Inc., regarding AT&T Transmittal 2719 IS DENIED and the petition to reject or suspend AT&T Transmittal 2719 filed by Mid-Com Consultants, Inc., IS DISMISSED.

10. IT IS FURTHER ORDERED that AT&T Communications MAY FILE a request to advance the effective date of these transmittals, to become effective on not less than one day's notice. For this purpose Special Permission No. 91-073 is assigned and Sections 61.56, 61.58, and 61.59 of the Commission's Rules, 47 C.F.R. §§ 61.56, 61.58, 61.59, are waived.

FEDERAL COMMUNICATIONS COMMISSION

Richard Firestone
Chief, Common Carrier Bureau

FOOTNOTES

[1] Mid-Com also filed a petition to reject or, in the alternative, to suspend Transmittal 2719. Mid-Com's petition was not timely filed, but was accompanied by a motion to accept the late-filed pleading. Mid-Com failed to demonstrate in this motion good cause for its delay in filing the petition. Therefore, we deny the motion and dismiss its petition against Transmittal 2719.

[2] MCI Telecommunications Corporation (MCI) submitted a letter to the Chief, Common Carrier Bureau, on January 14, 1991, regarding Transmittal 2719. On January 23, 1991, AT&T responded by letter. The issues raised by MCI in its letter are not properly before us and are not considered in this Order.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Ameritech Operating Companies Revisions to Tariff F.C.C. No. 2	Transmittal Nos. 396, 420, 480 and 498

ORDER

Adopted: January 31, 1991; Released: January 31, 1991

By the Chief, Common Carrier Bureau:

I. INTRODUCTION

1. On November 21, 1989, the Ameritech Operating Companies (Ameritech) filed Transmittal No. 396 to offer a new service -- Signal Transfer Point (STP) Access. The STP is a packet switch providing customers with access to Ameritech's common channel signalling (CCS) network. Ameritech describes STP access as a "dedicated switched access service" connecting customers to its CCS network. Ameritech Description and Justification (D&J) at 1. The CCS network is a packet network physically separate from the public switched network that performs out-of-band signalling and call set-up and provides transmission to local exchange carrier (LEC) databases. Ameritech also filed a petition for waiver of certain sections of Part 69 of the Commission's Rules.[1]

2. The Bureau requested that parties consolidate any petitions against Transmittal 396 and any comments on Ameritech's waiver petition into one pleading to be filed on December 15, 1989.[2] Replies were due on December 26, 1989. Petitions to reject or to suspend and investigate were filed by Ad Hoc Telecommunications Users Committee (Ad Hoc), Allnet Communications Services, Inc. (Allnet), and MCI Telecommunications Corporation (MCI) on December 15, 1989. Metropolitan Fiber Systems, Inc. (MFS) filed its petition to reject or, in the alternative, to suspend and investigate on December 6, 1989. Also, the BellSouth Telephone Companies (BellSouth) and US Sprint Communications Company Limited Partnership (Sprint) filed comments on December 15, 1989. Ameritech filed a reply on December 26, 1989.

3. On October 18, 1990, Ameritech filed Transmittal 480 to offer an out-of-band signalling service. With this transmittal, Ameritech would offer a complete service which presupposes a grant of the waiver it requests for its STP access service. Allnet, MCI, Sprint, CTI Telecommunications, RCI Long Distance, Inc., and the Competitive Telecommunications Association have filed petitions against Transmittal 480 and Ameritech has filed a reply.[3] Finally, Ameritech filed Transmittal 498 on December 13, 1990, which corrects and modifies language contained in Transmittal 480. Allnet has filed a petition to investigate Transmittal 498 and Ameritech has filed a reply. For the reasons stated below, we deny Ameritech's petition for waiver and must therefore reject all of the captioned tariff filings.

II. PLEADINGS

A. The Ameritech Offering[4]

4. There are two components to Ameritech's offering under Transmittal 396: a "port" on the STP, and a dedicated network access line (DNAL) to the port. The "port" is actually the termination in a CCS packet switch for the DNAL and includes the electronics for the DNAL termination comparable to a Special Access channel termination. The DNAL is a 1.544 megabit per second (Mbps) DS1 channel from the customer's premises to the STP. Ameritech would require customers to take both the port and DNAL components of its STP access service. *Id.* at 2.

5. Ameritech claims that STP access will enable interexchange carriers (ICs) to obtain signalling information for calls on the public switched voice and various data networks, faster call set-up and completion, and access to various data bases such as Ameritech's for validating credit card calls. *Id.* at 1. At the time of the filing, Ameritech was not ready to offer CCS services like out-of-band signalling or any of its database services to the public.

6. Ameritech requested a waiver of Part 69 to establish a new rate element for the STP port charge. Each "port" would be dedicated to a subscribing customer. Ameritech would establish a flat monthly charge for the port on the grounds that STP packet switches do not have usage measurement capabilities. *Id.* at 3. Ameritech would charge a special access rate for the DNAL. Ameritech claims "[t]he facilities and equipment components required on the STP Access DNAL are the same as those used in Special Access circuits. . . ." *Id.* at 8-9.

B. Comments

7. Two petitioners argue that the rules governing the provision of CCS services should not be developed in a piecemeal fashion through a series of waiver requests from various carriers, and advocate a Rule Making. Ad Hoc Petition at 5-6; Sprint Petition at 2-3. Ad Hoc also argues that Ameritech has not shown "good cause" for a waiver as required by Section 1.3 of the Commission's Rules. Ad Hoc Petition at 3-5. However, Sprint supports Ameritech's waiver petition because it does not want the availability of CCS services to be delayed pending the result of a Rule Making proceeding. Sprint Petition at 2. BellSouth suggests that Ameritech can rely upon the general waiver of the rule sections applicable to the Local Transport rate element.[5] BellSouth Comments at 1-2.

8. Sprint contends that Ameritech has not provided sufficient detail regarding its cost studies. Sprint Comments at 3-4. Allnet maintains that Ameritech's flat monthly rate would provide an unfair preference to large CCS users and would violate the "equal per unit" requirement of the Modified Final Judgment (MFJ). Allnet Petition at 1-2, *citing* United States v. AT&T, 552 F.Supp. 135, 233-34. MCI contends that Ameritech is currently recovering CCS network investment through Local Transport rates, and that those rates should be lowered to prevent double recovery. MCI Petition at 9-11.

9. MCI argues that Ameritech overstates the interstate portion of CCS costs by developing a percent interstate usage (PIU) factor rather than the separations factor in Part 36 of the Commission's Rules. *Id.* at 13-14. Sprint also criticizes Ameritech's separations factor, claiming that Ameritech has not shown that its separations factor is preferable to a factor based on dial equipment minutes (DEMs) or Subscriber Line Usage. Sprint maintains that a separations factor based on DEMs or Subscriber Line Usage would be approximately 14 percent, while Ameritech's factor would be approximately 27 percent. Sprint Comments at 4-5.

10. MCI criticizes Ameritech for not planning to make Feature Group B signalling available through CCS Access service. MCI Petition at 1-3. MCI accuses Ameritech of planning to establish screening practices at the STP gateway for IC traffic, but not for Ameritech traffic. MCI claims this practice is inconsistent with the Commission's Open Network Architecture (ONA) policies, and argues that ICs should be allowed to connect directly to the LIDB. *Id.* at 3-9. MCI maintains that the calling card verification of Ameritech's LIDB is not a billing and collection function, and should be tariffed. MCI analogizes calling card verification to the Automatic Number Identification (ANI) function of Feature Group D, which is tariffed. *Id.* at 11-13. MFS notes that any customer ordering STP access service is required to pay for a 56 kbps data transmission service. According to MFS, a competitive market exists for data transmission services, and this requirement is anticompetitive and an illegal tying arrangement in violation of antitrust laws. MFS Petition at 1-2. Finally, BellSouth requests that the Bureau leave other LECs free to develop their own CCS rate structures rather than being required to conform to a single rate structure imposed by the Bureau. BellSouth Comments at 2.

C. Reply

11. Ameritech claims that MCI's argument concerning Feature Group B access is premature until Ameritech files a tariff for out-of-band signalling services. Ameritech Reply at 3. Ameritech also asserts that direct connection to the database is not possible for network security reasons *Id.* at 2-3. Ameritech maintains that LIDB credit card validation is a detariffed billing and collection service because it believes LIDB services are not useful unless used in conjunction with Ameritech billing and collection services. *Id.* at 4-5.

12. Ameritech construes the *800 Database Order* [6] to require assignment of STP investment to COE Separations Category 2, and contends that Section 36.124 of the Commission's Rules, 47 C.F.R. § 36.124, requires non-directly assignable Category 2 investment to be separated on a minutes of use (MOU) basis. *Id.* at 4-5. Ameritech asserts that it has provided the same level of cost support that has been adequate in other contexts. *Id.* at 6. Ameritech also maintains that its STP access charge would have a *de minimis* effect on Local Transport rates, so no adjustment is needed to avoid double recovery. *Id.* at 7-8.

13. Ameritech replies that the equal per unit provision applies only to the delivery or receipt of "traffic," which will not be occurring with STP access. According to Ameritech, signalling information is not "traffic" within the meaning of the MFJ, because it is information passing from Ameritech to ICs, not ICs to end users. The term "traffic" is not defined in the MFJ, nor in Section 69.2 of the Commission's Rules. Second, Ameritech claims that the provision only applies to end offices and IC facilities. STP access, Ameritech continues, is neither. Finally, the provision does not apply, Ameritech argues, to Special Access and private line type services. *Id.* at 9.

14. Ameritech maintains that Transmittal 396 is not an illegally tied service because transport from the IC point of presence (POP) to the STP is not a separate service from STP access service. Ameritech also asserts that this arrangement is consistent with its ONA plan. *Id.* at 10-13. Finally, Ameritech argues that it has shown good cause for its waiver request because a separate rate element would enable Ameritech to recover costs from cost-causers. *Id.* at 13-14.

D. Other Filings

15. Ameritech filed Transmittal No. 420 on February 9, 1990, to clarify certain terms in Transmittal 396. MCI asserts that Transmittal 420 does not address any of the problems raised by MCI in its petition against Transmittal 396 and that the terms and definitions in Transmittal 420 are unreasonably vague. Ameritech replies that Transmittal 420 was not intended to address MCI's objections to Transmittal 396, because those objections were addressed in Ameritech's reply to MCI's initial petition. In addition, Ameritech contends that any vagueness in its terms is unavoidable because industry discussions on CCS terminology have not been completed. Ad Hoc filed a letter on February 6, 1990, suggesting that the Commission allow Transmittal 396 to take effect for one year as a temporary experimental tariff. Ameritech responds that Ad Hoc's suggestion would not be appropriate because Transmittal 396 was a "conduit" to CCS-related services. Ameritech seeks to distinguish this from CCS-related services themselves. Letter from M. Pabian, Attorney for Ameritech, to the Chief, Tariff Division, Common Carrier Bureau, February 14, 1990.

III. DISCUSSION

A. Waiver Petition

16. We conclude that Ameritech has not demonstrated that the waiver it seeks is warranted. Courts have observed that

> [a]n applicant for waiver faces a high hurdle even at the starting gate. "When an applicant seeks a waiver of a rule, it must plead with particularity the facts and circumstances which warrant such action."

WAIT Radio v. FCC, 418 F.2d 1153, 1157 (D.C. Cir. 1969), quoting *Rio Grande Family Radio Fellowship Inc. v. FCC*, 406 F.2d 664 (D.C. Cir. 1968). Circumstances that would justify grant of a waiver would include "considerations of hardship, equity, or more effective implementation of overall policy. . . ." *Id.* at 1159.

17. Ameritech has made no such showing in this case. Ameritech cites no special circumstances that would prevent it from providing out-of-band signalling as part of a transport offering that complies with existing rules. We note that another carrier has done so.[7] Nor has Ameritech made any showing that application of the existing Part 69 Rules would cause it undue hardship, would be inequitable, or would impair effective implementation of the Commission's overall policy objectives. In short, we find

that Ameritech has failed to demonstrate that the public interest requires grant of its petition for waiver. We therefore deny Ameritech's petition.

B. Tariff Revisions

18. Having concluded that Ameritech has not justified the waiver that it requested to allow it to implement STP Access, we find that the pending tariff revisions are unlawful because they do not comply with Commission Rules and those rules have not been waived. We therefore reject the captioned transmittals as a result of this failure to comply with Part 69 of the Commission's Rules.

IV. ORDERING CLAUSES

19. Accordingly, IT IS ORDERED that the petition for waiver filed by the Ameritech Operating Companies IS DENIED.

20. IT IS FURTHER ORDERED that the Ameritech Operating Companies Tariff F.C.C. No. 2, Transmittal Nos. 396, 420, 480, and 498 ARE REJECTED.

21. IT IS FURTHER ORDERED that the petitions to reject or in the alternative to suspend and investigate filed by Ad Hoc Telecommunications Users Committee, Allnet Communications Services, Inc., MCI Telecommunications Corporation, Metropolitan Fiber Systems, Inc., CTI Telecommunications, RCI Long Distance, Inc., and the Competitive Telecommunications Association ARE GRANTED to the extent indicated herein.

22. IT IS FURTHER ORDERED that the Ameritech Operating Companies SHALL ISSUE revisions to their tariff no later than five business days from the release of this Order removing the rejected material and reinstating currently effective material. These revisions shall be scheduled to become effective on not less than one day's notice.

23. IT IS FURTHER ORDERED that Special Permission No. 91-102 is assigned and Sections 61.58 and 61.59 of the Commission's Rules, 47 C.F.R. §§ 61.58, 61.59, are waived for the purpose of issuing the above revisions.

24. IT IS FURTHER ORDERED that the motion to accept late filed pleading filed by the Ameritech Operating Companies IS GRANTED.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Firestone
Chief, Common Carrier Bureau

FOOTNOTES

[1] Specifically, Ameritech seeks a waiver of Sections 69.4(b), 69.205, and 69.206, and Subparts B, D, and E of Part 69.

[2] *See* Ameritech Operating Companies File Petition for Waiver in Connection with Establishment of New Switched Access Rate Element, Public Notice, DA 89-1557, released Dec. 6, 1989 (Com.Car.Bur.).

[3] Ameritech also filed with its reply a motion to accept late filed pleading, which we grant.

[4] Due to our disposition of the issues raised by the combined pleadings regarding Ameritech's petition for waiver and its STP access tariff, we need not discuss the pleadings relating to Transmittals 480 and 498.

[5] In 1983, the Commission granted a temporary waiver of Sections 69.111 and 69.112 to enable American Telephone and Telegraph Company (AT&T) and the Bell Operating Companies (BOCs) to file access tariffs that complied with the "equal charge per unit of traffic delivered or received" requirement of the Consent Decree ordering the divestiture of the Bell System. This waiver was later extended. *See* American Telephone and Telegraph Co., 94 FCC 2d 545 (1983); MTS and WATS Market Structure, CC Docket No. 78-72, Phase I, Memorandum Opinion and Order, 97 FCC 2d 834, 862 (1984); Memorandum Opinion and Order, FCC 85-87, 50 Fed. Reg. 9633 (1985).

[6] *See* Provision of Access for 800 Service, CC Docket No. 86-10, 4 FCC Rcd 2824 (1989)(*800 Database Order)*.

[7] *See* BellSouth Telephone Companies, 5 FCC Rcd 7619 (Com.Car.Bur. 1990).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

New England and Telephone Telegraph Company	Transmittal Nos. 1100 and 1104
New York Telephone Company	Transmittal No. 1095

Petition for Waiver and Request
for Extension of Time

ORDER

Adopted: January 31, 1991; Released: January 31, 1991

By the Chief, Common Carrier Bureau:

1. On November 30, 1990, the Common Carrier Bureau released an Order[1] directing New York Telephone Company and New England Telephone Company (NYNEX), *inter alia*, to file with the Commission on February 1, 1991, a detailed accounting report with regard to the above-referenced tariffs. Specifically, the Bureau directed NYNEX to: provide a detailed accounting of actual amounts refunded pursuant to the above transmittals; to identify separately the specific amounts actually refunded; and to propose any additional refund mechanisms which may be necessary to achieve compliance with requirements of the *Consent Decree Order*.[2] On January 23, 1991, NYNEX filed a petition for waiver of the Bureau's Order and request for an extension of time until March 1, 1991 to file its report. NYNEX's petition is unopposed.

2. NYNEX states that a portion of the data for December 1990, which is essential for a complete calculation of the amount actually refunded, will not be available until early February, after all the January bills have been rendered. NYNEX asserts that it will then require an additional short period of time to compile the necessary data in order to prepare its report to the Commission. NYNEX further states that the instant request relates only to the date for submission of the report on the refund; NYNEX ratepayers have already received the refund through lower rates. According to NYNEX, it will provide a full accounting of the refund as required by the Bureau's Order.

3. We conclude that good cause has been shown to grant NYNEX's request for waiver of the Bureau's Order and extension of time. Therefore, we grant NYNEX's request to file its report by March 1, 1991.

4. Accordingly, IT IS ORDERED that the petition for waiver and extension of time filed by New York Telephone Company and New England Telephone and Telegraph Company IS GRANTED.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Firestone
Chief, Common Carrier Bureau

FOOTNOTES

[1] New England Telephone and Telegraph Co., Transmittal Nos. 1100 and 1104 and New York Telephone Co., Transmittal No. 1095, Order, 5 FCC Rcd 7442 (Com.Car.Bur.1990).

[2] New York Telephone Co. and New England Telephone and Telegraph Co., Apparent Violations of the Commission's Rules and Policies Governing Transactions with Affiliates, 5 FCC Rcd 5892 (1990), *recon. pending (Consent Decree Order)*.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

The Prescription of Revised Percentages of
Depreciation pursuant to the Communications
Act of 1934, as amended for:

Alascom, Inc.
Continental Telephone
Company of Virginia
GTE North Incorporated
GTE South Incorporated
GTE Southwest Incorporated
New England Telephone
and Telegraph Company
Ohio Bell Telephone Company
Pacific Northwest
Bell Telephone Company
South Central Bell
Telephone Company
Southern New England
Telephone Company
The Chesapeake and
Potomac Telephone
Company of Virginia
The Chesapeake and
Potomac Telephone
Company of West Virginia
United Inter-Mountain
Telephone Company

and

Policy Regarding Effective Date
of Depreciation Prescriptions

MEMORANDUM OPINION AND ORDER

Adopted: January 30, 1991; Released: January 31, 1991

By the Commission:

I. INTRODUCTION

1. In this Memorandum Opinion and Order, we prescribe depreciation rates and amortizations for thirteen domestic carriers that filed requests in 1990 for changes in their annual depreciation rates. We developed these depreciation rates and amortizations after considering the studies underlying the carriers' requests, staff analysis and recommendations, and the comments ot the interested parties. We also are implementing a change in the Commission's policy regarding the effective date for carriers' depreciation rate changes.

II. BACKGROUND

2. Depreciation is the loss of service value incurred in connection with the use and prospective retirement of telecommunications plant from known causes, the effect of which can be forecast with reasonable accuracy.[1] This Commission is authorized to prescribe depreciation rates which are used to compute the depreciation expense for telephone common carriers as part of our responsibilities under the Communications Act of 1934.[2]

3. The Commission maintains an active role in setting depreciation expense levels because depreciation is an important factor in the determination of a carrier's net investment and the level of earnings that it reports for financial and regulatory purposes. Depreciation is also a significant percentage of all current expenses. In recent years, depreciation expense has become the largest operating expense, amounting to 28% of total operating expenses of the Local Exchange Carriers (LECs) in 1989. Since depreciation rates are based upon estimates, [3] these rates require periodic review to ensure their reasonableness.

4. Under traditional rate-of-return rate base regulation, depreciation is an important factor because depreciation expense is included directly as a part of a carrier's revenue requirement and the accumulated depreciation is a deduction from the rate base. Thus, depreciation directly affects prices charged to telephone ratepayers.

5. Under this Commission's recently adopted Price Cap regulation,[4] increases in depreciation expense do not directly affect the rates charged to customers. However, since depreciation expense affects a carrier's earnings and, under certain circumstances, a carrier's earnings level will be used to determine the amount of sharing of excess earnings with ratepayers[5], the depreciation rates and the resultant expenses still have an important role under Price Cap regulation.

III. REVIEW PROCEDURES

6. It is our practice to review and revise, as necessary, depreciation rates and amortizations once every three years for all major domestic telecommunications carriers. We review depreciation rates for approximately one-third of the larger carriers each year. In determining depreciation rates for prescription, we generally follow the procedures outlined below:

> a. A carrier submits a depreciation study to the Common Carrier Bureau. The study consists of a variety of data related to the carrier's recent plant retirements and plans for future plant retirements (i.e., "basic data"), as well as the carrier's assessment of that data in estimating life and salvage parameters.
>
> b. The Bureau independently analyzes the basic data and reviews the carrier's life and salvage estimates.
>
> c. The Bureau prepares its own preliminary recommendations and forwards them to the state commission(s)[6] and the company in a review letter.
>
> d. The company's filings and the preliminary Bureau proposals are discussed at a conference in which representatives of the company, the staffs of the respective state commission(s) and the Bureau participate (i.e., the three-way meeting).

e. The Bureau makes its final recommendations at the close of the three-way meeting.

f. The carrier formally files for revised depreciation rates. These filings may or may not be consistent with the Bureau's recommendations.

g. The Bureau issues a public notice requesting comments on specific changes in depreciation rates.

h. After considering the complete record, the Commission prescribes depreciation rates.

7. This year, in accordance with our triennial schedule, the carriers listed in the caption submitted studies proposing revised depreciation rates and amortizations[7] based upon revised estimates of the primary depreciation factors (*i.e.*, equipment service life, net salvage and mortality dispersion patterns). Following the procedures outlined above, the Bureau proposed rates and amortizations in a *Public Notice* released August 17, 1990.[8] The Bureau transmitted to each carrier and respective state commission a copy of the *Public Notice* and a list of depreciation factors used to calculate its recommended depreciation rates and amortizations. Ameritech, The Bell Atlantic Telephone Companies, BellSouth Corporation, Cincinnati Bell Telephone, GTE Service Corporation, MCI Telecommunications Corporation, the NYNEX Telephone Companies, Pacific Bell, Southwestern Bell Telephone Company, U S West Communications and The New York State Department of Public Service (New York DPS) filed comments. Ameritech, Bell Atlantic, NYNEX, Pacific Bell, Southwestern Bell, U S West. United States Telephone Association (USTA), and the Virginia State Corporation Commission (Virginia Commission) filed reply comments.

IV. DISCUSSION

A. The Depreciation Rate Proposals

8. The rates and amortizations that the Bureau proposed in the *Public Notice* are the same rates and amortizations that the carriers requested in their formal filings. No party filed an objection to these rates and amortizations. We conclude, based upon the record in this proceeding, that the carriers' proposed depreciation rates and amortizations are consistent with the data underlying those rates and with Commission depreciation policy. Accordingly, we prescribe those rates and amounts. We also discuss below other issues raised by the carriers' studies, the public notice, and the commenting parties[9].

B. MCI's Objection To The Commission's Procedures For Prescribing Depreciation Rates and Its Comments On Internally Generated Funds

(1) MCI's Objections

9. MCI requests that the Commission explain the reasons for differences between the depreciation rates that the Bureau proposed in its review letters and the rates set forth in the *Public Notice*. MCI states that there is no public record of the three-way meetings, and that this information is necessary so that interested parties will have a full record with respect to the rates which are proposed for prescription. MCI contends that anything less than the availability of the full record would appear to raise important legal questions under applicable provisions of the Administrative Procedure Act (APA). MCI notes that during 1990 the FCC staff, in its review letters prior to three-way meetings, proposed depreciation expense of $3.5 billion. MCI states that as a result of the meetings, the Bureau recommended a total expense of $3.7 billion without explanation as to what was presented during the meetings and why changes in the initial proposals were made.

10. MCI also argues that carriers' internally generated funds are so large that they do not need increases in depreciation expense this year. MCI contends that over the past three years the Regional Bell Operating Companies (RBOCs) have generated internally nearly $63 billion.[10] It asserts that only $41 billion was used for capital investment during the same period, and thus $22 billion of internally generated funds was not used for capital investment. MCI believes that increases in depreciation expense this year will not go toward investment in improved technology for the benefit of ratepayers. MCI further asserts that, because of the carriers' ease of generating cash, ratepayers need to be assured that their interests are being protected and any increase in prescribed depreciation rates because of shorter useful lives are based on sound, reasonable assumptions.

(2) Responsive Pleadings

11. In their reply comments, the carriers and USTA disagree with MCI's contention that the depreciation review process is procedurally deficient. The carriers contend that MCI has full access to the carriers' initial and updated study filings upon which the FCC and the state commissions based their decisions regarding depreciation rate changes. They contend that, in accordance with the Communications Act, the Commission is obligated to consider state commission views[11] on depreciation and that in using the three-way meeting process the Commission has satisfied this obligation. They further argue that any informal discussions which are internal deliberative processes between the FCC and state commissions are proceedings to which MCI has no right of access. Finally, they contend that the Commission's procedures for prescribing depreciation rate changes meet the notice and comment requirements of the Communications Act and the Administrative Procedure Act, and therefore should not be changed.

(3) Discussion

12. MCI states that the difference between the preliminary depreciation rates proposed in the staff's review letters and the depreciation rates described in the *Public Notice* must be explained on the public record. Anything less, MCI contends, would appear to raise legal questions under "applicable provisions of the Administrative Procedure Act." MCI did not state, however, which provision of the Administrative Procedure Act prohibits our depreciation prescription procedures and we are not aware of any legal barrier to use those procedures. Nothing in the APA requires participation of anyone other than the carriers involved in a depreciation prescription proceeding. *See* 5 U.S.C. § 553(b) (actual notice to persons subject thereto is sufficient for Rule Making of particular applicability). In any event, even assuming general notice to the public of proposed depreciation prescriptions was required under the APA, the issuance of a Public Notice requesting comment on the Bureau's proposal satisfied this requirement. Nothing in the APA provides for public

disclosure and an opportunity to comment on proposals or discussions preliminary to the proposal ultimately noticed for comment, let alone on the Bureau's reasoning for departing from its preliminary recommendations. Moreover, this approach is consistent with our *ex parte* rules which state, "there are no *ex parte* restraints or disclosure requirements in . . . " [a] proceeding conducted pursuant to Section 220(b) of the Communications Act for prescription of common carrier depreciation rates prior to release of a public notice of specific proposed depreciation rates for a carrier or carriers."[12] Given the highly technical nature of the studies and the conclusions to be drawn therefrom, it is not unusual that the staff might change a preliminary recommendation during the review process as a result of further thought or explanation. Further, all studies on which the rates are based are part of the record in this proceeding. As a number of respondents point out, MCI had access to all of the studies and other relevant information, and took advantage of the opportunity to comment. It thus had more of an opportunity to participate than required by the APA, and has no basis for complaint regarding the legality of our procedures.

13. MCI contends that the use of shorter lives for the BOCs contributes directly to an increase in internally generated funds for them. MCI observes that, over the past three years, approximately $22 billion, or 35% of BOC internally generated funds was not used for new capital investment. MCI concedes, however, that there is no requirement that the BOCs reinvest internally generated funds in new equipment. MCI appears to imply that internally generated funds should be considered in setting depreciation rates. Pursuant to Section 32.2000 (g)(2)(ii) of our rules, we prescribe depreciation rates which are designed to depreciate the plant investment, on a straight line basis, over the life of the asset. We consider many factors in estimating plant lives (i.e., technological obsolescence, plant mortality data, effect of wear and tear, inadequacy, public requirements, and carrier replacement plans). MCI has not shown why the way in which carriers use internally generated funds is relevant in determining plant life estimates, and, thus, appropriate depreciation rates. In any event, the useful life periods of which MCI complains are fully supported by the record evidence. As a result, MCI's comments are without merit here.

C. Effective Dates of Depreciation Rate Changes

(1) Background

14. In its comments responsive to our 1989 *Public Notice*,[13] the Virginia Commission staff questioned our current policy of allowing a carrier to select any date within the study year or January 1 of the following year to begin using newly prescribed depreciation rates. The Virginia Commission urged the Commission to implement a policy of applying depreciation rates effective January 1 of the study year. In our *1989 Depreciation Rates Order* [14] we stated that it may be time to reassess our policy in this regard. We directed the staff to review the policy and make recommendations if such a review is warranted. As a result, the *Public Notice* invited comments on whether the Commission should adopt a uniform effective represcription date of January 1 of the study year.

(2) The Pleadings

15. Ameritech, Bell Atlantic, BellSouth, Cincinnati Bell, GTE, NYNEX, Pacific Bell, Southwestern Bell, and U S West favor continuation of the Commission's current policy which allows a carrier to select any date within the study year or January 1 of the following year as the effective date for new depreciation rates. They make four basic arguments. Their principal argument is that the flexibility permitted under the current policy is needed to coordinate the implementation of new depreciation rates with the implementation of new tariffs that reflect the new depreciation rates.[15] Second, they contend that a change in the effective date policy could cause an adverse impact on financial statements. For example, NYNEX states that adopting any uniform effective date would place the financial management side of the capital recovery process in jeopardy and, to the extent depreciation expense is ordered to change before offsetting revenues or reductions in other expenses are obtained, the carrier and its investors may experience capital loss, not recovery. Third, they contend that there is no reason to take away flexibility because depreciation is an endogenous factor under price caps and does not flow through to customers' prices.[16] Fourth, they contend that flexibility could affect state and federal relations. For example, NYNEX contends that the Commission's current policy contributes to coordination between federal and state depreciation and ratemaking matters which helps to maintain harmony between the jurisdictions. NYNEX further states that some states utilize FCC-prescribed depreciation rates for intrastate ratemaking purposes and would want the Commission to continue allowing flexible effective dates so that the Commission's prescription order could be made effective at the same time as it is reflected in a state rate proceeding.

16. In contrast to the comments of the telephone carriers, the New York DPS urges the FCC to adopt a uniform effective date of January 1 of the filing year for prescribed depreciation rates. In support of its position, the New York DPS states that depreciation expense measures the consumption of telephone plant during an accounting period and is a current period cost, and that the use of an effective date later than January 1 of the study year defers the recognition of the changed depreciation expense. This deferral results in the misstatement of both the company's current period depreciation expense and the net value of its plant. It believes that this can lead to an imbalance between the company's book depreciation reserve and its reserve requirement. The New York DPS further contends that depreciation expense should be accorded the same treatment as other current expenses and recorded at the cost actually incurred when it is incurred. In addition, it states that once the proper revised depreciation expense is known, it is inappropriate to continue to book an outdated level of expense. The New York DPS concludes that establishing an effective date of January 1 of the study year signals the industry that depreciation expense is not to be manipulated.

17. Ameritech, Bell Atlantic, NYNEX, Pacific Bell, Southwestern Bell, U S West and USTA filed reply comments in favor of flexibility on effective dates. These reply commenters generally reiterated the view expressed in the comments that flexibility in the effective dates is needed in order to coordinate the implementation of new depreciation rates with changes in their tariffs. Moreover,

Ameritech. Bell Atlantic. NYNEX. Pacific Bell, U S West and USTA in their reply comments disagree with New York DPS's equating depreciation expense with other current expenses and proposing corresponding current expense treatment for depreciation expense. Bell Atlantic and NYNEX contend that the New York DPS is incorrect in assuming that the depreciation prescription is based on information which is particular to January 1 of the study year. U S West states that there is no significant delay between the recognition of the change in depreciation expense by the Commission and its reflection on the carrier's books as asserted by the New York DPS. Nor has any material mismatch between a carrier's book depreciation reserve and its reserve requirement been shown by the New York DPS.

18. In its reply comments, the staff of the Virginia Commission supports a change in the Commission's policy regarding effective dates. It states that when a rate is booked at any time other than the study date, an incorrect rate is being booked. It believes that the current practice fails to accurately match depreciation expense with actual consumption of plant which causes a misrepresentation of the financial condition of the company. It also contends that this policy violates basic accounting principles by allowing an expense to be booked in a future accounting period when it affects a prior one, or to be booked for part of an accounting period, when it affects the entire period.

19. The Virginia Commission states that there is a misconception that capital recovery can only be realized by additional revenues obtained from customer rate increases from depreciation expenses. It suggests that there are alternative sources of capital recovery such as expense reduction and higher sales. Regarding the matching of expense changes and revenue changes, the Virginia Commission agrees with the need for this matching but points out that flexibility does not extend to manipulating reported earnings by either including or excluding revised depreciation expenses. The Virginia Commission discusses the difference between capital recovery and capital consumption, stating that although many use these phrases interchangeably, there are fundamental differences between the two concepts. Accounting for capital consumption requires ensuring that plant be fully depreciated by the time it retires. The recovery of that capital (in actuality, securing sufficient revenues to fund those expenses plus a fair return to investors) is entirely different and unrelated to capital consumption. The Virginia Commission further states that revenues are not generated by consuming plant but rather by selling goods and services and that the goal of depreciation is the measurement of capital consumption, not capital recovery.

(3) Discussion

20. Prior to 1981, it was common practice for carriers to request, and for the Commission to prescribe, January 1 of the study year as the effective date for revised depreciation rates. The Commission did so because the depreciation studies upon which the revised rates were based were made as of that date, and this practice assured that depreciation expense reported for the study year was based on the latest estimate of that expense.

21. In 1981, many carriers began requesting effective dates other than January 1 of the study year. These requests were prompted by changes in depreciation methods that the Commission adopted in 1981.[17] The Commission amended its rules in 1981 to allow the use of the remaining life method of depreciation, which distributes the unrecovered cost of a group of assets over its remaining life expectancy, and to allow the use of the straight line equal life group (SLELG) method of depreciation for new plant additions. Generally, the implementation of these new methods resulted in very large increases in the carriers' depreciation expenses.

22. In requesting effective dates other than January 1, the carriers contended that, because there was controversy among the states concerning the new depreciation methods, they would have difficulty obtaining approval of tariff increases from state commissions until this Commission had actually ordered new depreciation rates. In depreciation prescription orders issued in 1981, after considering the regulatory and financial reporting aspects of effective dates, the Commission determined that during the transition period to the remaining-life and SLELG methods, carriers could select effective dates for new depreciation rates between January 1 of the study year and January 1 of the following year.

23. In response to our request for comments on effective dates in the *Public Notice*, the carriers commenting on this issue unanimously support continuation of the current policy of allowing carriers flexibility in selecting an effective date for new depreciation rates. The two state commissions which commented on this issue argue that the Commission should return to its pre-1981 policy of prescribing January 1 of the study year as the effective date for new rates. After reviewing the comments on this issue, we are not persuaded that it makes sense, in light of new developments since 1981, to continue to allow carriers flexibility in the implementation of new depreciation rates.

24. First, the transition to new depreciation methods that originally gave rise to the current policy of flexibility is completed, and the significant expense increase and controversy related to the introduction of the new methods is no longer a factor. Through the use of the remaining-life and SLELG methods as well as amortizations, the carriers have increased their depreciation accruals to the extent that reserve imbalances have dramatically decreased.

25. Second, the states are not bound by effective dates or depreciation rates prescribed by the Commission. In *Louisiana PSC*,[18] the Supreme Court ruled that the Commission could not preempt the states on depreciation for state ratemaking purposes. Thus, while the carriers must use the effective dates prescribed by the Commission for federal accounting purposes, the states may use their own discretion in determining what effective dates should be used for state ratemaking purposes. Any difference between the dates used for state ratemaking purposes and the dates used for accounting purposes would be accounted for as jurisdictional differences under Part 32.[19]

26. Third, the Commission recently adopted Price Cap regulation for LECs. At this time, all but three of the carriers for which we prescribe depreciation rates will be under price caps for interstate rates. As specified in the Price Cap proceeding, depreciation rate increases will be treated as endogenous. Because of this endogenous treatment of depreciation rates, the direct link between changes in depreciation expense and changes in revenue is broken. Any concern about the coordination of depre-

ciation rate changes based on those rates, at least with respect to federal tariffs, is no longer a factor for consideration for most of the carriers.

27. In addition to these new developments since 1981, we believe there is another compelling reason to reconsider our current policy on flexibility in implementing new depreciation rates. The reason we originally allowed flexibility in selecting effective dates, and the carriers' primary contention as to why that flexibility should continue, is to permit the carriers to match the effective dates for new depreciation rates with the implementation of tariffs based on those depreciation rates. In practice, however, the matching of new depreciation rates with the implementation of new tariffs does not appear to be accurate. One indication of this is that, although individual carriers frequently request a single effective date, the new depreciation expense levels affect both federal and state revenue requirements as well as the revenue requirements of more than one state for multi-state carriers. The tariff changes for these various jurisdictions do not necessarily occur at the same time. All six multi-state carriers reviewed this year requested the same effective date in all states. Therefore, it cannot be that these carriers intend to match individual state tariffs with depreciation changes. We also note that of the twelve triennial carriers mentioned in this Order, seven requested a January 1, 1990 effective date. It is important to note that these seven carriers received increased depreciation expense which was not reflected in their interstate tariffs until July 1, 1990. Therefore, it does not appear that the matching of depreciation changes with tariff changes is a critical factor in the selection of a carrier's effective dates.

28. We acknowledge, as several commenters point out, that depreciation is based on estimates. This does not mean, however, that depreciation expense is a discretionary cost that should be adjusted to reach some desired or predetermined level of earnings. Depreciation occurs each year regardless of a carrier's revenues, and we agree with the New York DPS and the Virginia Commission that the latest depreciation rates are the best measure of depreciation expense. These rates have been established only after a lengthy process that takes into consideration the latest available information about plant lives and salvage values as well as the carrier's future plans for plant retirements and additions.

29. This Commission has historically held that January 1 of the filing year is the preferred effective date for accounting purposes. Even when we modified our policy to allow flexibility for the transition to new depreciation methods, we indicated that immediate recognition was more appropriate for accounting purposes.[20] We modified our policy temporarily only in recognition of the materiality of the changes caused by the new depreciation methods and the fact that carriers could not immediately respond to the changes in their revenue requirements.

30. In view of the fact that the transition to the new depreciation methods is now complete, that states now have latitude in modifying effective dates for their own ratemaking purposes, and that our adoption of Price Caps regulation breaks the direct link between depreciation costs and revenues for interstate ratemaking purposes, we have decided to revert to our earlier policy of prescribing January 1 of the filing year as the effective date for depreciation rates. Inasmuch as this order comes late in the 1990 review cycle, we believe it would be unfair to the carriers to implement this policy in this Order. For the captioned carriers, we therefore adopt the effective dates proposed by the carriers which are shown in the Appendix. Our new policy will be implemented for those carriers studied in the 1991 represcription and thereafter.

D. Amortizations for Dying Accounts

31. Our remaining-life procedures engender a number of technical problems when applied to accounts that are rapidly being phased out (i.e., "dying accounts"). For example, if the final date of termination of service is mis-forecast by as little as a few months, the depreciation rates can change drastically. The most practical way of resolving this problem is to apply an amortization procedure which adjusts the depreciation expense each month to reflect accounting activity.[21] This allows the carriers to reduce the reserve account balance to zero in relatively equal increments.

32. During the 1990 review, the Bureau identified 17 "dying accounts", and concluded after thorough review that the use of an amortization procedure to write off these accounts is consistent with this Commission's policy and practice. No commenting party opposed this proposal for these accounts. We conclude that special amortization procedures should be used for the accounts and amortization periods indicated below:

Carrier and Jurisdiction	Account	Period (months)
GTE-North-Wisconsin	Operator Systems	12
GTE-South-Georgia	Radio	30
GTE-South-South Carolina	Analog ESS	36
	Operator Systems	36
GTE Southwest-New Mexico	Analog ESS	42
New England Telephone-Maine	Step-by-Step	36
	Crossbar	30
-Massachusetts	Step-by-Step	36
	Crossbar	30
-New Hampshire	Step-by-Step	36
	Crossbar	24
-Rhode Island	Step-by-Step	12
	Crossbar	12
-Vermont	Step-by-Step	36
	Crossbar	12
Southern New England Telephone	Step-by-Step	24
	Crossbar	24

33. The special procedure for calculating the amortization for "dying accounts" is as follows:

> a. Determine the net service value (*i.e.*, gross. book cost. less book reserve, less the. estimated future net salvage shown in the, Appendix) at the beginning of each month..
>
> b. Divide the net service value determined in. Step 1 by the number of months remaining in. the amortization period. For example if the. amortization period is 36 months. the first, month's amortization is 1/36 of the net. service value at the beginning of the first. month. The second month's amortization is. 1/35 of the net service value at the beginning. of the second month. and so on.

E. Submission of Whole-Life Depreciation Parameters

34. In many of the depreciation prescription orders that the Commission has approved since its decision in *Property Depreciation*, the Commission has expressed its concern with the size of the depreciation reserve imbalance and the speed with which its actions were resolving the imbalance. Because of the rapid rate of technological advancement in the industry, we continue to believe that the industry's reserve condition is extremely important. As a result, we require carriers in this *Order* to continue to file whole-life rates that are consistent with the prescribed rates until notified to the contrary.

F. Conclusion

35. Having considered the carriers' proposals, and the studies upon which those proposals are based, the views and recommendations of the states, the responses to the *Public Notice*, and the Bureau's studies and analyses, we adopt the depreciation rates, amortization amounts, and effective dates listed in the Appendix.

V. ORDERING CLAUSES

36. ACCORDINGLY IT IS ORDERED, pursuant to Sections 4(i), 201-205 and 220(b) of the Communications Act of 1934, as amended, 47 U.S.C. Sections 154(i), 201-205 and 220(b), that the percentages of depreciation and amortization amounts set forth in the Appendix to this Order ARE PRESCRIBED, effective on the dates listed.

37. IT IS FURTHER ORDERED, that the effective date for carriers submitting depreciation studies for review during the 1991 represcription and thereafter will be January 1 of the study year.

38. IT IS FURTHER ORDERED, that this *Order* is effective upon release.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] 47 C.F.R. Section 32.9000.

[2] *See generally* 47 U.S.C. § 220(b) (1982). In recent years, we have also prescribed amortization amounts in lieu of depreciation rates to resolve certain depreciation accounting problems. *See* Amortization of Depreciation Reserve Imbalances of Local Exchange Carriers, *Report and Order*, 3 FCC Rcd 984 (1988) (hereinafter, the *Amortization Order*). An amortization amount is a specific amount to be charged to depreciation expense each year.

[3] Pursuant to our rules, the depreciation rate for an account is a function of life and salvage estimates and the book reserve ratio. *See* 47 C.F.R. Section 32.2000(g)(2)(ii).

[4] *See* Policy and Rules Concerning Rates for Dominant Carriers, CC Docket No. 87-313, Notice of Proposed Rule Making, 2 FCC Rcd 5208 (1987); Further Notice of Proposed Rule Making, 3 FCC Rcd 3195 (1988); Report and Order and Second Further Notice of Proposed Rule Making, 4 FCC Rcd 2873 (1989); (recon. pending) Supplemental Notice of Proposed Rule Making, 5 FCC Rcd 2176 (1990); Second Report and Order, 5 FCC Rcd 6786 (1990)(*Second Report and Order)* (recon. pending).

[5] *Second Report and Order*, 5 FCC Rcd at paras. 120-165.

[6] This coordination is conducted pursuant to Section 220(i) of the Communications Act of 1934, as amended, 47 U.S.C. § 220(i).

[7] The rates proposed herein for United Inter-Mountain's West Virginia operation are initial rates, not revised rates, because, prior to installing a fiber cable from Wytheville, Virginia to Bluefield, West Virginia, earlier this year, United Inter-Mountain had no facilities in West Virginia.

[8] Comments Invited On Depreciation Rate Prescriptions Proposed for Domestic Telephone Carriers And On Commission Policy For Effective Date of Depreciation Prescriptions, 5 FCC Rcd 5257 (1990) (*Public Notice)*.

[9] Ameritech in its comments raised questions about how changes in depreciation expense is treated under the Commission's Price Cap plan. It requested that the Commission treat depreciation rate changes as exogenous changes to the price cap index in order for the LECs to recover those expense changes through rate adjustments. We have already determined that depreciation is endogenous in the Price Cap proceeding. *See Second Report and Order*, 5 FCC Rcd 6786 (1990). Accordingly, we need not address Ameritech's proposal here.

[10] The internally generated funds referred to here consist primarily of depreciation expense, return, and deferred income taxes.

[11] *See* 47 C.F.R. Section 220(i), *supra*.

[12] *See* 47 C.F.R. § 1.1204 (a)(7).

[13] Depreciation Rate Prescriptions Proposed for Domestic Telephone Companies - Pleading Cycle Established, 4 FCC Rcd 6263 (1989).

[14] The Prescription of Revised Percentages of Depreciation pursuant to the Communications Act of 1934, as amended for: GTE Florida Incorporated *et. al.*, 5 FCC Rcd 766 (1990).

[15] *See*, for example, Bell Atlantic's comments at page 2.

[16] *See*, for example, Ameritech's comments at page 3.

[17] Amendment of Part 31 (Uniform System of Accounts for Class A and Class B Telephone Companies), 83 FCC 2d 267 (1980) *Property Depreciation, reconsideration*, 87 FCC 2d 916 (1981), *Supplemental Opinion and Order*, 87 FCC 2d 1112 (1981).

[18] Louisiana Public Service Commission v. F.C.C., 476 U.S. 355 (1986) (*Louisiana PSC)*.

[19] *See* 47 C.F.R. Sections 32.1500, 32.4370, and 32.7910.

[20] *See, e.g.*, The Prescription of Revised Percentages of Depreciation pursuant to Section 220(b) of the Communications Act of 1934, as amended, for: General Telephone Company of Florida et. al., 88 FCC 2d 1354 (1982).

[21] *See, e.g.*, The Prescription of Revised Percentages of Depreciation pursuant to Section 220(b) of the Communications Act of 1934, as amended, for: American Telephone and Telegraph Company *et al.*, 96 FCC 2d 257 (1983).

APPENDIX
PAGE 1

FEDERAL COMMUNICATIONS COMMISSION
Schedule of Annual Percentages of Depreciation for ALASCOM, INCORPORATED

Effective January 1, 1990

Rate Category Description	Average Remaining Life (years) A	Future Net Salvage (%) B	Reserve Level (%) C	Remaining Life Rate (%) D=(100%-B-C)/A	Annual Amort. Expense ($000) E
2112 Motor Vehicles	4.9	12	37.3	10.3	-6
2113 Aircraft	6.1	40	19.0	6.7	0
2114 Special Purpose Vehicles	1.0	0	84.2	15.8	0
2115 Garage Work Equipment	3.5	0	45.7	15.5	0
2116 Other Work Equipment	5.7	5	69.3	4.5	10
2121 Buildings	18.5	5	31.4	3.4	1182
2121 Self-Supported Towers	9.6	-25	66.3	6.1	201
2122 Furniture	5.7	10	75.8	2.5	184
2123 Company Comm Equipment	5.2	10	63.8	5.0	14
2123 Office Support Equip	5.5	5	23.6	13.0	0
2124 Gen Purpose Computers	1.6	0	90.2	6.1	0
2212 Autovon Switching	1.7	-5	79.5	15.0	-160
2212 Digital Switching	10.8	0	35.1	6.0	218
2212 Telex Switching	8.3	-5	50.0	6.6	19
2220 Operator Systems	3.3	-5	76.5	8.6	310
2231 Earth Stations	5.0	5	61.5	6.7	-1504
2231 Microwave Radio	4.6	-5	48.3	12.3	0
2231 Non Cellular Radio	8.6	5	48.4	5.4	0
2231 Satellite	1.5	0	83.6	10.9	0
2232 Circuit Analog	4.5	5	48.5	10.3	851
2232 Circuit Digital	8.3	10	27.1	7.6	0
2341 Large PBX	2.5	3	73.5	9.4	59
2351 Public Telephone Equip	5.0	10	39.4	10.1	0
2362 Other Terminal Equip	5.0	0	33.2	13.4	18
2411 Guyed Towers	2.6	-25	89.1	13.8	376
2411 Poles	1.6	-25	113.6	7.1	0
2421 Aerial Cable-Metal	2.9	-5	19.7	29.4	0
2422 Underground Cable-Metal	16.5	-10	0.1	6.7	1
2422 Underground Cable-Non Metal	22.0	-10	8.7	4.6	0
2423 Buried Cable-Coaxial	2.0	-5	40.3	32.4	99
2423 Buried Cable-Metal	12.0	-5	40.3	5.4	27
2423 Buried Cable-Non Metal	16.3	-5	14.0	5.6	0
2424 Submarine Cable-Metal	7.8	-5	-141.2	31.6	-61
2426 Intra-Bldg Cable	10.9	0	59.5	3.7	0
2441 Conduit Systems	32.0	-3	19.8	2.6	1

The figures in Columns B, C, and D are percentages of gross book cost.

The reserve level in Column C is used to calculate the depreciation rate and does not necessarily reflect the book reserve. The amortization amounts in Column E, ordered in FCC 88-13, released January 21, 1988, are continued.

FEDERAL COMMUNICATIONS COMMISSION
Schedule of Annual Percentages of Depreciation for THE CHESAPEAKE AND POTOMAC TELEPHONE COMPANY OF VIRGINIA

Effective January 1, 1990

Rate Category Description	Average Remaining Life (years) A	Future Net Salvage (%) B	Reserve Level (%) C	Remaining Life Rate (%) D=(100%-B-C)/A	Annual Amort. Expense ($000) E
2112 MOTOR VEHICLES	3.6	18	48.7	9.3	0
2115 GARAGE WORK EQUIP	10.9	1	20.7	7.2	-51
2116 OTH WORK EQUIP	9.7	5	22.8	7.4	-512
2121 BUILDINGS	30.0	2	21.6	2.5	-197
2122 FURNITURE	9.0	7	14.6	8.7	-36
2123 OFFICE EQUIP-CO COMM EQUIP	7.1	8	38.9	7.5	-168
2123 OFFICE SUPPORT EQUIP	6.0	12	7.7	13.4	-25
2124 COMPUTERS	3.6	7	50.1	11.9	0
2211 ANALOG ELEC SW	6.5	2	45.7	8.0	9022
2211 CUST. PREMIS	2.2	0	73.4	12.1	0
2212 DIGITAL ELECT	12.2	1	17.3	6.7	553
2215 ELECTRO-MECH SXS	1.1	-6	53.4	47.8	0
2215 ELECTRO-MECH XBAR	0.5	-6	106.0	0.0	0
2220 OPERATOR SYSTEMS-XBAR/ANALOG	2.1	0	57.6	20.2	58
2220 OPERATOR SYSTEMS-EMS DIGITAL	15.0	0	0.0	6.7	0
2231 RADIO SYSTEMS	8.4	-3	28.6	8.9	-82
2232 CIRCUIT ANALOG	5.0	-1	44.6	11.3	3672
2232 CIRCUIT DIGITAL	6.7	0	25.9	11.1	556
2232 CIRCUIT EQPT DDS	7.8	-4	24.5	10.2	-30
2351 PUBLIC TELEPHONE	7.6	10	54.2	4.7	714
2362 OTH TERM EQUIP	5.4	1	68.0	5.7	-404
2362 OTHER TERMINAL EQUIP	8.4	18	63.6	2.2	0
2411 POLES	16.9	-43	32.2	6.6	-1253
2421 AERIAL CABLE	13.7	-17	36.9	5.8	4677
2422 UNDRGRND CABLE	18.4	-12	35.7	4.1	6641
2423 BURIED CABLE	13.5	-5	32.1	5.4	7684
2424 SUBMARINE CABLE	11.7	-8	54.1	4.6	2
2426 INTRABLDG NTWK CABLE	14.1	-20	50.3	4.9	1374
2441 CONDUIT SYSTEMS	43.0	0	18.9	1.9	1776

The figures in Columns B, C, and D are percentages of gross book cost.

The reserve level in Column C is used to calculate the depreciation rate and does not necessarily reflect the book reserve. The amortization amounts in Column E, ordered in FCC 88-13, released January 21, 1988, and as amended by Erratum DA 88-202, released February 19, 1988, are continued.

FEDERAL COMMUNICATIONS COMMISSION
Schedule of Annual Percentages of Depreciation for
THE CHESAPEAKE AND POTOMAC TELEPHONE COMPANY OF WEST VIRGINIA

Effective January 1, 1990

	Rate Category Description	Average Remaining Life	Future Net Salvage	Reserve Level	Remaining Life Rate	Annual Amort. Expense
		(years) A	(%) B	(%) C	(%) D=(100%-B-C)/A	($000) E
2112	MOTOR VEHICLES	3.4	14	51.5	10.1	0
2115	GARAGE WORK EQPT	9.7	6	30.4	6.6	-3
2116	OTHER WORK EQPT	9.5	6	23.6	7.4	-27
2121	BUILDINGS	28.0	4	23.7	2.6	-210
2122	FURNITURE	9.2	3	34.3	6.8	43
2123	OFC EQPT-CO COMM EQ	6.1	8	35.5	9.3	2
2123	OFC EQPT-OFC SUP EQ	5.7	5	21.5	12.9	26
2124	COMPUTERS	3.1	5	57.6	12.1	0
2211	ANALOG SWITCHING	3.4	10	37.1	15.6	2112
2212	DIGITAL SWITCHING	12.2	5	15.9	6.5	48
2215	EMECH SWITCHING-SXS	0.8	-3	103.0	0.0	0
2215	EMECH SWITCHING-XBAR	0.9	-2	88.2	15.3	0
2220	OPER SYS-DIGITAL	9.9	5	18.2	7.8	0
2220	OPER SYS-XBAR/ANALOG	2.4	0	88.2	4.9	42
2231	RADIO SYSTEMS	7.0	3	39.2	8.3	-161
2232	CIRCUIT EQPT-ANALOG	4.8	0	27.5	15.1	1245
2232	CIRCUIT EQPT-DIG CIR	6.8	1	37.0	9.1	2752
2232	CIRCUIT EQPT-DIG SYS	4.0	1	22.5	19.1	-3
2351	PUBLIC TELEPHONE	7.8	4	42.1	6.9	-5
2362	OTH TER EQ-TEL & MIS	6.7	4	59.1	5.5	-127
2362	OTH TERM EQ-OTH TERM	9.1	11	42.7	5.1	-1
2411	POLES	16.0	-40	39.1	6.3	304
2421	AERIAL CABLE	15.1	-21	40.8	5.3	7183
2422	UNDERGROUND CABLE	18.2	-17	32.6	4.6	1066
2423	BURIED CABLE	10.8	-7	48.6	5.4	5458
2424	SUBMARINE CABLE	7.1	0	50.5	7.0	-7
2426	INTRABLDG CABLE	9.9	-21	45.6	7.6	394
2441	CONDUIT SYSTEMS	37.0	-8	20.6	2.4	468

The figures in Columns B, C, and D are percentages of gross book cost.

The reserve level in Column C is used to calculate the depreciation rate and does not necessarily reflect the book reserve. The amortization amounts in Column E, ordered in FCC 88-13, released January 21, 1988, are continued.

FEDERAL COMMUNICATIONS COMMISSION
Schedule of Annual Percentages of Depreciation for
CONTINENTAL TELEPHONE COMPANY OF VIRGINIA

Effective January 1, 1990

	Rate Category Description	Average Remaining Life (years) A	Future Net Salvage (%) B	Reserve Level (%) C	Remaining Life Rate (%) D=(100%-B-C)/A	Annual Amort. Expense ($000) E
2112	MOTOR VEHICLES	4.9	20	17.4	12.8	0
2116	OTH WORK EQPT	13.8	0	25.0	5.4	-83
2121	BUILDINGS	31.0	10	19.6	2.3	-132
2122	FURNITURE	17.6	11	22.7	3.8	-31
2123	OFFICE EQUIPMENT	7.2	0	41.9	8.1	-12
2124	GEN PURPOSE COMP	3.7	5	51.3	11.8	0
2212	DIGITAL SWITCHING	11.2	2	24.3	6.6	-551
2215	SXS SWITCHING	1.1	0	93.8	5.6	-13
2220	OPERATOR SYSTEM	9.4	0	13.1	9.2	0
2231	RADIO-MICROWAVE	10.3	0	39.1	5.9	4
2232	CIRCUIT EQPT	5.8	5	43.5	8.9	282
2351	PUBLIC TELEPHONE	6.8	0	48.5	7.6	-9
2362	OTH TERM EQPT	6.2	0	58.2	6.7	0
2411	POLE LINES	14.1	-55	57.3	6.9	97
2421	AERIAL CABLE	14.5	-10	34.9	5.2	-63
2422	UNDERGROUND CABLE	18.7	0	29.3	3.8	94
2423	BURIED CABLE	15.6	0	25.3	4.8	1641
2424	SUBMARINE CABLE	12.2	0	58.2	3.4	-9
2431	AERIAL WIRE	—	-92	107.3	5.0	0
2441	CONDUIT SYSTEM	34.0	0	26.3	2.2	3

The figures in Columns B, C, and D are percentages of gross book cost.

The reserve level in Column C is used to calculate the depreciation rate and does not necessarily reflect the book reserve. The amortization amounts in Column E, ordered in FCC 88-13, released January 21, 1988, are continued.

FEDERAL COMMUNICATIONS COMMISSION
Schedule of Annual Percentages of Depreciation for
GTE NORTH INCORPORATED - IOWA

Effective January 1, 1991

Rate Category Description	Average Remaining Life (years) A	Future Net Salvage (%) B	Reserve Level (%) C	Remaining Life Rate (%) D=(100%-B-C)/A	Annual Amort. Expense ($000) E
2112 MOTOR VEHICLES	4.5	15	63.3	4.8	0
2113 AIRCRAFT (1)	—	40	60.0	8.0	0
2115 GARAGE WORK EQ	12.3	0	5.0	7.7	0
2116 OTHER WORK EQUIPMENT	9.0	14	41.9	4.9	0
2121 BUILDINGS	20.0	5	32.9	3.1	0
2122 FURNITURE	13.5	5	49.6	3.4	0
2123 CO COMMUNICATION EQUIP	9.3	1	55.4	4.7	0
2123 OFFICE EQUIPMENT	9.9	1	79.9	1.9	0
2124 GEN'L PURPOSE COMPUTERS	4.4	5	30.2	14.7	0
2211 ANALOG ELEC SWITCHING	7.5	0	77.2	3.0	0
2212 DIGITAL ELEC SWITCHING	13.2	3	16.9	6.1	0
2215 ELECTROMECH RECORDING	2.6	0	61.0	15.0	0
2215 ELECTROMECH SWITCHING	3.5	2	72.9	7.2	0
2231 RADIO SYSTEMS	3.4	0	15.5	24.9	0
2232 CIRCUIT EQUIPMENT	6.4	5	29.9	10.2	0
2362 OTHER TERMINAL EQUIP	4.8	1	57.8	8.6	0
2411 POLES	12.1	-40	16.2	10.2	0
2421 AERIAL CABLE-METALLIC	11.8	-20	20.2	8.5	0
2421 AERIAL CABLE-NONMETAL	18.7	-10	8.7	5.4	0
2422 UNDGROUND CABLE-NON MET	23.0	-7	7.6	4.3	0
2422 UNDRGROUND CABLE-METAL	16.2	-13	20.2	5.7	0
2423 BURIED CABLE-METALLIC	13.9	-5	35.9	5.0	0
2423 BURIED CABLE-NON METAL	23.0	-5	7.5	4.2	0
2426 INTRABLDG NETWORK CABLE	—	-15	115.0	5.0	18
2431 AERIAL WIRE	4.6	-92	142.2	10.8	0
2441 CONDUIT SYSTEMS	38.0	-3	30.9	1.9	0

The figures in Columns B, C, and D are percentages of gross book cost.

The reserve level in Column C is used to calculate the depreciation rate and does not necessarily reflect the book reserve.

(1) This rate is not based upon life, salvage and reserve factors.

FEDERAL COMMUNICATIONS COMMISSION
Schedule of Annual Percentages of Depreciation for
GTE NORTH INCORPORATED - NEBRASKA

Effective January 1, 1991

Rate Category Description	Average Remaining Life	Future Net Salvage	Reserve Level	Remaining Life Rate
	(years) A	(%) B	(%) C	(%) D=(100%-B-C)/A
2112 MOTOR VEHICLES	4.6	13	53.0	7.4
2115 GARAGE WORK EQUIPMENT	6.5	5	80.2	2.3
2116 OTHER WORK EQUIPMENT	9.4	5	56.9	4.1
2121 BUILDINGS	19.0	4	37.2	3.1
2122 FURNITURE	—	5	95.0	5.0
2123 CO COMMUNICATION EQUIP	7.4	5	66.8	3.8
2123 OFFICE EQUIPMENT	8.5	5	15.2	9.4
2124 GEN'L PURPOSE COMPUTERS	4.6	5	11.2	18.2
2212 DIGITAL ELEC SWITCHING	14.3	3	23.7	5.1
2215 ELECTROMECH RECORDING	3.5	-5	93.0	3.4
2215 ELECTROMECH SWITCHING	2.9	-5	85.2	6.8
2232 CIRCUIT EQUIPMENT	7.3	5	43.1	7.1
2351 PUBLIC TEL TERM EQUIP	5.2	5	74.5	3.9
2362 OTHER TERMINAL EQUIP	6.5	4	75.1	3.2
2411 POLES	16.8	-50	77.3	4.3
2421 AERIAL CABLE-METALLIC	14.3	-25	65.1	4.2
2421 AERIAL CABLE-NON METAL	26.0	-15	58.3	2.2
2422 UNDERGROUND CABLE-METAL	22.0	-25	18.4	4.8
2422 UNERDGROUND CABLE-N MET	22.0	-15	14.1	4.6
2423 BURIED CABLE-METALLIC	15.4	-8	27.9	5.2
2423 BURIED CABLE-NON METAL	24.0	-7	14.4	3.9
2426 INTRABLDG NETWORK CABLE	12.3	-25	52.2	5.9
2431 AERIAL WIRE	6.5	-34	-138.7	42.0
2441 CONDUIT SYSTEMS	42.0	-10	29.0	1.9

The figures in Columns B, C, and D are percentages of gross book cost.

FEDERAL COMMUNICATIONS COMMISSION
Schedule of Annual Percentages of Depreciation for
GTE NORTH INCORPORATED - OHIO

Effective January 1, 1991

Rate Category Description	Average Remaining Life	Future Net Salvage	Reserve Level	Remaining Life Rate	Annual Amort. Expense
	(years) A	(%) B	(%) C	(%) D=(100%-B-C)/A	($000) E
2112 MOTOR VEHICLES	4.4	12	46.0	9.5	0
2113 AIRCRAFT	5.0	48	18.9	6.6	0
2115 GARAGE WORK EQUIPMENT	8.9	0	38.5	6.9	-20
2116 OTHER WORK EQUIPMENT	8.4	8	30.4	7.3	-53
2121 BUILDINGS	17.0	0	33.9	3.9	152
2122 FURNITURE	12.7	5	56.3	3.0	208
2123 CO COMMUNICATION EQUIP	8.9	1	30.0	7.8	-573
2123 OFFICE EQUIPMENT	10.0	1	18.3	8.1	0
2124 GEN'L PURPOSE COMPUTERS	4.1	5	43.4	12.6	0
2211 ANALOG ELEC SWITCHING	7.2	-1	42.7	8.1	883
2212 DIGITAL ELEC SWITCHING	12.1	3	21.2	6.3	-159
2215 ELECTROMECH RECORDING	3.2	-1	34.5	20.8	0
2215 ELECTROMECH SWITCHING	3.4	0	53.9	13.6	0
2231 RADIO SYSTEMS	4.9	-1	71.0	6.1	10
2232 CIRCUIT EQUIPMENT	6.5	4	39.1	8.8	2924
2351 PUBLIC TEL*TERM EQUIP	4.6	5	51.5	9.5	-30
2362 OTHER TERMINAL EQUIP	6.4	1	80.3	2.9	0
2411 POLES	17.2	-52	41.2	6.4	-55
2421 AERIAL CABLE-METALLIC	17.8	-47	53.0	5.3	3248
2421 AERIAL CABLE-NON METAL	18.5	-25	11.7	6.1	3
2422 UNDERGROUND CABLE-METAL	19.4	-31	44.6	4.5	413
2422 UNDERGROUND CABLE-N MET	19.5	-16	7.9	5.5	0
2423 BURIED CABLE-METALLIC	13.0	-11	39.7	5.5	2261
2423 BURIED CABLE-NON METAL	22.0	-5	7.0	4.5	0
2424 SUBMARINE CABLE	12.6	0	53.5	3.7	-2
2426 INTRABLDG NETWORK CABLE	12.3	-47	35.0	9.1	0
2431 AERIAL WIRE	5.7	-61	85.5	13.2	113
2441 CONDUIT SYSTEMS	39.0	-11	25.6	2.2	-6

The figures in Columns B, C, and D are percentages of gross book cost.

The reserve level in Column C is used to calculate the depreciation rate and does not necessarily reflect the book reserve. The amortization amounts in Column E, ordered in FCC 88-13, released January 21, 1988 are continued.

FEDERAL COMMUNICATIONS COMMISSION
Schedule of Annual Percentages of Depreciation for GTE NORTH INCORPORATED - WISCONSIN

Effective January 1, 1991

Rate Category Description	Average Remaining Life (years) A	Future Net Salvage (%) B	Reserve Level (%) C	Remaining Life Rate (%) D=(100%-B-C)/A
2112 MOTOR VEHICLES	4.5	14	39.9	10.2
2115 GARAGE WORK EQUIPMENT	7.7	0	68.1	4.1
2116 OTHER WORK EQUIPMENT	8.9	0	52.9	5.3
2121 BUILDINGS	21.0	0	25.1	3.6
2122 FURNITURE	10.0	6	12.3	8.2
2123 CO COMMUNICATION EQ	7.2	5	75.8	2.7
2123 OFFICE EQUIPMENT	8.0	5	12.9	10.3
2124 GEN'L PURPOSE COMPUTERS	4.1	5	32.0	15.4
2211 ANALOG ELEC SWITCHING	2.4	-1	85.8	6.3
2212 DIGITAL ELEC SWITCHING	14.1	3	28.6	4.9
2215 ELECTROMECH RECORDING	4.7	-3	-39.2	30.3
2215 ELECTROMECH SWITCHING	4.5	-5	66.4	8.6
2220 OPERATOR SYSTEMS @	0.0	-3	77.2	0.0
2231 RADIO SYSTEMS	5.0	1	64.7	6.9
2232 CIRCUIT EQUIPMENT	6.4	4	23.3	11.4
2351 PUBLIC TEL TERM EQUIP	4.8	5	83.6	2.4
2362 OTHER TERMINAL EQUIP	5.9	1	96.3	0.5
2411 POLES	14.3	-47	65.3	5.7
2421 AERIAL CABLE-METALLIC	12.6	-37	43.2	7.4
2421 AERIAL CABLE-NON METAL	19.9	-20	12.3	5.4
2422 UNDERGROUND CABLE-METAL	20.0	-28	21.8	5.3
2422 UNDERGROUND CABLE-N MET	17.9	-15	6.9	6.0
2423 BURIED CABLE-METALLIC	12.5	-8	44.8	5.1
2423 BURIED CABLE-NON METAL	23.0	-7	13.6	4.1
2424 SUBMARINE CABLE	12.5	-10	56.5	4.3
2426 INTRABLDG NETWORK CABLE	12.3	-37	40.5	7.8
2431 AERIAL WIRE	4.6	-80	153.8	5.7
2441 CONDUIT SYSTEMS	40.0	-10	25.8	2.1

The figures in Columns B, C, and D are percentages of gross book cost.

@ As described in paragraph 32 of the Order, the net service value for the Operator Systems Account is to be amortized over a twelve month period ending December 31, 1991.

FEDERAL COMMUNICATIONS COMMISSION
Schedule of Annual Percentages of Depreciation for
GTE SOUTH INCORPORATED - ALABAMA

Effective July 1, 1990

	Rate Category Description	Average Remaining Life (years) A	Future Net Salvage (%) B	Reserve Level (%) C	Remaining Life Rate (%) D=(100%-B-C)/A	Annual Amort. Expense ($000) E
2112	MOTOR VEHICLES	5.2	23	46.6	5.8	0
2115	GARAGE WORK EQUIP	8.6	0	62.2	4.4	1
2116	OTH WORK EQUIP	12.4	3	28.3	5.5	-22
2121	BUILDINGS	32.0	10	16.0	2.3	-70
2122	FURNITURE	11.9	2	39.6	4.9	2
2123	COMPANY COMM EQPT	6.4	0	43.9	8.8	-67
2123	OFFICE SUPPT. EQPT	9.5	2	37.9	6.3	-8
2124	GENL PURP COMP	3.3	5	62.4	9.9	0
2211	ANALOG ELECT SW	5.5	-1	16.0	15.5	0
2212	DIGITAL ELECT SW	12.7	5	18.4	6.0	0
2215	ELECTROMECHAN SW	3.3	-2	52.3	15.1	0
2220	OPERATOR SYSTEMS	20.0	5	0.0	4.8	0
2231	RADIO SYSTEMS	2.1	0	66.8	15.8	3
2232	CIRCUIT EQUIP	6.8	3	27.8	10.2	84
2351	PUBLIC TELEPHONES	5.7	2	44.4	9.4	-30
2362	OTH TERM EQUIP	2.3	-2	69.7	14.0	0
2411	POLES	13.3	-45	31.4	8.5	-32
2421	AERIAL CABLE-MET	16.3	-38	32.4	6.5	114
2421	AERIAL CAB-NONMET	17.8	-10	15.9	5.3	3
2422	UNDERGRND CAB N-MET	21.0	-2	15.0	4.1	2
2422	UNDERGRND CAB-MET	17.9	-15	29.1	4.8	80
2423	BURIED CAB-MET	13.5	-10	23.3	6.4	475
2423	BURIED CAB-NONMET	21.0	-5	13.3	4.4	2
2424	SUBMARINE CAB-MET	17.8	-5	25.7	4.5	0
2426	INTRABLDG NTWK CAB	16.6	-38	30.3	6.5	1
2431	AERIAL WIRE	5.3	-85	74.2	20.9	0
2441	CONDUIT SYSTEMS	43.0	-1	25.9	1.7	-4

The figures in Columns B, C, and D are percentages of gross book cost.

The reserve level in Column C is used to calculate the depreciation rate and does not necessarily reflect the book reserve. The amortization amounts in Column E, ordered in FCC 88-13, released January 21, 1988, are continued.

FEDERAL COMMUNICATIONS COMMISSION
Schedule of Annual Percentages of Depreciation for
GTE SOUTH INCORPORATED - GEORGIA

Effective July 1, 1990

	Rate Category Description	Average Remaining Life (years) A	Future Net Salvage (%) B	Reserve Level (%) C	Remaining Life Rate (%) D=(100%-B-C)/A	Annual Amort. Expense ($000) E
2112	MOTOR VEHICLES	3.9	19	48.8	8.3	0
2115	GARAGE WORK EQUIP	10.4	0	27.5	7.0	2
2116	OTH WORK EQUIP	9.8	5	38.5	5.8	-12
2121	BUILDINGS	28.0	0	19.2	2.9	-27
2122	FURNITURE	11.3	2	49.7	4.3	7
2123	COMP COMM. EQPT	6.3	0	42.1	9.2	-170
2123	OFFICE SUPPORT EQUIP	7.6	2	60.6	4.9	2
2124	GENERAL PURPOSE COMP	3.4	5	24.1	20.9	13
2211	ANALOG ELECT. SW	7.5	0	39.2	8.1	0
2212	DIGITAL ELECT. SW	12.3	3	15.1	6.7	78
2215	ELECTROMECH SW	4.5	-2	78.6	5.2	0
2220	OPERATOR SYSTEMS	19.0	3	0.0	5.1	0
2231	RADIO SYSTEMS	—	-4	54.7	—	●
2232	CIRCUIT EQUIPMENT	5.8	3	6.5	15.6	835
2351	PUBLIC TELEPHONES	6.3	2	48.1	7.9	-27
2362	OTH TERM EQUIP	3.5	-2	54.7	13.5	0
2411	POLES	12.9	-44	32.2	8.7	135
2421	AERIAL CABLE-MET	13.6	-35	32.0	7.6	288
2421	AERIAL CABLE-N-MET	18.5	-23	10.5	6.1	0
2422	UNDERGROUND CAB NMET	20.0	-12	12.3	5.0	0
2422	UNDERGROUND CAB-MET	15.3	-21	33.9	5.7	256
2423	BURIED CABLE-MET.	13.4	-6	24.1	6.1	942
2423	BURIED CABLE-N-MET.	22.0	-6	12.2	4.3	0
2424	SUBMARINE CAB MET	16.7	0	15.3	5.1	0
2424	SUBMARINE CAB N-MET	25.0	-1	5.5	3.8	0
2426	INTRABLDG. NETWK CAB	14.3	-35	33.3	7.1	3
2431	AERIAL WIRE	3.5	-80	93.3	24.8	170
2441	CONDUIT SYSTEMS	47.0	-1	17.6	1.8	-24

The figures in Columns B, C, and D are percentages of gross book cost.

The reserve level in Column C is used to calculate the depreciation rate and does not necessarily reflect the book reserve. The amortization amounts in Column E, ordered in FCC 88-13, released January 21, 1988, are continued.

● As described in paragraph 32 of the Order, the net service value for the Radio Account is to be amortized over a thirty month period ending December 31, 1992.

FEDERAL COMMUNICATIONS COMMISSION
Schedule of Annual Percentages of Depreciation for
GTE SOUTH INCORPORATED - SOUTH CAROLINA

Effective July 1, 1990

	Rate Category Description	Average Remaining Life	Future Net Salvage	Reserve Level	Remaining Life Rate	Annual Amort. Expense
		(years) A	(%) B	(%) C	(%) D=(100%-B-C)/A	($000) E
2112	MOTOR VEHICLES	5.1	14	36.9	9.6	-70
2115	GARAGE WORK EQUIP	9.5	0	35.5	6.8	0
2116	OTHER WORK EQUIP	9.8	0	44.9	5.6	7
2121	BUILDINGS	28.0	6	13.6	2.9	34
2122	FURNITURE	8.0	5	72.3	2.8	23
2123	OFFICE SUPPORT EQPT	9.5	2	69.9	3.0	9
2123	COMP COMM EQUIPMENT	6.6	0	50.6	7.5	0
2124	GEN'L PUR COMPUTERS	3.5	5	42.3	15.1	48
2211	ANALOG ELECT SW	—	0	—	—	●
2212	DIGITAL ELECT SW	12.2	5	20.0	6.1	85
2220	OPERATOR SYS-FUTURE	19.0	5	0.0	5.0	0
2220	OPERATOR SYS-PRESENT	—	0	—	—	●
2231	RADIO SYSTEMS	5.4	-5	-27.3	24.5	-10
2232	CIRCUIT EQUIPMENT	7.1	4	14.1	11.5	478
2351	PUBLIC TELEPHONES	5.3	2	61.0	7.0	0
2362	OTHER TERMINAL EQPT	3.6	-2	57.9	12.3	0
2411	POLES	14.8	-40	48.4	6.2	24
2421	AERIAL CABLE-METALL	12.1	-33	29.4	8.6	237
2421	AERIAL CABLE-NONMET	18.1	-25	15.6	6.0	0
2422	UNDERGROUND CA-MET	18.0	-15	23.7	5.1	23
2422	UNDERGROUND CA-NMET	21.0	-25	11.3	5.4	0
2423	BURIED CABLE-METALL	12.7	-6	21.1	6.7	452
2423	BURIED CABLE-NONMET	22.0	-6	9.1	4.4	0
2424	SUBMARINE CABLE-MET	7.3	-5	46.8	8.0	2
2426	INTRABLDG NETWK CA	12.3	-33	27.9	8.5	18
2431	AERIAL WIRE	2.7	-71	142.2	10.7	83
2441	CONDUIT SYSTEMS	41.0	-1	23.3	1.9	-1

The figures in Columns B, C, and D are percentages of gross book cost.

The reserve level in Column C is used to calculate the depreciation rate and does not necessarily reflect the book reserve. The amortization amounts in Column E, ordered in FCC 88-7, released January 22, 1988, and as amended by Erratum DA 88-201, released February 19, 1988, are continued.

● As described in paragraph 32 of the Order, the net service value for the Analog Electronic Switching and Operator Systems-Present accounts are to be amortized over a thirty-six month period ending June 30, 1993.

FEDERAL COMMUNICATIONS COMMISSION
Schedule of Annual Percentages of Depreciation for
GTE SOUTH INCORPORATED - TENNESSEE

Effective July 1, 1990

Rate Category Description		Average Remaining Life	Future Net Salvage	Reserve Level	Remaining Life Rate	Annual Amort. Expense
		(years) A	(%) B	(%) C	(%) D=(100%-B-C)/A	($000) E
2112	MOTOR VEHICLES	6.7	7	41.3	7.7	0
2115	GARAGE WORK EQUIP	8.7	0	61.8	4.4	0
2116	OTH WORK EQUIP	12.1	5	33.6	5.1	-15
2121	BUILDINGS	31.0	10	23.2	2.2	-15
2122	FURNITURE	11.8	10	42.0	4.1	3
2123	OFFICE SUPT EQPT	7.7	2	71.0	3.5	3
2123	COMP COMM EQPT	6.4	0	38.7	9.6	-27
2124	GENL PURP COMPT	3.0	5	67.3	9.2	0
2212	DIGITAL ELECT SW	12.9	10	27.1	4.9	14
2215	ELECTRO-MECH SW	1.8	-2	73.7	15.7	362
2220	OPERATOR SYSTEMS	20.0	10	9.8	4.0	0
2231	RADIO SYSTEMS	4.8	-2	54.0	10.0	11
2232	CIRCUIT EQUIPMENT	6.4	1	25.5	11.5	114
2351	PUBLIC TELEPHONES	5.1	2	60.5	7.4	-38
2362	OTH TERM EQUIP	2.8	-2	63.8	13.6	0
2411	POLES	13.1	-34	26.7	8.2	44
2421	AERIAL CAB NON-MET	18.5	-17	10.0	5.8	0
2421	AERIAL CAB-MET	16.4	-25	35.7	5.4	313
2422	UNDG CAB NON-MET	21.0	-8	9.3	4.7	0
2422	UNDG CAB-MET	19.5	-9	28.2	4.1	20
2423	BURIED CAB NON-MET	21.0	-5	19.1	4.1	0
2423	BURIED CAB-MET	12.0	-4	23.5	6.7	121
2426	INTRABLDG NETWK CAB	16.4	-25	34.6	5.5	1
2431	AERIAL WIRE	4.4	-85	127.1	13.2	0
2441	CONDUIT SYSTEMS	44.0	-1	24.4	1.7	-3

The figures in Columns B, C, and D are percentages of gross book cost.

The reserve level in Column C is used to calculate the depreciation rate and does not necessarily reflect the book reserve. The amortization amounts in Column E, ordered in FCC 88-13, released January 21, 1988, are continued.

FEDERAL COMMUNICATIONS COMMISSION
Schedule of Annual Percentages of Depreciation for
GTE SOUTHWEST INCORPORATED - ARKANSAS

Effective July 1, 1990

	Rate Category Description	Average Remaining Life	Future Net Salvage	Reserve Level	Remaining Life Rate	Annual Amort. Expense
		(years) A	(%) B	(%) C	(%) D=(100%-B-C)/A	($000) E
2112	HEAVY TRUCKS-1 TON AND OVER	5.3	16	35.6	9.1	1
2112	PASSENGER CARS	3.2	16	57.4	8.3	0
2112	PICKUPS-VANS-LIGHT TRUCKS	3.9	17	56.9	6.7	0
2112	SPCL EQUIP/MOTOR VEHICLES	5.3	13	42.1	8.5	0
2115	GARAGE WORK EQUIPMENT	13.2	2	56.2	3.2	-2
2116	MOBILE TOOLS	5.7	14	87.6	0.0	0
2116	TOOLS & OTHER WORK EQUIP	10.7	4	28.0	6.4	-13
2116	TRAILERS	8.4	21	48.4	3.6	-9
2121	BUILDINGS	23.0	1	21.6	3.4	-10
2122	FURNITURE	16.8	2	30.1	4.0	-1
2123	CO OFFICIAL-LARGE PBX	4.5	0	39.8	13.4	4
2123	CO OFFICIAL-STA APPARATUS	8.9	10	30.6	6.7	-22
2123	COM OFF LOCATED IN CO	5.4	0	3.2	17.9	0
2123	OFFICE SUPPORT EQUIPMENT	6.6	7	80.7	1.9	0
2124	GENERAL PURPOSE COMPUTERS	3.6	2	38.1	16.6	5
2212	DIGITAL ELECTRONIC SWITCHING	12.9	5	14.1	6.3	14
2215	AUTO MESSAGE RECORDING	7.9	0	35.6	8.2	-125
2215	AUTOMATIC SWITCHING	7.9	-1	38.6	7.9	-435
2220	MANUAL SWITCHING	0.0	0	97.5	0.0	0
2231	RADIO SYSTEMS	16.1	5	23.1	4.5	2
2232	CIRCUIT EQUIPMENT	7.1	6	22.1	10.1	167
2351	PUBLIC TELEPHONE EQUIP	10.3	20	38.1	4.1	0
2362	E911 EQUIPMENT	3.6	0	30.4	19.3	0
2362	HANDICAPPED EQUIPMENT	9.2	0	0.0	10.9	0
2362	TERMINAL EQUIPMENT	7.5	4	75.3	2.8	0
2411	POLES	14.9	-72	68.8	6.9	173
2411	TOWERS	14.2	-54	0.0	10.8	0
2421	AERIAL CABLE	14.6	-26	48.1	5.3	222
2421	AERIAL CABLE-NONMETALLIC	17.7	0	18.4	4.6	0
2422	UNDERGROUND CABLE-METAL	15.1	-8	19.9	5.8	10
2422	UNDERGROUND CABLE-NONMETAL	21.0	0	6.7	4.4	0
2423	BURIED CABLE-METAL	14.5	-11	33.4	5.4	491
2423	BURIED CABLE-NONMETALLIC	17.6	0	7.8	5.2	0
2426	INTRABUILDING CABLE-METALLIC	15.3	-26	39.2	5.7	0
2426	INTRABUILDING CABLE-NONMETAL	17.7	0	0.0	5.6	0
2431	AERIAL WIRE	6.4	-231	152.7	27.9	156
2441	CONDUIT SYSTEMS	39.0	-5	13.6	2.3	-2

The figures in Columns B, C, and D are percentages of gross book cost.

The reserve level in Column C is used to calculate the depreciation rate and does not necessarily reflect the book reserve. The amortization amounts in Column E, ordered in FCC 88-14, released January 21, 1988, are continued.

FEDERAL COMMUNICATIONS COMMISSION
Schedule of Annual Percentages of Depreciation for
GTE SOUTHWEST INCORPORATED - NEW MEXICO

Effective July 1, 1990

	Rate Category Description	Average Remaining Life (years) A	Future Net Salvage (%) B	Reserve Level (%) C	Remaining Life Rate (%) D=(100%-B-C)/A	Annual Amort. Expense ($000) E
2112	HEAVY TRUCKS-1 TON AND OVER	5.3	16	43.3	7.7	-7
2112	PASSENGER CARS	3.2	16	63.0	6.6	0
2112	PICKUPS-VANS-LIGHT TRUCKS	3.9	17	77.4	1.4	-8
2112	SPCL EQUIP/MOTOR VEHICLES	5.3	13	82.1	0.9	-8
2115	GARAGE WORK EQUIPMENT	13.2	2	71.5	2.0	-1
2116	MOBILE TOOLS	5.7	14	90.4	0.0	-1
2116	TOOLS & OTHER WORK EQUIP	10.7	4	27.1	6.4	-10
2116	TRAILERS	8.4	21	28.5	6.0	-4
2121	BUILDINGS	26.0	3	20.7	2.9	59
2122	FURNITURE	16.8	2	28.8	4.1	-2
2123	CO OFFICIAL-LARGE PBX	4.5	0	81.4	4.1	-5
2123	CO OFFICIAL-STA APPARATUS	8.9	10	33.4	6.4	-12
2123	COM OFF LOCATED IN CO	5.4	0	13.2	16.1	0
2123	OFFICE SUPPORT EQUIPMENT	6.6	7	86.2	1.0	5
2124	GENERAL PURPOSE COMPUTERS	3.6	2	28.2	19.4	0
2211	ANALOG SPC SWITCH-#2EAX @	0.0	0	62.0	0.0	566
2212	DIGITAL ELECTRONIC SWITCHING	11.7	5	27.7	5.8	37
2215	AUTOMATIC MESSAGE RECORDING	0.0	6	0.0	0.0	0
2215	AUTOMATIC SWITCHING	0.0	6	60.2	0.0	0
2220	MANUAL SWITCHING	0.0	6	96.1	0.0	0
2220	T.S.P.S.	0.0	0	100.0	0.0	0
2231	RADIO SYSTEMS	16.1	5	36.7	3.6	13
2232	CIRCUIT EQUIPMENT	5.8	4	37.8	10.0	261
2351	PUBLIC TELEPHONE EQUIP.	10.3	20	41.1	3.8	-4
2362	E911 EQUIPMENT	3.6	0	8.2	25.5	0
2362	HANDICAPPED EQUIPMENT	9.2	0	0.0	10.9	0
2362	TERMINAL EQUIPMENT	7.5	4	67.5	3.8	0
2411	POLES	18.5	-62	77.8	4.6	107
2411	TOWERS	14.2	-54	63.8	6.4	-3
2421	AERIAL CABLE	13.3	-51	51.6	7.5	378
2421	AERIAL CABLE-NONMETALLIC	17.7	0	27.7	4.1	0
2422	UNDERGROUND CABLE-METAL	19.9	-2	38.0	3.2	57
2422	UNDERGROUND CABLE-NONMETAL	21.0	0	11.8	4.2	0
2423	BURIED CABLE-METAL	15.3	-2	28.4	4.8	5
2423	BURIED CABLE-NONMETALLIC	17.6	0	9.4	5.1	0
2426	INTRABUILDING CABLE-METALLIC	13.5	-51	41.0	8.1	0
2426	INTRABUILDING CABLE-NONMETAL	17.7	0	0.0	5.6	0
2431	AERIAL WIRE	6.1	-114	119.9	15.4	69
2441	CONDUIT SYSTEMS	41.0	-5	22.5	2.0	1

The figures in Columns B, C, and D are percentages of gross book cost.

The reserve level in Column C is used to calculate the depreciation rate and does not necessarily reflect the book reserve. The amortization amounts in Column E, ordered in FCC 88-7, released January 22, 1988, are continued.

@ As described in paragraph 32 of the Order, the net service value for the Analog Switching #2 Account is to be amortized over a forty-two month period, ending December 31, 1993.

FEDERAL COMMUNICATIONS COMMISSION
Schedule of Annual Percentages of Depreciation for
GTE SOUTHWEST INCORPORATED - OKLAHOMA

Effective July 1, 1990

	Rate Category Description	Average Remaining Life	Future Net Salvage	Reserve Level	Remaining Life Rate	Annual Amort. Expense
		(years) A	(%) B	(%) C	(%) D=(100%-B-C)/A	($000) E
2112	HEAVY TRUCKS-1 TON AND OVER	5.3	16	35.8	9.1	-18
2112	PASSENGER CARS	3.2	16	36.0	15.0	0
2112	PICKUPS-VANS-LIGHT TRUCKS	3.9	17	45.5	9.6	-16
2112	SPCL EQUIP/MOTOR VEHICLES	5.3	13	38.7	9.1	-19
2115	GARAGE WORK EQUIPMENT	13.2	2	57.4	3.1	-1
2116	MOBILE TOOLS	5.7	14	54.9	5.5	10
2116	TOOLS & OTHER WORK EQUIP	10.7	4	32.9	5.9	-14
2116	TRAILERS	8.4	21	30.8	5.7	-1
2121	BUILDINGS	22.0	6	21.6	3.3	55
2122	FURNITURE	16.8	2	26.7	4.2	-11
2123	CO OFFICIAL-LARGE PBX	4.5	0	70.4	6.6	-5
2123	CO OFFICIAL-STA APPARATUS	8.9	10	47.2	4.8	-6
2123	COM OFF LOCATED IN CO	5.4	0	25.8	13.7	0
2123	OFFICE SUPPORT EQUIPMENT	6.6	7	57.0	5.5	1
2124	GENERAL PURPOSE COMPUTERS	3.6	2	35.3	17.4	0
2211	ANALOG SPC SWITCH-#2 EAX	0.0	0	100.0	0.0	0
2212	DIGITAL ELECTRONIC SWITCHING	12.1	5	21.3	6.1	112
2215	AUTO MESSAGE RECORDING	6.7	18	63.2	2.8	35
2215	AUTOMATIC SWITCHING	6.7	0	65.2	5.2	202
2220	MANUAL SWITCHING	0.0	3	97.9	0.0	0
2220	T.S.P.S.	0.0	0	100.0	0.0	0
2231	RADIO SYSTEMS	16.1	5	17.5	4.8	-58
2232	CIRCUIT EQUIPMENT	6.5	5	24.7	10.8	408
2351	PUBLIC TELEPHONE EQUIP.	10.3	20	46.7	3.2	5
2362	E911 EQUIPMENT	3.6	0	22.3	21.6	0
2362	HANDICAPPED EQUIPMENT	9.2	0	0.0	10.9	0
2362	TERMINAL EQUIPMENT	7.5	4	74.8	2.8	0
2411	POLES	14.9	-63	67.6	6.4	429
2411	TOWERS	14.2	-54	61.3	6.5	-7
2421	AERIAL CABLE	14.7	-33	42.7	6.1	425
2421	AERIAL CABLE-NONMETALLIC	17.7	0	20.0	4.5	0
2422	UNDERGROUND CABLE-METAL	16.3	7	15.6	4.7	51
2422	UNDERGROUND CABLE-NONMETAL	21.0	0	13.8	4.1	1
2423	BURIED CABLE-METAL	15.0	-10	32.0	5.2	163
2423	BURIED CABLE-NONMETALLIC	17.6	0	11.8	5.0	0
2424	SUBMARINE CABLE-METAL	23.0	0	7.7	4.0	-2
2426	INTRABUILDING CABLE-METALLIC	14.7	-33	21.2	7.6	0
2426	INTRABUILDING CABLE-NONMETAL	17.7	0	25.1	4.2	0
2431	AERIAL WIRE	3.9	-202	180.6	31.1	253
2441	CONDUIT SYSTEMS	45.0	-10	15.0	2.1	7

The figures in Columns B, C, and D are percentages of gross book cost.

The reserve level in Column C is used to calculate the depreciation rate and does not necessarily reflect the book reserve. The amortization amounts in Column E, ordered in FCC 88-7, and as amended by Erratum DA-88-201, released January 22, 1988, are continued.

FEDERAL COMMUNICATIONS COMMISSION
Schedule of Annual Percentages of Depreciation for
GTE SOUTHWEST INCORPORATED - TEXAS

Effective July 1, 1990

Rate Category Description	Average Remaining Life (years) A	Future Net Salvage (%) B	Reserve Level (%) C	Remaining Life Rate (%) D=(100%-B-C)/A	Annual Amort. Expense ($000) E
2112 HEAVY TRKS-1 TON & OVER	5.3	16	40.5	8.2	-35
2112 PASSENGER CARS	3.2	16	38.4	14.3	0
2112 PICKUPS-VANS-LT TRUCKS	3.9	17	38.2	11.5	0
2112 SPCL EQ/MOTOR VEHICLES	5.3	13	43.0	8.3	0
2113 AIRCRAFT	1.8	50	46.9	1.7	0
2115 GARAGE WORK EQUIPMENT	13.2	2	51.8	3.5	-14
2116 MOBILE TOOLS	5.7	14	67.1	3.3	0
2116 TOOLS & OTHER WK EQUIP	10.7	4	25.2	6.6	-309
2116 TRAILERS	8.4	21	34.4	5.3	-64
2121 BUILDINGS	23.0	13	19.4	2.9	513
2122 FURNITURE	16.8	2	30.5	4.0	-101
2123 CO OFFICIAL-LARGE PBX	4.5	0	66.4	7.5	0
2123 CO OFFICIAL-STATION APP	8.9	10	28.9	6.9	-747
2123 COM OFF LOCATED IN CO	5.4	0	11.4	16.4	0
2123 OFFICE SUPPORT EQUIP	6.6	7	50.1	6.5	0
2124 GEN'L PURPOSE COMPUTERS	3.6	5	35.6	16.5	106
2211 ANALOG SPC SWITCH-#1	0.0	4	98.9	0.0	0
2211 ANALOG SPC SWITCH-#2	2.8	4	27.3	24.5	163
2212 DIGITAL ELEC SWITCHING	12.8	5	19.8	5.9	1007
2215 AUTO MESSAGE RECORDING	0.0	0	99.4	0.0	0
2215 AUTOMATIC SWITCHING	5.4	0	73.6	4.9	0
2220 MANUAL SWITCHING	0.0	3	95.5	0.0	0
2220 T.S.P.S.	0.0	0	97.0	0.0	0
2231 RADIO SYSTEMS	16.1	5	35.8	3.7	40
2232 CIRCUIT EQUIPMENT	5.9	9	27.3	10.8	6396
2351 PUBLIC TELEPHONE EQUIP	10.3	20	22.2	5.6	-193
2362 E911 EQUIPMENT	3.6	0	42.9	15.9	0
2362 HANDICAPPED EQUIPMENT	9.2	0	100.0	0.0	0
2362 TERMINAL EQUIPMENT	7.5	4	48.9	6.3	0
2411 POLES	14.8	-65	55.4	7.4	1852
2411 TOWERS	14.2	-54	43.6	7.8	1
2421 AERIAL CABLE	14.7	-31	44.5	5.9	8700
2421 AERIAL CABLE-NONMETAL	17.7	0	14.5	4.8	8
2422 UNDERGROUND CABLE-METAL	19.2	-7	20.3	4.5	678
2422 UNDERGROUND CABLE-N MET	21.0	0	14.1	4.1	39
2423 BURIED CABLE-METAL	12.1	-9	28.8	6.6	5016
2423 BURIED CABLE-NONMETAL	17.6	0	13.6	4.9	24
2424 SUBMARINE CABLE-METAL	23.0	0	30.9	3.0	30
2424 SUBMARINE CABLE-N METAL	21.0	0	-95.3	9.3	0
2426 INTRABUILDING CABLE-MET	14.7	-31	27.1	7.1	0
2426 INTRABUILDING CABLE-N M	17.7	0	8.6	5.2	0
2431 AERIAL WIRE	5.0	-100	132.8	13.4	959
2441 CONDUIT SYSTEMS	43.0	-10	17.1	2.2	68

The figures in Columns B, C, and D are percentages of gross book cost.

The reserve level in Column C is used to calculate the depreciation rate and does not necessarily reflect the book reserve. The amortization amounts in Column E, ordered in FCC 88-14, released January 22, 1988, are continued.

FEDERAL COMMUNICATIONS COMMISSION
Schedule of Annual Percentages of Depreciation for
NEW ENGLAND TELEPHONE AND TELEGRAPH COMPANY - MAINE

Effective July 1, 1990

	Rate Category Description	Average Remaining Life (years) A	Future Net Salvage (%) B	Reserve Level (%) C	Remaining Life Rate (%) D=(100%-B-C)/A	Annual Amort. Expense ($000) E
2112	MOTOR VEHICLES	—	10	92.3	5.0	0
2114	SPEC PURP VEHICLES	6.6	8	47.9	6.7	0
2115	GARAGE WORK EQPT.	6.9	8	37.2	7.9	0
2116	OTHER WORK EQPT.	8.6	5	39.1	6.5	-17
2121	BUILDINGS	23.0	5	33.3	2.7	266
2122	FURNITURE	11.7	6	17.5	6.5	7
2123	OFFICE SUPP. EQPT.	8.4	7	25.9	8.0	0
2123	OFFICE COMM. EQPT.	6.5	7	40.9	8.0	195
2124	GEN PURP COMPUTERS	2.0	1	85.5	6.8	0
2211	ELECTRONIC SW ANALOG	7.2	2	48.8	6.8	937
2212	ELECTRONIC SW DIG	13.9	2	17.5	5.8	84
2215	ELECTRO-MECH.SW XBAR	—	-3	77.7	—	●
2215	ELECTRO-MECH.SW.SXS	—	-3	84.2	—	*
2220	OPERATOR SYSTEMS	5.9	0	35.0	11.0	0
2231	RADIO SYSTEMS	4.6	-5	53.3	11.2	-278
2232	CIRCUIT EQPT OTH-ANA	3.2	-2	39.3	19.6	4458
2232	CIRCUIT EQPT OTH-DIG	7.2	0	36.3	8.8	0
2232	CIRCUIT EQPT-DDS	2.5	-4	56.2	19.1	0
2311	STATION APPARATUS	8.4	1	22.5	9.1	-40
2351	PUB.TEL.TERM.EQPT.	4.3	1	61.5	8.7	337
2362	OTHER TERM. EQPT.	4.6	-2	50.2	11.3	0
2411	POLES	19.3	-49	39.1	5.7	-364
2421	AERIAL CA EX NMET	20.0	-25	7.8	5.9	0
2421	AERIAL CA TOLL NMET	21.0	-20	13.7	5.1	0
2421	AERIAL CAB EX MET	12.9	-26	42.4	6.5	4752
2421	AERIAL CAB TOLL MET	10.3	-21	61.2	5.8	1159
2422	UNDGRND CA EX MET	17.8	-34	36.9	5.5	790
2422	UNDGRND CA EX NMET	16.2	-31	13.4	7.3	0
2422	UNDGRND CA TOLL MET	10.4	-29	56.1	7.0	254
2422	UNDGRND CA TOLL NMET	21.0	-14	14.6	4.7	0
2423	BURIED CAB EX MET	12.6	-6	30.9	6.0	354
2423	BURIED CAB TOLL MET	8.5	-3	64.5	4.5	84
2424	SUBMAR CA TOLL NMET	27.0	-5	2.4	3.8	0
2424	SUBMARINE CA EX MET	9.8	-5	56.0	5.0	-46
2424	SUBMARINE CA TOLL MET	11.4	-5	59.0	4.0	-11
2426	INTRA NTWK CA EX MET	12.9	-26	22.5	8.0	0
2431	AERIAL WIRE	5.3	-37	66.5	13.3	-130
2441	CONDUIT	48.0	-5	17.2	1.8	187

The figures in Columns B, C, and D are percentages of gross book cost.

The reserve level in Column C is used to calculate the depreciation rate and does not necessarily reflect the book reserve. The amortization amounts in Column E, ordered in FCC 88-13, released January 21, 1988, are continued.

* As described in paragraph 32 of the Order, the net service value for the Step-by-Step Account is to be amortized over a thirty-six month period ending June 30, 1993.

● As described in paragraph 32 of the Order, the net service value for the Crossbar Account is to be amortized over a thirty month period ending December 31, 1992.

FEDERAL COMMUNICATIONS COMMISSION
Schedule of Annual Percentages of Depreciation for
NEW ENGLAND TELEPHONE AND TELEGRAPH COMPANY - MASSACHUSETTS
Effective July 1, 1990

Rate Category Description	Average Remaining Life (years) A	Future Net Salvage (%) B	Reserve Level (%) C	Remaining Life Rate (%) D=(100%-B-C)/A	Annual Amort. Expense ($000) E
2112 MOTOR VEHICLES	2.0	12	83.5	2.3	0
2114 SPEC PURP VEHICLES	6.5	2	65.4	5.0	0
2115 GARAGE WORK EQPT.	6.6	2	38.8	9.0	0
2116 OTHER WORK EQPT.	7.8	2	41.2	7.3	-169
2121 BUILDINGS	23.0	10	33.5	2.5	220
2122 FURNITURE	9.1	5	30.4	7.1	650
2123 OFFICE SUPP. EQPT.	8.5	8	13.9	9.2	0
2123 OFFICIAL COMM. EQPT.	5.5	8	41.2	9.2	-1611
2124 GEN PURP COMPUTERS	2.3	1	93.4	2.4	0
2211 ELECTRONIC SW ANALOG	7.4	3	45.7	6.9	14779
2212 ELECTRONIC SW DIGITAL	11.4	3	19.1	6.8	-92
2215 ELECTRO-MECH.SW. SXS	—	-2	77.5	—	*
2215 ELECTRO-MECH.SW. XBAR	—	-12	94.6	—	@
2220 OPERATOR SYSTEMS	5.0	0	51.7	9.7	0
2231 RADIO SYSTEMS	3.6	0	50.1	13.9	-393
2232 CIRCUIT EQPT OTH-DIG	6.9	1	33.5	9.5	0
2232 CIRCUIT EQPT-DDS	3.5	-2	43.5	16.7	-1025
2232 CIRCUIT EQ OTH-ANA.	3.6	0	46.6	14.8	8037
2311 STATION APPARATUS	3.0	1	88.2	3.6	0
2351 PUB.TEL.TERM.EQPT.	4.4	1	55.3	9.9	0
2362 OTHER TERM. EQPT. DDS	5.9	-1	24.1	13.0	-146
2362 OTH TERM. EQPT. OTH	4.4	-5	60.8	10.0	0
2411 POLE LINES	22.0	-102	51.0	6.9	3005
2421 AERIAL CA TOLL NMET	21.0	-23	9.2	5.4	0
2421 AERIAL CAB EX MET	14.4	-26	36.7	6.2	4773
2421 AERIAL CAB EX NMET	17.2	-25	6.8	6.9	0
2421 AERIAL CAB TOLL MET	9.1	-24	55.3	7.5	889
2422 UNDRGRND CAB EX MET	17.4	-43	40.7	5.9	8286
2422 UNDRGRND CAB EX NMET	16.3	-40	11.8	7.9	0
2422 UNDRGRND CAB TOLL MET	8.6	-35	60.8	8.6	2135
2422 UNDRGRND CAB TOLL NMET	20.0	-34	14.7	6.0	0
2423 BURIED CAB EX MET	17.5	-10	32.6	4.4	-46
2423 BURIED CAB EX NMET	17.8	-10	18.3	5.2	0
2423 BURIED CAB TOLL MET	6.8	-6	60.3	6.7	-69
2424 SUBMARINE CA TOLL NMET	26.0	-10	3.4	4.1	0
2424 SUBMARINE CAB EX MET	9.3	-10	87.1	2.5	-120
2424 SUBMARINE CAB TOLL MET	11.4	-10	64.0	4.0	-43
2426 INTRA NTWK CA EX MET	11.6	-26	8.8	10.1	0
2426 INTRA NWK CA EX NMET	17.5	-25	9.0	6.6	0
2431 AERIAL WIRE	6.0	-86	80.0	17.7	-68
2441 CONDUIT	45.0	-5	24.9	1.8	2129

The figures in Columns B, C, and D are percentages of gross book cost.

The reserve level in Column C is used to calculate the depreciation rate and does not necessarily reflect the book reserve. The amortization amounts in Column E, ordered in FCC 88-13, released January 21, 1988, are continued.

* As described in paragraph 32 of the Order, the net service value for the Step-by-Step Account is to be amortized over a thirty-six month period ending June 30, 1993.

@ As described in paragraph 32 of the Order, the net service value for the Crossbar Account is to be amortized over a thirty month period ending December 31, 1992.

FEDERAL COMMUNICATIONS COMMISSION
Schedule of Annual Percentages of Depreciation for
NEW ENGLAND TELEPHONE AND TELEGRAPH COMPANY - NEW HAMPSHIRE

Effective July 1, 1990

	Rate Category Description	Average Remaining Life	Future Net Salvage	Reserve Level	Remaining Life Rate	Annual Amort. Expense
		(years) A	(%) B	(%) C	(%) D=(100%-B-C)/A	($000) E
2112	MOTOR VEHICLES	—	11	95.6	5.0	0
2114	SPEC PURP VEHICLES	7.0	4	19.9	10.9	0
2115	GARAGE WORK EQPT.	6.9	2	42.6	8.0	0
2116	OTHER WORK EQPT.	8.5	2	39.7	6.9	-40
2121	BUILDINGS	26.0	9	26.9	2.5	274
2122	FURNITURE	11.7	7	9.9	7.1	28
2123	OFFICE SUPP. EQPT.	8.7	9	46.2	5.1	0
2123	OFFICE COMM. EQPT.	4.9	9	40.3	10.3	125
2124	GEN. PURP. COMPUTERS	2.0	5	87.4	3.8	0
2211	ELECTRONIC SW ANA	8.0	3	22.9	9.3	907
2212	ELECTRONIC SW DIG	11.5	3	15.4	7.1	-189
2215	ELECTRO-MECH SW SXS	—	-3	78.4	—	*
2215	ELECTRO-MECH SW XBAR	—	-1	82.9	—	@
2220	OPERATOR SYSTEMS	5.3	0	44.4	10.5	0
2231	RADIO SYSTEMS	4.8	-2	46.4	11.6	-30
2232	CIRCUIT EQPT OTH-ANA	3.7	-3	55.7	12.8	3685
2232	CIRCUIT EQPT OTH-DIG	7.4	0	32.3	9.1	0
2232	CIRCUIT EQPT-DDS	3.6	-4	47.2	15.8	-4
2311	STATION APPARATUS	6.5	1	38.5	9.3	-72
2351	PUB.TEL.TERM.EQPT.	4.6	1	57.8	9.0	301
2362	OTH TERM EQPT DDS	5.9	2	16.3	13.8	-7
2362	OTH TERM EQPT OTH	4.3	-5	64.7	9.4	0
2411	POLES	19.5	-45	32.6	5.8	121
2421	AERIAL CA TOLL NMET	21.0	-17	11.6	5.0	0
2421	AERIAL CAB EX MET	13.2	-28	34.7	7.1	3385
2421	AERIAL CAB EX NMET	20.0	-27	7.8	6.0	0
2421	AERIAL CAB TOLL MET	10.5	-18	45.2	6.9	592
2422	UNDRGRND CA EX MET	17.9	-25	30.7	5.3	1118
2422	UNDRGRND CA EX NMET	16.1	-23	10.9	7.0	0
2422	UNDRGRND CA TOLL MET	11.2	-18	44.2	6.6	277
2422	UNDRGRND CA TOLL NMET	20.0	-17	17.5	5.0	0
2423	BURIED CAB EX MET	12.5	-8	38.5	5.6	770
2423	BURIED CAB EX NMET	21.0	-8	41.1	3.2	0
2423	BURIED CAB TOLL MET	6.8	-5	72.4	4.8	99
2424	SUBMARINE CAB EX MET	16.7	-10	46.2	3.8	-11
2424	SUBMARINE CA TOLL MET	17.1	-5	38.2	3.9	-3
2426	INTRA NTWK CA EX MET	13.1	-28	18.6	8.4	0
2426	INTRA NWK CA EX NMET	20.0	-27	10.8	5.8	0
2431	AERIAL WIRE	6.1	-69	79.0	14.8	-243
2441	CONDUIT	44.0	-5	16.2	2.0	478

The figures in Columns B, C, and D are percentages of gross book cost.

The reserve level in Column C is used to calculate the depreciation rate and does not necessarily reflect the book reserve. The amortization amounts in Column E, ordered in FCC 88-13, released January 21, 1988, are continued.

* As described in paragraph 32 of the Order, the net service value for the Step-by-Step Account is to be amortized over a thirty-six month period ending June 30, 1993.

@ As described in paragraph 32 of the Order, the net sevice value for the Crossbar Account is to be amortized over a twenty-four month period ending June 30, 1992.

FEDERAL COMMUNICATIONS COMMISSION
Schedule of Annual Percentages of Depreciation for
NEW ENGLAND TELEPHONE AND TELEGRAPH COMPANY - RHODE ISLAND

Effective July 1, 1990

	Rate Category Description	Average Remaining Life	Future Net Salvage	Reserve Level	Remaining Life Rate	Annual Amort. Expense
		(years) A	(%) B	(%) C	(%) D=(100%-B-C)/A	($000) E
2112	MOTOR VEHICLES	2.1	12	83.4	2.2	0
2115	GARAGE WORK EQPT.	6.7	5	31.5	9.5	0
2116	OTHER WORK EQPT.	7.9	0	44.8	7.0	4
2121	BUILDINGS	24.0	11	33.1	2.3	206
2122	FURNITURE	11.6	14	4.9	7.0	-39
2123	OFFICE SUPP.EQPT.	8.3	10	25.6	7.8	0
2123	OFFICIAL COMM. EQPT.	6.0	10	41.3	8.1	130
2124	GEN PURP COMPUTERS	2.1	1	93.4	2.7	0
2211	ELECTRONIC SW ANA	7.8	3	46.2	6.5	1798
2212	ELECTRONIC SW DIG	11.4	3	18.6	6.9	34
2215	ELECTRO-MECH SW SXS	—	-8	108.0	—	●
2215	ELECTRO-MECH SW XBAR	—	-3	-65.4	—	●
2220	OPERATOR SYSTEMS	4.7	0	92.9	1.5	0
2231	RADIO SYSTEMS	2.3	-5	29.2	33.0	-67
2232	CIRCUIT EQPT OTH DIG	7.5	1	39.0	8.0	0
2232	CIRCUIT EQPT. DDS	3.6	-2	58.9	12.0	0
2232	CIRCUIT EQPT OTH ANA	4.3	-1	45.2	13.0	1183
2311	STATION APPARATUS	7.1	1	24.7	10.5	-67
2351	PUB.TEL.TERM.EQPT.	4.2	1	56.0	10.2	428
2362	OTH TERM EQPT DDS	—	2	98.0	5.0	0
2362	OTH TERM EQPT OTH	4.8	-6	58.4	9.9	51
2411	POLE LINES	24.0	-92	48.4	6.0	618
2421	AERIAL CA EX MET	16.6	-35	45.9	5.4	2282
2421	AERIAL CA TOLL MET	7.2	-24	24.9	13.8	-58
2421	AERIAL CAB EX NMET	18.2	-32	20.1	6.1	0
2421	AERIAL CAB TOLL NMET	21.0	-23	15.8	5.1	0
2422	UNDGRND CA EX MET	17.4	-43	55.4	5.0	2157
2422	UNDGRND CA TOLL NMET	21.0	-20	10.8	5.2	0
2422	UNDRGRND CA EX NMET	17.1	-30	24.8	6.2	0
2422	UNDRGRND CA TOLL MET	7.6	-35	42.1	12.2	-7
2423	BURIED CAB EX MET	15.2	-5	41.2	4.2	105
2423	BURIED CAB EX NMET	17.8	-5	32.9	4.1	0
2423	BURIED CAB TOLL MET	6.1	-5	66.8	6.3	0
2424	SUBMARINE CA EX MET	12.9	-5	90.9	1.1	3
2424	SUBMARINE CA EX NMET	24.0	-5	13.5	3.8	0
2424	SUBMARINE CA TOLL MET	8.1	-5	37.8	8.3	-26
2424	SUBMARINE CA TOLL NMET	26.0	-5	4.1	3.9	0
2426	INTRA NTWK CA EX MET	15.0	-35	10.8	8.3	0
2431	AERIAL WIRE	6.3	-30	86.8	6.9	-48
2441	CONDUIT	37.0	-5	33.3	1.9	358

The figures in Columns B, C, and D are percentages of gross book cost.

The reserve level in Column C is used to calculate the depreciation rate and does not necessarily reflect the book reserve. The amortization amounts in Column E, ordered in FCC 88-13, released January 21, 1988, are continued.

● As described in paragraph 32 of the Order, the net service value for the Step-by-Step and Crossbar accounts are to be amortized over a twelve month period ending June 30, 1991.

FEDERAL COMMUNICATIONS COMMISSION
Schedule of Annual Percentages of Depreciation for
NEW ENGLAND TELEPHONE AND TELEGRAPH COMPANY - VERMONT

Effective July 1, 1990

	Rate Category Description	Average Remaining Life	Future Net Salvage	Reserve Level	Remaining Life Rate	Annual Amort. Expense
		(years) A	(%) B	(%) C	(%) D=(100%-B-C)/A	($000) E
2112	MOTOR VEHICLES	—	7	99.4	5.0	0
2114	SPEC PURP VEHICLES	8.6	0	42.6	6.7	0
2115	GARAGE WORK EQPT.	8.6	0	41.5	6.8	0
2116	OTHER WORK EQPT.	8.4	0	45.0	6.5	-19
2121	BUILDINGS	21.0	9	35.2	2.7	309
2122	FURNITURE	9.9	9	21.4	7.0	3
2123	OFFICE SUPP. EQPT.	8.6	9	24.1	7.8	0
2123	OFFICE COMM. EQPT.	6.2	9	36.1	8.9	113
2124	GEN PURP COMPUTERS	2.9	1	73.5	8.8	0
2211	ELECTRONIC SW ANA	7.0	1	47.0	7.4	1125
2212	ELECTRONIC SW DIG	11.3	1	16.7	7.3	-112
2215	ELECTRO-MECH SW XBAR	—	0	0.0	—	@
2215	ELECTRO-MECH. SW SXS	—	-2	89.2	—	*
2220	OPERATOR SYSTEMS	5.3	0	46.8	10.0	0
2231	RADIO SYSTEMS	2.8	-7	31.9	26.8	-64
2232	CIRCUIT EQPT DDS	2.7	-4	12.7	33.8	-3
2232	CIRCUIT EQPT OTH ANA	3.4	0	19.1	23.8	1594
2232	CIRCUIT EQPT OTH DIG	7.0	0	36.0	9.1	0
2311	STATION APPARATUS	8.4	1	27.0	8.6	-24
2351	PUB. TELEPHONE EQPT.	4.4	1	62.7	8.2	153
2362	OTH TERM. EQPT DDS	—	2	98.0	5.0	0
2362	OTH TERM. EQPT OTH	4.7	-7	49.0	12.3	0
2411	POLES	17.9	-60	45.6	6.4	849
2421	AERIAL CA EX MET	15.1	-35	43.2	6.1	2919
2421	AERIAL CA TOLL NMET	21.0	-17	9.7	5.1	0
2421	AERIAL CAB EX NMET	22.0	-33	11.0	5.5	0
2421	AERIAL CAB TOLL MET	10.6	-18	58.1	5.7	475
2422	UNDRGRND CA EX MET	17.3	-38	34.4	6.0	327
2422	UNDRGRND CA EX NMET	16.6	-36	18.2	7.1	0
2422	UNDRGRND CA TOLL MET	10.3	-36	64.1	7.0	56
2422	UNDRGRND CA TOLL NMET	20.0	-34	21.5	5.6	0
2423	BURIED CA TOLL NMET	20.0	-4	18.0	4.3	0
2423	BURIED CAB EX MET	16.1	-7	31.8	4.7	173
2423	BURIED CAB TOLL MET	8.9	-4	64.3	4.5	115
2424	SUBMAR CA TOLL NMET	26.0	-10	1.9	4.2	0
2424	SUBMARINE CA EX MET	10.5	-10	74.8	3.4	-1
2424	SUBMARINE CA TOLL MET	5.9	-10	89.1	3.5	-3
2426	INTRA NTWK CA EX MET	17.6	-35	11.0	7.0	0
2431	AERIAL WIRE	5.2	-73	82.9	17.3	0
2441	CONDUIT	44.0	-5	15.5	2.0	224

The figures in Columns B, C, and D are percentages of gross book cost.

The reserve level in Column C is used to calculate the depreciation rate and does not necessarily reflect the book reserve. The amortization amounts in Column E, ordered in FCC 88-13, released January 21, 1988, are continued.

* As described in paragraph 32 of the Order, the net service value for the Step-by-Step Account is to be amortized over a thirty-six month period ending June 30, 1993.

@ As described in paragraph 32 of the Order, the net service for the Crossbar Account is to be amortized over a twelve month period ending June 30, 1991.

FEDERAL COMMUNICATIONS COMMISSION
Schedule of Annual Percentages of Depreciation for
OHIO BELL TELEPHONE COMPANY

Effective January 1, 1990

	Rate Category Description	Average Remaining Life (years) A	Future Net Salvage (%) B	Reserve Level (%) C	Remaining Life Rate (%) D=(100%-B-C)/A	Annual Amort. Expense ($000) E
2112	MOTOR VEHICLES	4.4	14	31.9	12.3	0
2113	AIRCRAFT	6.5	14	28.2	8.9	-46
2115	GARAGE WORK EQPT.	7.1	6	54.6	5.5	-93
2116	OTHER WORK EQPT.	7.1	6	39.3	7.7	-603
2121	BUILDINGS	28.0	8	23.0	2.5	1292
2122	FURNITURE	13.7	5	22.2	5.3	717
2123	OFFICE EQUIPMENT	7.5	2	-9.8	14.4	239
2123	COMPANY COMM EQUIPMENT	6.0	0	43.1	9.5	-164
2124	GEN PURPOSE COMPUTERS	3.5	6	46.4	13.6	-414
2211	ANALOG ELECTRONIC	7.4	3	42.6	7.4	11773
2212	DIGITAL ELECTRONIC	10.8	3	18.6	7.3	569
2215	STEP-BY-STEP	1.1	-9	75.6	30.4	0
2215	CROSSBAR	1.9	-6	35.2	37.3	0
2220	OPERATOR SYSTEMS	5.7	-2	86.0	2.8	128
2231	RADIO SYSTEMS	4.6	1	47.6	11.2	-358
2232	CIRCUIT-DDS	4.8	10	10.6	16.5	25
2232	CIRCUIT-OTHER	6.5	1	36.3	9.6	5504
2351	PUBLIC TELEPHONE	6.4	0	58.1	6.5	13
2362	OTHER TERMINAL EQPT	3.3	1	66.1	10.0	-497
2411	POLES	16.0	-90	59.1	8.2	-185
2421	AERIAL CABLE	11.3	-15	51.0	5.7	7521
2422	UNDERGROUND CABLE	19.6	-16	37.9	4.0	10450
2423	BURIED CABLE	18.1	-9	30.8	4.3	2367
2424	SUBMARINE CABLE	6.8	-17	94.8	3.3	-11
2426	INTRA-BLDG CABLE	12.2	-19	43.2	6.2	950
2431	AERIAL WIRE	6.6	-72	150.8	3.2	0
2441	CONDUIT SYSTEMS	41.0	-18	29.2	2.2	6320

The figures in Columns B, C, and D are percentages of gross book cost.

The reserve level in Column C is used to calculate the depreciation rate and does not necessarily reflect the book reserve. The amortization amounts in Column E, ordered in FCC 88-13, released January 21, 1988, are continued.

FEDERAL COMMUNICATIONS COMMISSION
Schedule of Annual Percentages of Depreciation for
PACIFIC NORTHWEST BELL TELEPHONE COMPANY - OREGON

Effective January 1, 1990

Rate Category Description	Average Remaining Life	Future Net Salvage	Reserve Level	Remaining Life Rate
	(years) A	(%) B	(%) C	(%) D=(100%-B-C)/A
2112 MOTOR VEHICLES	5.7	15	30.6	9.5
2114 SPECIAL PURPOSE VEHICLES	7.5	10	17.4	9.7
2115 GARAGE WORK EQUIPMENT	7.6	10	56.5	4.4
2116 OTHER WORK EQUIPMENT	7.6	10	51.7	5.0
2121 BUILDINGS	29.0	1	24.2	2.6
2122 FURNITURE	9.3	18	41.5	4.4
2123 COMPANY COMM EQUIP	4.7	0	54.2	9.7
2123 OFFICE EQUIPMENT	8.5	9	16.7	8.7
2124 GEN PURPOSE COMPUTERS	2.8	9	35.6	19.8
2211 ANALOG ELECTRONIC	7.5	2	43.6	7.3
2212 DIGITAL ELECTRONIC	12.2	5	17.0	6.4
2220 OPERATOR SYSTEMS	7.0	5	25.6	9.9
2231 RADIO SYSTEMS	8.7	-5	41.6	7.3
2232 CIRCUIT-ANALOG	6.6	0	36.7	9.6
2232 CIRCUIT-DDS	7.2	20	30.9	6.8
2232 CIRCUIT-DIGITAL	8.3	3	28.8	8.2
2351 PUBLIC TELEPHONE-TERMINAL EQUIP	6.3	6	74.9	3.0
2362 OTHER TERMINAL EQUIP	5.0	0	34.1	13.2
2411 POLE LINES	12.9	-57	48.4	8.4
2421 AERIAL CABLE-METAL	14.2	-16	38.7	5.4
2421 AERIAL CABLE-NON METAL	18.3	-25	22.4	5.6
2422 UNDERGROUND CABLE-METAL	17.1	-6	33.6	4.2
2422 UNDERGROUND CABLE-NON METAL	21.0	-16	12.6	4.9
2423 BURIED CABLE-METAL	18.4	-9	31.3	4.2
2423 BURIED CABLE-NON METAL	22.0	-9	4.4	4.8
2424 SUBMARINE CABLE-METAL	11.1	-4	69.7	3.1
2424 SUBMARINE CABLE-NON METAL	30.0	-4	0.0	3.5
2426 INTRABLDG NTWK CABLE-METAL	10.5	-18	46.9	6.8
2426 INTRABLDG NTWK CABLE-NON METAL	18.0	-25	21.9	5.7
2431 AERIAL WIRE	6.2	-52	86.4	10.6
2441 CONDUIT SYSTEMS	36.0	-7	22.9	2.3

The figures in Columns B, C, and D are percentages of gross book cost.

FEDERAL COMMUNICATIONS COMMISSION
Schedule of Annual Percentages of Depreciation for
PACIFIC NORTHWEST BELL TELEPHONE COMPANY - WASHINGTON

Effective January 1, 1990

Rate Category Description	Average Remaining Life	Future Net Salvage	Reserve Level	Remaining Life Rate	Annual Amort. Expense
	(years) A	(%) B	(%) C	(%) D=(100%-B-C)/A	($000) E
2112 MOTOR VEHICLES	6.1	15	37.5	7.8	0
2113 AIRCRAFT	—	50	50.0	5.0	0
2114 SPECIAL PURPOSE VEHICLES	6.5	7	53.4	6.1	0
2115 GARAGE WORK EQUIPMENT	6.8	7	57.2	5.3	0
2116 OTHER WORK EQUIP	7.2	7	45.1	6.7	0
2121 BUILDINGS	34.0	4	16.8	2.3	-747
2122 FURNITURE	11.8	22	38.3	3.4	-397
2123 COMPANY COMM EQUIPMENT	5.3	-1	44.8	10.6	-1065
2123 OFFICE SUPPORT EQUIP	8.4	6	31.5	7.4	0
2124 GEN PURPOSE COMPUTER	3.0	10	46.2	14.6	0
2211 ANALOG ELECTRONIC	8.2	2	42.9	6.7	9438
2212 DIGITAL ELECTRONIC	12.8	5	16.5	6.1	-80
2220 OPERATOR SYSTEMS	6.7	5	20.9	11.1	0
2231 RADIO SYSTEMS	8.2	0	22.5	9.5	-118
2232 CIRCUIT-ANALOG	6.9	0	37.4	9.1	4452
2232 CIRCUIT-DDS	6.4	10	34.2	8.7	-156
2232 CIRCUIT-DIGITAL	8.2	3	26.0	8.7	0
2311 STATION APPARATUS	—	—	—	—	3
2351 PUBLIC TELEPHONE EQUIP	6.8	5	59.0	5.3	-516
2363 OTHER TERMINAL EQUIP	5.8	0	44.8	9.5	-1307
2411 POLE LINES	13.7	-75	57.1	8.6	1415
2421 AERIAL CABLE-METAL	13.8	-25	38.9	6.2	1803
2421 AERIAL CABLE-NON METAL	16.5	-25	-11.5	8.3	0
2422 UNDERGROUND CABLE-METAL	17.5	-22	40.1	4.7	5435
2422 UNDERGROUND CABLE-NON METAL	22.0	-22	13.8	4.9	0
2423 BURIED CABLE-METALC	17.0	-7	29.6	4.6	618
2423 BURIED CABLE-NON METAL	19.6	-7	12.8	4.8	0
2424 SUBMAINE CABLE-METAL	11.9	5	46.8	4.1	-153
2424 SUBMARINE CABLE-NON METAL	17.8	-1	42.3	3.3	0
2426 INTRABLDG NETWORK-METAL	11.0	-20	42.1	7.1	0
2426 INTRABLDG NETWORK-NON METAL	16.1	-22	13.7	6.7	0
2431 AERIAL WIRE	4.3	-83	126.0	13.3	0
2441 CONDUIT SYSTEMS	37.0	-8	22.5	2.3	1046

The figures in Columns B, C, and D are percentages of gross book cost.

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FEDERAL COMMUNICATIONS COMMISSION
Schedule of Annual Percentages of Depreciation for
SOUTH CENTRAL BELL TELEPHONE COMPANY - ALABAMA

Effective July 1, 1990

Rate Category Description	Average Remaining Life	Future Net Salvage	Reserve Level	Remaining Life Rate	Annual Amort. Expense
	(years) A	(%) B	(%) C	(%) D=(100%-B-C)/A	($000) E
2112 Motor Vehicles	4.0	12	43.8	11.1	0
2113 Aircraft	6.9	60	0.0	5.8	0
2115 Garage Work Equip	11.1	2	32.4	5.9	17
2116 Other Work Equip	11.1	2	32.4	5.9	162
2121 Buildings	36.0	4	20.5	2.1	151
2122 Furniture	12.6	9	20.2	5.6	-60
2123 Office Equipment	4.2	26	20.2	12.8	-28
2124 Gen Purpose Computers	3.4	5	40.9	15.9	0
2211 Analog ESS	7.9	2	40.0	7.3	6730
2212 Digital ESS	12.3	2	16.9	6.6	-259
2215 Crossbar	—	-3	103.0	5.0	0
2215 Step-by-Step	—	-7	107.0	5.0	0
2220 Operator Systems	9.3	2	74.9	2.5	-1
2231 Radio Systems	6.0	0	27.6	12.1	-22
2232 Circuit-DDS	4.1	10	35.5	13.3	0
2232 Circuit-Other	5.3	2	33.4	12.2	5489
2311 Station Apparatus	5.1	2	6.5	17.9	0
2341 Large PBX	4.6	-4	40.2	13.9	0
2351 Public Telephone	3.4	20	48.5	9.3	0
2362 Other Terminal Equip	3.7	-4	42.6	16.6	0
2411 Poles	22.0	-40	38.6	4.6	-110
2421 Aerial Cable-Metal	13.6	-17	39.3	5.7	653
2421 Aerial Cable-Non Metal	16.3	-20	18.7	6.2	-7
2422 U G Cable-Metal	17.3	-13	43.0	4.0	5173
2422 U G Cable-Non Metal	19.0	-20	21.0	5.2	53
2423 Buried Cable-Metal	15.2	-6	36.1	4.6	5905
2423 Buried Cable-Non Metal	11.5	-11	20.7	7.9	-8
2424 Submarine Cable	14.5	0	43.4	3.9	-15
2426 Intra-Bldg Cable	11.6	-11	33.7	6.7	23
2431 Aerial Wire	16.6	-78	66.9	6.7	-110
2441 Conduit Systems	50.0	-5	21.7	1.7	243

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FEDERAL COMMUNICATIONS COMMISSION
Schedule of Annual Percentages of Depreciation for
SOUTH CENTRAL BELL TELEPHONE COMPANY - KENTUCKY

Effective July 1, 1990

Rate Category Description	Average Remaining Life (years) A	Future Net Salvage (%) B	Reserve Level (%) C	Remaining Life Rate (%) D=(100%-B-C)/A	Annual Amort. Expense ($000) E
2112 Motor Vehicles	3.9	15	38.7	11.9	0
2115 Garage Work Equip	13.0	1	23.6	5.8	1
2116 Other Work Equip	13.0	1	23.6	5.8	14
2121 Buildings	30.0	3	25.0	2.4	798
2122 Furniture	8.8	5	33.3	7.0	44
2123 Office Equipment	4.6	27	13.4	13.0	-419
2124 Gen Purpose Computers	3.3	1	17.3	24.8	0
2211 Analog ESS	6.4	2	41.8	8.8	5418
2212 Digital ESS	12.2	3	13.1	6.9	53
2215 Crossbar	—	-3	103.0	5.0	0
2215 Step-by-Step	—	-4	104.0	5.0	0
2220 Operator Systems	6.3	3	84.7	2.0	0
2231 Radio Systems	6.4	-5	30.0	11.7	-127
2232 Circuit-DDS	4.2	10	21.8	16.2	0
2232 Circuit-Other	6.6	2	32.6	9.9	-411
2311 Station Apparatus	3.3	4	0.0	29.1	0
2341 Large PBX	3.9	-4	20.0	21.5	0
2351 Public Telephone	3.0	20	59.4	6.9	0
2362 Other Terminal Equip	3.3	-4	50.6	16.2	0
2411 Poles	20.0	-49	41.5	5.4	-42
2421 Aerial Cable-Metal	12.8	-13	40.9	5.6	945
2421 Aerial Cable-Non Metal	19.7	-13	14.4	5.0	-18
2422 U G Cable-Metal	17.3	-19	43.8	4.3	3339
2422 U G Cable-Non Metal	19.1	-7	13.6	4.9	-39
2423 Buried Cable-Metal	14.5	-10	40.0	4.8	5657
2423 Buried Cable-Non Metal	13.9	-3	9.8	6.7	-3
2424 Submarine Cable	16.7	0	37.7	3.7	-1
2426 Intra-Bldg Cable	11.9	-6	29.6	6.4	32
2431 Aerial Wire	12.0	-32	56.1	6.3	-264
2441 Conduit Systems	50.0	-5	19.5	1.7	69

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FEDERAL COMMUNICATIONS COMMISSION
Schedule of Annual Percentages of Depreciation for
SOUTH CENTRAL BELL TELEPHONE COMPANY - LOUISIANA

Effective July 1, 1990

Rate Category Description	Average Remaining Life (years) A	Future Net Salvage (%) B	Reserve Level (%) C	Remaining Life Rate (%) D=(100%-B-C)/A	Annual Amort. Expense ($000) E
2112 Motor Vehicles	4.3	10	42.2	11.1	0
2114 Special Purpose Vehicles	13.0	1	2.7	7.4	0
2115 Garage Work Equip	13.0	1	2.7	7.4	-56
2116 Other Work Equip	13.0	1	2.7	7.4	-629
2121 Buildings	31.0	5	25.1	2.3	1006
2122 Furniture	6.9	2	52.8	6.6	363
2123 Office Equipment	4.1	27	17.8	13.5	140
2124 Gen Purpose Computers	3.4	0	29.0	20.9	0
2211 Analog ESS	6.9	2	51.2	6.8	13402
2212 Digital ESS	12.2	1	22.4	6.3	-325
2215 Crossbar	1.0	-3	86.1	16.9	0
2215 Manual	5.4	-8	0.0	20.0	0
2215 Step-by-Step	2.3	-8	42.4	28.5	0
2220 Operator Systems	—	-2	101.7	5.0	-2
2231 Radio Systems	6.6	-5	41.7	9.6	190
2232 Circuit-DDS	4.2	10	9.1	19.3	0
2232 Circuit-Other	6.0	0	39.1	10.2	-217
2311 Station Apparatus	5.4	4	-2.4	18.2	0
2341 Large PBX	4.0	-4	14.7	22.3	0
2351 Public Telephone	3.6	20	48.2	8.8	0
2362 Other Terminal Equip	3.1	-4	46.3	18.6	0
2411 Poles	18.6	-49	41.2	5.8	-91
2421 Aerial Cable-Metal	10.4	-11	42.9	6.5	948
2421 Aerial Cable-Non Metal	16.3	-20	19.1	6.2	3
2422 U G Cable-Metal	17.5	-9	35.3	4.2	4860
2422 U G Cable-Non Metal	19.1	-20	21.3	5.2	109
2423 Buried Cable-Metal	10.9	-10	48.3	5.7	25345
2423 Buried Cable-Non Metal	11.8	-10	20.2	7.6	-1
2424 Submarine Cable	10.3	-1	39.9	5.9	-183
2426 Intra-Bldg Cable	11.4	-5	39.4	5.8	162
2431 Aerial Wire	4.8	-4	-13.9	24.6	-369
2441 Conduit Systems	50.0	-5	18.2	1.7	-3

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The reserve level in Column C is used to calculate the depreciation rate and does not necessarily reflect the book reserve. The amortization amounts in Column E, ordered in FCC 88-13, released January 21, 1988, are continued.

FEDERAL COMMUNICATIONS COMMISSION
Schedule of Annual Percentages of Depreciation for
SOUTH CENTRAL BELL TELEPHONE COMPANY - MISSISSIPPI

Effective July 1, 1990

	Rate Category Description	Average Remaining Life	Future Net Salvage	Reserve Level	Remaining Life Rate	Annual Amort. Expense
		(years) A	(%) B	(%) C	(%) D=(100%-B-C)/A	($000) E
2112	Motor Vehicles	3.5	12	43.4	12.7	0
2115	Garage Work Equip	11.1	-2	26.7	6.8	6
2116	Other Work Equip	11.1	-2	26.7	6.8	40
2121	Buildings	33.0	2	22.2	2.3	221
2122	Furniture	8.9	3	39.1	6.5	75
2123	Office Equipment	4.0	28	20.6	12.9	31
2124	Gen Purpose Computers	3.4	0	59.3	12.0	0
2211	Analog ESS	6.7	2	37.1	9.1	2667
2212	Digital ESS	12.1	3	17.4	6.6	212
2215	Step-by-Step	—	-8	108.0	5.0	0
2215	Crossbar	1.9	-3	26.9	40.1	0
2220	Operator Systems	—	3	98.6	5.0	1
2231	Radio Systems	6.5	-7	51.5	8.5	100
2232	Circuit-Other	5.9	2	33.0	11.0	3009
2232	Circuit-DDS	4.0	10	34.7	13.8	0
2311	Station Apparatus	2.4	2	73.8	10.1	0
2341	Large PBX	3.5	-4	26.1	22.3	0
2351	Public Telephone	3.8	20	46.5	8.8	0
2362	Other Terminal Equip	3.7	-4	48.0	15.1	0
2411	Poles	19.9	-62	30.6	6.6	-1797
2421	Aerial Cable-Metal	10.9	-19	45.9	6.7	3123
2421	Aerial Cable-Non Meta	16.6	-10	15.1	5.7	0
2422	U G Cable-Metal	17.2	-28	42.9	4.9	2404
2422	U G Cable-Non Metal	15.1	-20	24.2	6.3	18
2423	Buried Cable-Metal	12.0	-10	40.7	5.8	7976
2423	Buried Cable-Non Metal	11.7	-5	20.0	7.3	8
2424	Submarine Cable	10.4	-5	33.0	6.9	34
2426	Intra-Bldg Cable	11.7	-12	37.7	6.4	72
2431	Aerial Wire	15.7	-76	63.6	7.2	-717
2441	Conduit Systems	49.0	-5	19.1	1.8	-272

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FEDERAL COMMUNICATIONS COMMISSION
Schedule of Annual Percentages of Depreciation for
SOUTH CENTRAL BELL TELEPHONE COMPANY - TENNESSEE

Effective July 1, 1990

	Rate Category Description	Average Remaining Life	Future Net Salvage	Reserve Level	Remaining Life Rate	Annual Amort. Expense
		(years) A	(%) B	(%) C	(%) D=(100%-B-C)/A	($000) E
2112	Motor Vehicles	4.2	16	42.1	10.0	0
2115	Garage Work Equip	13.1	-1	21.8	6.0	-16
2116	Other Work Equipment	13.1	-1	21.8	6.0	-200
2121	Buildings	30.0	1	25.9	2.4	-44
2122	Furniture	11.0	9	30.2	5.5	55
2123	Office Equipment	3.9	28	19.1	13.6	15
2124	Gen Purpose Computers	3.6	2	57.5	11.3	0
2211	Analog ESS	7.6	3	43.6	7.0	11571
2212	Digital ESS	12.2	5	14.5	6.6	185
2215	Step-by-Step	2.2	-8	54.7	24.2	0
2215	Crossbar	—	-3	103.0	5.0	0
2220	Operator Systems	7.7	5	21.6	9.5	4
2231	Radio Systems	7.8	0	23.3	9.8	-564
2232	Circuit-Other	6.2	2	34.3	10.3	2988
2232	Circuit-DDS	4.4	10	47.0	9.8	0
2311	Station Apparatus	4.6	4	7.4	19.3	0
2341	Large PBX	4.6	-4	10.7	20.3	0
2351	Public Telephone	3.8	20	42.0	10.0	0
2362	Other Terminal Equip	3.2	3	66.3	9.6	366
2411	Poles	23.0	-48	28.1	5.2	-3210
2421	Aerial Cable-Metal	12.7	-15	43.2	5.7	6886
2421	Aerial Cable-Non Metal	20.0	-20	9.5	5.5	-7
2422	U G Cable-Metal	17.0	-9	37.0	4.2	4802
2422	U G Cable-Non Metal	19.2	-20	16.5	5.4	5
2423	Buried Cable-Metal	13.6	-5	40.7	4.7	12532
2423	Buried Cable-Non Metal	13.1	-9	23.9	6.5	-31
2424	Submarine Cable	15.4	-1	36.3	4.2	-10
2426	Intra-Bldg Cable	13.6	-10	25.9	6.2	172
2431	Aerial Wire	14.5	-40	36.6	7.1	-1851
2441	Conduit Systems	49.0	-5	21.2	1.7	-119

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FEDERAL COMMUNICATIONS COMMISSION
Schedule of Annual Percentages of Depreciation for
SOUTHERN NEW ENGLAND TELEPHONE COMPANY - CONNECTICUT

Effective January 1, 1990

	Rate Category Description	Average Remaining Life (years) A	Future Net Salvage (%) B	Reserve Level (%) C	Remaining Life Rate (%) D=(100%-B-C)/A	Annual Amort. Expense ($000) E
2112	MOTOR VEHICLES	5.0	8	42.2	10.0	0
2115	GARAGE WORK EQ	12.1	0	18.3	6.8	10
2116	OTHER WORK EQ	5.5	2	35.3	11.4	431
2121	BUILDINGS	25.0	-5	30.1	3.0	-588
2122	FURNITURE	8.4	1	49.7	5.9	871
2123	OFFICE SUPPORT EQ	8.0	0	55.0	5.6	226
2123	CO COMM EQ	5.2	3	54.4	8.2	0
2124	GENL PURPOSE COMP	3.9	1	47.5	13.2	0
2200	OPERATOR SYS-DIGITAL	19.0	2	0.0	5.2	0
2200	OPERATOR SYS-OTHER	1.5	0	71.5	19.0	555
2211	ANALOG ESS	8.2	-1	37.2	7.8	10114
2212	DIGITAL ESS	12.1	2	16.0	6.8	160
2215	STEP-BY STEP SWITCH	—	-5	55.4	—	●
2215	CROSSBAR SWITCH	—	-4	104.0	—	●
2231	RADIO SYSTEMS	5.9	0	52.0	8.1	-24
2232	DIGITAL DATA SYSTEMS	5.6	6	56.7	6.7	0
2232	DIGITAL CKT-OTHER	8.7	0	27.2	8.4	0
2232	ANALOG CKT-OTHER	5.8	-3	59.8	7.4	3443
2351	PUBLIC TELEPHONE	5.1	1	57.3	8.2	62
2362	OTE-PBX	4.6	0	85.7	3.1	0
2362	OTE-TEL+MISC	4.6	0	28.6	15.5	-427
2411	POLES	21.0	-73	47.1	6.0	-1066
2421	AERIAL CABLE	16.7	-27	38.2	5.3	2628
2422	U G CABLE-METALLIC	18.5	-22	41.6	4.3	4243
2422	U G CABLE-NON METAL	26.0	-6	13.9	3.5	0
2423	BURIED CABLE	19.1	-9	28.7	4.2	1101
2424	SUBMARINE CABLE	11.4	0	54.0	4.0	7
2426	INTRABUILDING NET CA	15.5	-27	43.8	5.4	518
2441	CONDUIT SYSTEMS	38.0	-10	29.9	2.1	2424

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● As described in paragraph 32 of the Order, the net service values for the Step-by-Step and Crossbar accounts are to be amortized over a twenty-four month period ending December 31, 1991.

FEDERAL COMMUNICATIONS COMMISSION
Schedule of Annual Percentages of Depreciation for
UNITED INTER-MOUNTAIN TELEPHONE - WEST VIRGINIA

Effective January 1, 1990

Rate Category Description	Average Remaining Life (years) A	Future Net Salvage (%) B	Reserve Level (%) C	Remaining Life Rate (%) D=(100%-B-C)/A
2121 BUILDINGS	20.0	0	0.0	5.0
2232 CIRCUIT EQUIPMENT	14.0	2	0.0	7.0
2421 AERIAL CABLE-NON METAL	30.0	-20	0.0	4.0

The figures in Columns B, C, and D are percentages of gross book cost.

Before the
Federal Communications Commission
Washington, D.C. 20554

PR Docket No. 90-133

In the Matter of

Amendment of Parts 2 and 80 of the
Commission's Rules regarding revision
of the high frequency (HF) channels
for the maritime mobile service to
implement the Final Acts of the
World Administrative Radio Conference
for the Mobile Services, Geneva, 1987.

REPORT AND ORDER
(Proceeding Terminated)

Adopted: January 10, 1991; Released: January 30, 1991

By the Commission:

I. INTRODUCTION

1. This *Report and Order* adopts changes to the Commission's Rules that substantially revise the channeling plans in the high frequency bands between 4000-27500 kHz (HF bands) allocated exclusively to the maritime mobile service. This proceeding continues the implementation of the Final Acts of the 1987 World Administrative Radio Conference for Mobile Services (1987 Mobile WARC) into the Commission's Rules.[1] These revisions will take effect at 0001 hours Coordinated Universal Time (UTC) on July 1, 1991, in accordance with international provisions. They will affect every existing maritime station, coast and ship, public and private, that operates on frequencies between 4000 kHz and 27500 kHz.

II. BACKGROUND

2. A major task of the 1987 Mobile WARC was to rearrange the channelling of the exclusive maritime mobile HF bands, which had not been reviewed since 1974, and to incorporate the new bands that had been allocated for the maritime mobile service by the 1979 World Administrative Radio Conference. The objective was to permit the new spectrum to be used for the newer forms of maritime mobile systems and expand the capabilities of existing systems. Consequently, the revisions reflect an increase in frequency spectrum for digital selective calling (DSC), narrow-band direct-printing (NBDP), and radiotelephony (voice), and a decrease in frequency spectrum for manual Morse code telegraphy.[2] The existing frequencies for these services also were rearranged to accommodate the new channelling scheme. Additionally, the amount of spectrum allocated for coast station wideband telegraphy was preserved without reduction but the allocation was shifted in frequency.

3. To enact these changes, we proposed in the *Notice of Proposed Rule Making* (*Notice*) to reflect the requirements adopted internationally in 47 C.F.R. § 2.106, Table of Frequency Allocations, and the frequency tables contained in 47 C.F.R. Part 80, Stations in the Maritime Services We also proposed procedures for modification of licenses notification of ship and coast station operators, transfer o operating frequencies, and the application process for new frequency assignments. [3] Mobile Marine Radio, Inc (MMR), licensee of public coast station WLO, Mobile Alabama, filed comments, and Rockwell International Corporation (Rockwell), licensee of several private coast stations and a manufacturer of HF equipment, filed reply comments.

III. DISCUSSION

4. The frequency revisions in the maritime HF bands between 4000 kHz and 27500 kHz are extensive. Generally, the proposals were well received. Many of the revisions are table revisions, direct substitutions of frequencies, or extensions of existing frequency tables that are necessary to conform to international regulations. Because these changes are straightforward and generated no comments, we adopt them as proposed. *See* attached Appendix. Our discussion here will focus on the complex frequency changes that generated comments or reply comments.

5. *Morse code telegraphy*. For Morse code ship stations we proposed in the *Notice* to repeat the same operating frequencies several times to maintain the format of the 62 Channel Series currently in 47 C.F.R. § 80.357(a).[4] For Morse code coast stations, we proposed to add 4.4 kilohertz of the 22.5 kilohertz made available by the 1987 Mobile WARC at 26 MHz to the table of coast station frequencies in 47 C.F.R. § 80.357(b).[5]

6. MMR supports the proposed 62 Channel Series approach for ship stations, but requests that the new 18 MHz simplex frequencies available for NBDP as well as Morse code be added to the table of 62 Channel Series for Morse code operations.[6] It argues that the additional frequencies are necessary to offset the reduction of Morse code spectrum, that it experienced a growth in Morse code traffic during the decade of 1979-1989, and that the use of these frequencies for Morse code is compatible with NBDP operations. MMR further requests that the 50 kilohertz of spectrum at 19 MHz and all 22.5 kilohertz of spectrum at 26 MHz be added to the Rules for coast station Morse code telegraphy operations.[7] It also notes that a channel spacing of 500 Hz, rather than 400 Hz, is necessary and that a 1-2 kilohertz separation is needed between coast station assignments.[8]

7. We have reviewed the concerns regarding spectrum for coast stations Morse code telegraphy.[9] Internationally the 50 kilohertz of spectrum at 19 MHz and the 22.5 kilohertz of spectrum at 26 MHz are not channelized but left flexible for various uses by coast stations (Morse code telegraphy, wideband telegraphy, facsimile, and special (undefined) transmission systems). Furthermore, this is shared government/non-government spectrum that must be coordinated and its use must be notified to the International Frequency Registration Board (IFRB). Consequently, it is difficult to access the needs of the industry at this time, and there is no assurance that the frequencies we add to the Rules will be accepted internationally. Thus rather than listing discrete frequencies, we will amend 4

C.F.R. § 80.357(b) to include the frequency bands that are available for coast station Morse code telegraphy; thereby, the 50 kilohertz of spectrum at 19 MHz and the 22.5 kilohertz of spectrum at 26 MHz will be available for application as suggested by MMR. This approach will allow applicants flexibility to request assignments from the new spectrum.[10] We emphasize, however, that frequency assignments in these bands are subject to intra-government coordination and international notification requirements.

8. Further, we find it unnecessary to add the 18 MHz simplex frequencies to the table of 62 Channel Series for ship Morse code telegraphy as suggested by MMR. As proposed, these frequencies would be added to the existing table of NBDP simplex frequencies and permitted to be used for Morse code telegraphy if the allocated Morse code spectrum (*i.e.*, the 62 Channel Series) were not adequate for communications.[11] Consequently, as proposed, the new 18 MHz simplex frequencies would be available to ship stations for Morse code telegraphy. Moreover, it appears that MMR's comments regarding the 18 MHz spectrum for ship station Morse code operations were due, in part, to our proposal concerning coast station spectrum in the 19 and 26 MHz bands.[12] Thus, we will adopt the changes to 47 C.F.R. § 80.357(a)(3)(i) as proposed; that is, the 18 MHz ship frequencies will be added to the NBDP frequency table but made available for Morse code telegraphy if the 62 Channel Series frequencies are inadequate. This follows the objective of the 1987 Mobile WARC to move spectrum to the newer forms of communications while permitting access to the spectrum as needed.

9. *Digital selective calling*. Because the 1987 WARC tripled the number of DSC frequencies, we proposed in the *Notice* to replace the one table of frequencies in 47 C.F.R. § 80.359(a) with three tables of paired frequencies: a "Worldwide" table, an "Atlantic" table, and a "Pacific" table. As proposed, public coast stations would be assigned the "worldwide" series and one "regional" series depending upon their locations.[13] MMR agrees with creating a "worldwide" and two "regional" tables of paired frequencies, but opposes restricting the use of these frequencies by assigning only two series of frequencies to public coast stations. Instead, it requests that all frequencies be made available to all coast or ship stations but their use should be governed by the location of coast or ship stations being contacted, similar to Morse calling frequencies in 47 C.F.R. § 80.355(c)(2).[14] As MMR points out, this change would enhance shore-to-ship communications by limiting the number of calling frequencies to be monitored by ship stations. Otherwise, if the amendments were adopted as proposed, ships would need to scan all DSC frequencies or make prior arrangements to receive calls.

10. Rockwell supports MMR's comments regarding DSC frequencies.[15] It further notes that our proposal would exclude private coast station use and opposes this change stating "[i]mportant and useful business and operational communications are exchanged between private coast stations and ships and it would be, in our opinion, a counterproductive step to now deny full DSC capability to users of this class of maritime communications service . . . The basic purpose of DSC should, as originally intended, be to facilitate calling for all classes of service and all types of communications systems for the maritime community."[16]

11. We agree with the comments of MMR and Rockwell concerning DSC communications. We have revised 47 C.F.R. § 80.359(a) to permit all coast and ship stations to use the frequencies for its geographic region. Both public and private stations will have access to all DSC frequencies as requested. Ship stations would only need to monitor the frequencies authorized in their geographic region. These changes, suggested by MMR and Rockwell, will encourage the growth of DSC.

12. *Duplex radiotelephony for public correspondence*. The 1987 Mobile WARC allocated an additional 70 paired frequencies for duplex radiotelephony (duplex channels). These were divided equally between government and non-government users. In the *Notice*, we proposed that the 35 non-government duplex channels be added for public correspondence. Before the additional channels could be added to the Commission's Rules, however, a worldwide allotment plan had to be developed by the International Frequency Registration Board (IFRB). We requested comments as to the equitable geographical distribution of the duplex channels.

13. MMR supports adding the new duplex channels for public correspondence and asks that we complete this proceeding before IFRB's decision on the new duplex allotments. It suggests that the Commission make the new channels available for application and subsequently conform the allotment table in 47 C.F.R. § 80.371(b) to reflect the assignments.[17] MMR indicates that this approach would expedite this rule making and allow the allotment decisions to be made more appropriately in the context of the application process.

14. With regard to the 35 additional non-government duplex channels made available by the 1987 Mobile WARC, 79 percent of our allotment requests which we submitted to the IFRB were approved.[18] An examination of the table shows that there are multiple frequencies available within each frequency band (see § 80.371(b)(2), Table B, of the attached Appendix). Above 12 MHz, it is possible to assign a unique channel (non-shared) to each of the five domestic public coast stations currently providing high seas public correspondence. MMR argues, however, that we should make all IFRB approved allotments available for application. We agree to permit access to all duplex channels permitted internationally and have included all IFRB approved allotments in the attached Appendix. This will allow applicants the most flexibility for meeting their operational needs.[19]

15. Further, MMR suggests that the duplex channels currently used for simplex operation in the Mississippi River System revert to duplex operation for only high seas public correspondence.[20] It proposes that the existing frequencies (duplex channels) used on the Mississippi River be replaced with frequencies from the shared 4/8 MHz spectrum and the new 12-26 MHz simplex frequencies.[21] To do this, MMR suggests that the proposed provisions for the new 4 MHz shared spectrum (4000-4063 kHz) be expanded to include simplex operations.[22]

16. We have reviewed the request with regard to the replacement frequencies for the Mississippi River System. The 4/8 MHz spectrum is not readily available for use as substitute spectrum because it is shared with government users. As indicated in the *Notice*, this spectrum is used extensively by the government fixed services. Therefore, there may not be frequencies available where they are needed and the use of these frequencies may be limited. Thus, considering the need to conclude this proceeding as

quickly as possible, we will proceed with the 4, 6, and 8 MHz substitutions as proposed in the *Notice*. Further, we are making the 4 MHz shared spectrum (4000-4063 kHz) available for simplex use, as suggested by MMR. This is consistent with our proposal to deviate from international provisions and permit the 4 MHz band to be used by coast stations.[23] This change will enable us to explore more fully substitute frequencies for the Mississippi River System from the 4/8 MHz shared spectrum at another time.[24]

17. With regard to the new 12-26 MHz simplex frequencies, we agree with MMR that they are readily available and can be used to replace the four existing frequencies between 12 MHz and 17 MHz that are assigned for use on the Mississippi River System. Thus, we are making these substitutions in the table of Mississippi River Working Frequencies in 47 C.F.R. § 80.371(d).[25] MMR supported making the eighteen remaining frequencies available for public correspondence.[26] Because of the lack of specific comments on the use of the 12-26 MHz simplex frequencies for public correspondence, however, we have decided to allocate four of these simplex frequencies (*i.e.*, two 18 MHz and two 25 MHz frequencies) to 47 C.F.R. § 80.373(c) for business and operational purposes and, as proposed in the *Notice*, the remaining fourteen for public correspondence.[27] Upon further review in consultation with the U.S. Coast Guard, we believe that this will provide private mariners, such as fishing vessels and deep sea yachts, with channels in each available HF band. This would be beneficial for effective communications on the high seas, especially during periods of high sun-spot activity when these bands can be used for communications.

18. *Miscellaneous*. MMR requests that the Commission begin accepting applications for new frequencies 30 days after the issuance of this *Report and Order* rather than waiting until after July 1, 1991, as proposed.[28] It notes that stations licensed by other countries that are able to operate on the new frequencies effective July 1, 1991, may develop a "following" for handling maritime traffic. MMR argues that delaying the application process until after July 1, 1991, would put United States stations at a competitive disadvantage because they would need to make in-roads against established traffic patterns. We agree that the availability of these frequencies for assignment is essential to worldwide competition. Consequently, we will accept applications as of March 1, 1991, (*i.e.*, approximately 30 days after publication of this Report and Order in the Federal Register). Operation on these new frequencies, however, may not be begin until July 1, 1991, in accordance with international provisions.

19. In the *Notice*, we proposed that public coast station applicants for manual Morse code telegraphy, radiotelephony, and the shared 4/8 MHz frequencies provide a justification of their need for additional frequencies.[29] This justification should include a showing indicating that recent traffic usage exceeds 40 percent at peak hours. MMR supports this justification requirement. We are adopting the justification requirement as proposed.[30] It will foster efficient use of the available frequencies. Further, this showing will prevent frequency hording and allow an effective means to distribute the new duplex channels for radiotelephony adopted herein for public correspondence (see discussion above).[31] This requirement should not be burdensome on public coast stations licensees because, as common carriers, they already maintain records on traffic for billing purposes and must file tariffs with the Commission for the communication services provided.

20. In the *Notice*, we also proposed that the new frequencies for Morse code telegraphy at 26 MHz automatically be added to licenses upon renewal. MMR opposed this and suggested that we should require applications.[32] This point is moot because we have amended 47 C.F.R. § 80.357(b) to specify the available bands, including the 26 MHz Morse code telegraphy spectrum, rather than the discrete frequencies as proposed in the *Notice* (see discussion para. 7). Consequently, these frequencies must be applied for and coordinated with the government through the Frequency Assignment Subcommittee of the Interdepartment Radio Advisory Committee (IRAC).

IV. CONCLUSION

21. Adoption of the amendments to the Commission's Rules will bring the U.S. into conformance with the international provisions without delay and, therefore, is in the public interest. By taking this action now, we will give all parties the longest possible time to effect the necessary changes. We note, however, that the United States Senate has not provided its advice and consent to ratification of the Final Acts of the 1987 Mobile WARC. Should any provision of the Final Acts not be ratified as written, further amendments of the Rules may be required.[33]

V. REGULATORY FLEXIBILITY ACT FINAL ANALYSIS

22. In accordance with Section 605(b) of the Regulatory Flexibility Act of 1980, 5 U.S.C. § 605(b), our final analysis of the economic impact of these amendments to small entities is as follows:

A. *Need and purpose of this action*: The amendments contained herein incorporate into the Commission's Rules the international revisions to the exclusive maritime mobile HF bands (4000-27500 kHz) adopted by the 1987 Mobile WARC. Because of the global range of HF band frequencies, all HF maritime stations must change frequency at the same time to avoid worldwide interference. The changes are needed to ensure that the maritime stations in the United States meet the new international requirements in a timely manner. Failure to implement the changes would put the United States merchant vessels at a competitive disadvantage to other nations and could adversely affect communications related to safety of life and property at sea.

B. *Summary of issues raised by the public comments in response to the Initial Regulatory Flexibility Analysis*: The Initial Regulatory Flexibility Analysis (Initial Analysis) estimated that over 40,000 licensed ship and coast stations operating in the HF bands would need to change frequencies at 0001 hours UTC on July 1, 1991. The impact of this requirement should be minimal for synthesized transmitters or receivers which can simply be reprogrammed. The crystals in crystal-tuned transmitters or receivers, however, must be replaced. The Initial Analysis estimated that between 2,000-4,000 licensed ship and coast HF stations are crystal-tuned and that the cost to re-fit each of them with new crystals should not exceed $100 per set. One commenter, MMR, licensee of public coast station WLO, indicated that re-fitting its transmitters and receivers with new crystals would cost hundreds of dollars.[34] We receive no other comments on this point. Because the smaller entities are more likely to use synthesized transmitters/receivers, we continue to believe that the economic impact on small entities should not be severe.

C. *Significant alternatives considered and rejected*: Because of the global range of HF frequencies, all countries of the world must change frequencies at the same time to conduct maritime communications. Further, these frequency changes are necessary to update the distress and safety system in the maritime mobile service.[35] After weighing all aspects of this proceeding, we have concluded that the amendments adopted herein represent the most reasonable and least burdensome course of action to ensure compliance with international provisions.

VI. PAPERWORK REDUCTION ACT STATEMENT

23. The decisions contained herein have been analyzed with respect to the Paperwork Reduction Act of 1980 and found to impose a new or modified information requirement on the public. The Office of Management and Budget (OMB) has approved the collection of information contained in these rules. The collection requirement is reported in the Application for Land Radio Station License in the Maritime Service (FCC Form 503). The OMB control number for this collection of information requirement is No. 3060-0089.

VII. ORDERING CLAUSES

24. Accordingly, IT IS ORDERED, pursuant to the authority contained in Sections 4(i) and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i) and 303(r), that Parts 2 and 80 of the Commission's Rules ARE AMENDED as set forth in the Appendix below.

25. IT IS FURTHER ORDERED that, consistent with the Final Acts of the World Administrative Radio Conference for Mobile Services, Geneva, 1987, this *Report and Order* is effective at 0001 hours UTC on July 1, 1991.

26. IT IS FURTHER ORDERED that a copy of this *Report and Order* be sent to the Chief Counsel for Advocacy of the Small Business Administration.

27. IT IS FURTHER ORDERED that this proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] The 1987 Mobile WARC, held in Geneva from September 14 to October 17, 1987, was broad in scope. Its changes are being implemented through three rule making proceedings. The first proceeding addressed changes to the Table of Frequency Allocations and certain maritime requirements that entered into force on October 3, 1989. *See* Report and Order, GEN Docket No. 89-103, adopted September 19, 1989, 4 FCC Rcd 7603 (1989). This, the second rule making proceeding, addresses those revisions that pertain to the maritime mobile HF bands. *See* Notice of Proposed Rule Making, PR Docket No. 90-133, adopted March 8, 1990, 5 FCC Rcd 1838 (1990). The final proceeding will implement the Global Maritime Distress and Safety System (GMDSS) into the maritime mobile service rules. *See* Notice of Proposed Rule Making, PR Docket No. 90-480, adopted October 11, 1990, 5 FCC Rcd 6212 (1990).

[2] DSC and NBDP are modern techniques for conducting radiocommunications. DSC is a system used to establish contact with a station or group of stations automatically by means of radio. DSC essentially provides direct dialing capability to the maritime community for conducting voice communications. NBDP is a system used to provide telex (printed) messages automatically by means of radio. NBDP provides a method of delivering printed material automatically to a particular station or group of stations. The technical characteristics of these systems are prescribed by the International Radio Consultative Committee (CCIR).

[3] Notice of Proposed Rule Making, PR Docket No. 90-133, 5 FCC Rcd 1838 (1990).

[4] *Notice* at para. 8.

[5] In the *Notice*, we proposed 11 discrete frequencies spaced 400 Hz apart for coast stations; this results in 4.4 kilohertz of spectrum. We stated that 11 frequencies should be sufficient because there are only 14 public coast stations currently using Morse code telegraphy and the 26 MHz band has limited operational use due to propagation conditions. *Notice* at para. 9.

[6] MMR comments at 3-4.

[7] MMR comments at 4.

[8] MMR comments at 5-6.

[9] MMR also indicates that a substitute frequency is needed for coast station frequency 22320 kHz in the Gulf of Mexico. MMR comments at 5. Our records indicate that this frequency is indeed licensed to WLO, Mobile, Alabama. Accordingly, the substitute frequency, 22570.5 kHz, will be added to the Rules as requested.

[10] This flexibility will allow the coordination of assignments as noted by MMR (*i.e.*, 500 Hz channel with 1-2 kilohertz spacing) depending upon government requirements and international notifications.

[11] *Notice* at para. 8.

[12] In the *Notice*, we stated that "[b]ecause there are no 18 MHz band frequencies available for ship station Morse code telegraphy that would correspond with the 19 MHz band coast frequencies, we propose to add frequencies for coast station Morse code telegraphy at 26 MHz only." *Notice* at para. 9 and MMR comments at 3.

[13] *Notice* at para. 11.

[14] MMR comments at 10-11.

[15] Rockwell comments at 1.

[16] Rockwell comments at 2.

[17] MMR comments at 19.

[18] On September 28, 1990, the IFRB issued the initial allotment plan (IFRB Circular-letter No. 836). Of the 315 allotments requested (35 channels at 9 locations), 250 allotments were accepted. No changes to United States allotments are expected to the final allotment plan which will be issued by the IFRB for implementation on July 1, 1991.

[19] During the application process, applicants should request channels to minimize interference. The Commission's staff, however, will review the channel requested and may substitute another channel from the same MHz band.

[20] Certain duplex radiotelephone channels have been split and their frequencies are assigned on a simplex basis to four inland coast stations to provide adequate communications on the inland waterways. In some instances, the frequencies are used also in the duplex mode for public correspondence on the high seas.

[21] Frequencies in the 4000-4063 kHz and 8100-8195 kHz bands are shared on a co-primary basis between the fixed and maritime mobile services (shared 4/8 MHz spectrum). Additionally, the 1987 Mobile WARC allocated an additional eighteen radiotelephony frequencies between 12 MHz and 26 MHz for simplex operations (12-26 MHz simplex frequencies). In the *Notice*, we proposed to make the shared 4/8 MHz spectrum and the 12-26 MHz simplex frequencies available for public correspondence. *Notice* at paras. 13 and 15.

[22] MMR comments at 15.

[23] Internationally, the 4 MHz frequencies are limited to ship stations (*see* Radio Regulation No. 517). Individual countries, however, may deviate from international provisions so long as harmful interference is not caused to services carried out by other administrations in accordance with international regulations (*see* Radio Regulation No. 342). In the *Notice*, we stated that coast station operation is possible without interference to other administrations because of the limited range of frequencies in the 4 MHz and 8 MHz bands. *Notice* at para. 15. MMR supports this proposal and suggests that simplex operations be allowed between 4000-4063 MHz, similar to the provisions between 8100-8195 MHz. MMR comments at 15.

[24] Further documentation of the requirements of the Mississippi River System and the high seas public correspondence service, especially in view of the additional channels for duplex service adopted herein, is needed before we pursue coordination of these frequencies that are shared with the fixed services.

[25] Channels 1202 and 1620 revert to high seas public correspondence use only. They are currently assigned to high seas public coast stations KMI, Dixon, California, and WOO, Ocean Gate, New Jersey, respectively.

[26] MMR notes that, although these frequencies are not protected internationally, they could be used for special purpose services tailored to specific customers or markets. MMR further suggests that the Commission recognize that there may be non-voice emissions, *e.g.*, data, that would be appropriate for these frequencies. MMR comments at 15. Use of these simplex radiotelephony frequencies for non-voice emissions, however, would be in contravention to the Radio Regulations. As pointed out in the *Notice*, these simplex frequencies would be shared with the U.S. government and the international community. Existing simplex frequencies are used extensively by the U.S. government and foreign vessels. Because they are shared worldwide, there exists a potential for substantial interference among users. Allowing these frequencies to be used for data transmissions would add to this interference potential. Consequently, we decline to permit these simplex frequencies to be used for non-voice emissions.

[27] These simplex radiotelephony frequencies are considered "common use" frequencies under the international Radio Regulations. As such, these simplex frequencies, unlike the duplex frequencies, would not be protected internationally. They cannot be notified for inclusion in the Master International Frequency Register which provides stations with interference protection. These frequencies can be listed in the international List of Coast Stations but this document offers no interference protection. *See* Radio Regulation No. 1220 and Recommendation 304.

[28] MMR comments at 19.

[29] *Notice* at para. 19.

[30] Public coast station applications that are submitted on or after March 1, 1991, in accordance with this Report and Order, must include a justification of need. *See* discussion above.

[31] Applicants for the new duplex channels for radiotelephony would need to include this justification for each frequency band requested. Because a record of a two month period is necessary for the justification, only one channel per frequency band may be processed at a time. Inherently, this application process will permit the assignment of the new frequencies only to those that can demonstrate a need based on traffic.

[32] MMR comments at 20-21.

[33] We foresee little difficulty with this approach but caution that we may have to re-evaluate these revisions if consent by the United States Senate requires modifications. The benefits gained by implementation in accordance with the international dates, however, outweigh the possibility that further changes might be necessary.

[34] MMR comments at 17.

[35] The Global Maritime Distress and Safety System (GMDSS) will improve distress and safety communications worldwide. It will be phased in internationally from 1992 to 1999. GMDSS will replace the present maritime distress and safety system which relies on ship-to-ship distress alerting using manual Morse code. It will provide a new standard of safety for seafarers worldwide. The GMDSS will rely primarily on ship-to-shore distress alerting using satellites and improved HF terrestrial systems employing automated digital communications techniques.

APPENDIX

Parts 2 and 80 of Title 47 of the Code of Federal Regulations are amended as follows:

1. The authority citation for Part 2 continues to read as follows:

AUTHORITY: Secs. 4, 302, 303, 307, 48 Stat. 1066, 1082, **as amended; 47 U.S.C. 154, 302, 303, 307, unless otherwise noted.**

2. Section 2.106 is amended by removing Footnote 523 in its entirety and by revising the Table of Frequency Allocations and subsequent Footnotes in the appropriate positions to read as follows:

§2.106 Table of Frequency Allocations

INTERNATIONAL TABLE			UNITED STATES TABLE		FCC USE DESIGNATORS	
			GOVERNMENT	NON-GOVERNMENT		
Region 1 Allocation kHz (1)	Region 2 Allocation kHz (2)	Region 3 Allocation kHz (3)	Allocation kHz (4)	Allocation kHz (5)	Rule Part(s) (6)	Special-Use Frequencies (7)
*	*		*	*		*
4 000 - 4 063 * * *			4 000 - 4 438 MARITIME MOBILE 500A 500B 520 520B US82 US236 US296	4 000 - 4 438 MARITIME MOBILE 500A 500B 520 520B US82 US236 US296	* * *	
4 063 - 4 438 MARITIME MOBILE 500A 500B 520 520A 520B 518 519						
*	*		*	*		*
6 200 - 6 525 MARITIME MOBILE 500A 500B 520 520B 522			6 200 - 6525 MARITIME MOBILE 500A 500B 520 520B US82 US296	6 200 - 6 525 MARITIME MOBILE 500A 500B 520 520B US82 US296	* * *	
*	*		*	*		*

INTERNATIONAL TABLE			UNITED STATES TABLE		FCC USE DESIGNATORS	
			GOVERNMENT	NON-GOVERNMENT		
Region 1 Allocation kHz (1)	Region 2 Allocation kHz (2)	Region 3 Allocation kHz (3)	Allocation kHz (4)	Allocation kHz (5)	Rule Part(s) (6)	Special-Use Frequencies (7)
8 100 - 8 195 * * *			8 100 - 8 815 MARITIME MOBILE 500A 500B 520B 529A 501 US82 US236 US296	8 100 - 8 815 MARITIME MOBILE 500A 500B 520B 529A 501 US82 US236 US296	* * *	
8 195 - 8 815 MARITIME MOBILE 500A 500B 520B 529A 501						
*	*		*	*		*
12 230 - 13 200 MARITIME MOBILE 500A 500B 520B 529A 532			12 230 - 13 200 MARITIME MOBILE 500A 500B 520B 529A US82 US296	12 230 - 13 200 MARITIME MOBILE 500A 500B 520B 529A US82 US296	* * *	
*	*		*	*		*
16 360 - 17 410 MARITIME MOBILE 500A 500B 520B 529A 532			16 360 - 17 410 MARITIME MOBILE 500A 500B 520B 529A US82 US296	16 360 - 17 410 MARITIME MOBILE 500A 500B 520B 529A US82 US296	MARITIME (80)	
*	*		*	*		*

§2.106 Table of Frequency Allocations

INTERNATIONAL TABLE			UNITED STATES TABLE		FCC USE DESIGNATORS	
			GOVERNMENT	NON-GOVERNMENT		
Region 1 Allocation kHz (1)	Region 2 Allocation kHz (2)	Region 3 Allocation kHz (3)	Allocation kHz (4)	Allocation kHz (5)	Rule Part(s) (6)	Special-Use Frequencies (7)
18 168 - 18 780 FIXED Mobile except aeronautical mobile			18 168 - 18 780 FIXED Mobile	18 168 - 18 780 FIXED Mobile	* * *	
18 780 - 18 900 MARITIME MOBILE 532			18 780 - 18 900 MARITIME MOBILE US82 US296	18 780 - 18 900 MARITIME MOBILE US82 US296	* * *	
*		*	*	*		*
19 680 - 19 800 MARITIME MOBILE 520B 532			19 680 - 19 800 MARITIME MOBILE 520B	19 680 - 19 800 MARITIME MOBILE 520B	* * *	
*		*	*	*		*
22 000 - 22 855 MARITIME MOBILE 520B 532 540			22 000 - 22 855 MARITIME MOBILE 520B US82 US296	22 000 - 22 855 MARITIME MOBILE 520B US82 US296	* * *	
*		*	*	*		*

§2.106 Table of Frequency Allocations

INTERNATIONAL TABLE			UNITED STATES TABLE		FCC USE DESIGNATORS	
			GOVERNMENT	NON-GOVERNMENT		
Region 1 Allocation kHz (1)	Region 2 Allocation kHz (2)	Region 3 Allocation kHz (3)	Allocation kHz (4)	Allocation kHz (5)	Rule Part(s) (6)	Special-Use Frequencies (7)
25 070 - 25 210 MARITIME MOBILE 544			25 070 - 25 210 MARITIME MOBILE US82 US281 US296	25 070 - 25 210 MARITIME MOBILE US82 US281 US296 NG112	* * *	

* * * * *

26 100 - 26 175 MARITIME MOBILE 520B 544			26 100 - 26 175 MARITIME MOBILE 520B	26 100 - 26 175 MARITIME MOBILE 520B	* * *	

* * * * *

500 The carrier frequency 2182 kHz is an international distress and calling frequency for radiotelephony. The conditions for the use of the band 2173.5-2190.5 kHz are prescribed in Articles 37, 38, N 38, and 60.

500A The frequencies 2187.5 kHz, 4207.5 kHz, 6312 kHz, 8414.5 kHz, 12577 kHz, and 16804.5 kHz are international distress frequencies for digital selective calling. The conditions for the use of these frequencies are prescribed in Article N 38.

500B The frequencies 2174.5 kHz, 4177.5 kHz, 6268 kHz, 8376.5 kHz, 12520 kHz, and 16695 kHz are international distress frequencies for narrow-band direct-printing telegraphy. The conditions for the use of these frequencies are prescribed in Article N 38.

501 The carrier frequencies 2182 kHz, 3023 kHz, 5680 kHz, 8364 kHz and the frequencies 121.5 MHz, 156.8 MHz and 243 MHz may also be used, in accordance with the procedures in force for terrestrial radiocommunication services, for search and rescue operations concerning manned space vehicles. The conditions for the use of the frequencies are prescribed in Articles 38 and N 38. The same applies to the frequencies 10003 kHz, 14993 kHz and 19993 kHz, but in each of these cases emissions must be confined in a band of ± 3 kHz about the frequency.

505 The carrier (reference) frequencies 3023 kHz and 5680 kHz may also be used, in accordance with Articles 38 and N 38 by stations of the maritime mobile service engaged in coordinated search and rescue operations.

517 The use of the band 4000-4063 kHz by the maritime mobile service is limited to ship stations using radiotelephony (see No. 4374 and Appendix 16).

520 The conditions for the use of the carrier frequencies 4125 kHz and 6215 kHz are prescribed in Article 37, 38, N 38 and 60.

520A The frequency 4209.5 kHz is used exclusively for the transmission by coast stations of meteorological and navigational warnings and urgent information to ships by means of narrow-band direct-printing techniques (see Resolution 332 (Mob-87)).

520B The frequencies 4210 kHz, 6314 kHz, 8416.5 kHz, 12579 kHz, 16806.5 kHz, 19680.5 kHz, 22376 kHz, and 26100.5 kHz are the international frequencies for the transmission of Maritime Safety Information (MSI) (see Resolution 333 (Mob-87) and Appendix 31).

529A The conditions for the use of the carrier frequency 8291 kHz, 12290 kHz, and 16420 kHz are prescribed in Articles 38, N 38 and 60.

US296 Until July 1, 1991, in the bands designated for ship wide-band telegraphy, facsimile and special transmission systems, the following assignable frequencies are available to non-Government stations on a shared basis with Government stations: 2070.5, 2072.5, 2074.5, 2076.5, 4160.6, 4168, 6238.6, 6242.6, 8326, 8341.5, 12485, 12489, 16654, 16658, 22186 and 22190 kHz. Effective July 1, 1991, in the bands designated for ship wide-band telegraphy, facsimile and special transmission systems, the following assignable frequencies are available to non-Government stations on a shared basis with Government stations: 2070.5, 2072.5, 2074.5, 2076.5, 4154.5, 4169.5, 6235.5, 6259.5, 8302.5, 8338.5, 12370.5, 12418.5, 16551.5, 16614.5, 18847.5, 18868.5, 22181.5, 22238.5, 25123.5, and 25159.5 kHz.

3. The authority citation for Part 80 continues to read as follows:

AUTHORITY: Secs. 4, 303, 48 Stat. 1066, 1082, as amended; 47 U.S.C. 154, 303, unless otherwise noted. Interpret or apply 48 Stat. 1064-1068, 1081-1105, as amended; 47 U.S.C. 151-155, 301-609; 3 UST 3450, 3 UST 4726, 12 UST 2377.

4. In Section 80.355, paragraph (c)(2) is amended by revising it in its entirety to read as follows:

§ 80.355 Distress, urgency, safety, call and reply Morse code frequencies.

* * * * *

(c) * * *

(2) Ship station frequencies. The following table describes the calling frequencies in the 4000-27500 kHz band which are available for use by authorized ship stations equipped with crystal controlled oscillators for A1A or J2A radiotelegraphy. There are two series of frequencies for worldwide use and two series of frequencies for each geographic region. Ship stations with synthesized transmitters may operate on every full 100 Hz increment in the 0.5 kHz channel for the frequencies listed, except for 100 Hz above and below those designated for worldwide use. During normal business hours when not communicating on other frequencies, all U.S. coast radiotelegraph stations must monitor the worldwide frequencies and the initial calling frequencies for the region in which it is located. The specific frequencies which must be monitored by a coast station will vary with propagation conditions. The calling frequencies which are routinely monitored by specific coast stations can be determined by reference to the ITU publication entitled "List of Coast Stations". Initial calls by ship stations must be made on the appropriate initial calling frequency first. Calls on the worldwide frequencies may be made only after calls on the appropriate initial calling frequency are unsuccessful.

		Ship Morse calling frequencies (kHz)							
Region	ITU							ITU	
Worldwide	3	4184.0	6276.0	8368.0	12552.0	16736.0	22280.5	C	25172.0
	4	4184.5	6276.5	8369.0	12553.5	16738.0	22281.0	C	25172.0
Atlantic									
initial	1	4182.0	6277.0	8366.0	12550.0	16734.0	22279.5	A	25171.5
alternate	2	4182.5	6277.5	8366.5	12550.5	16734.5	22280.0	A	25171.5
Caribbean									
initial	1	4182.0	6277.0	8366.0	12550.0	16734.0	22279.5	A	25171.5
alternate	2	4182.5	6277.5	8366.5	12550.5	16734.5	22280.0	A	25171.5
Gulf-Mexico									
initial	5	4183.0	6278.0	8367.0	12551.0	16735.0	22281.5	A	25171.5
alternate	6	4183.5	6278.5	8367.5	12551.5	16735.5	22282.0	A	25171.5
N Pacific									
initial	7	4185.0	6279.0	8368.5	12552.5	16736.5	22282.5	B	25172.5
alternate	8	4185.5	6279.5	8369.5	12553.0	16737.0	22283.0	B	25172.5
S Pacific									
initial	9	4186.0	6280.0	8370.0	12554.0	16737.5	22283.5	B	25172.5
alternate	10	4186.5	6280.5	8370.5	12554.5	16738.5	22284.0	B	25172.5

* * * * *

5. Section 80.357 is amended by revising paragraph (a)(3) in its entirety, by revising the text of paragraph (b)(1) in its entirety, by revising the table numbers listed in columns entitled 16 MHz and 22 MHz of paragraph (b)(1) in their entirety, and by revising paragraph (b)(2)(ii) in its entirety to read as follows:

§ 80.357 Morse code working frequencies.

* * * * *

(a) * * *

(3) Frequencies in the 2000-27500 kHz band. This paragraph describes the working frequencies and Channel Series in the 2000-27500 kHz band which are assignable to ship stations.

(i) Two Channel Series will be assigned for routine use to each ship station. Frequencies from any other Channel Series may be used if the frequencies in the assigned Channel Series are not adequate for communications.

Channel Series	Ship Morse working frequencies (kHz)						
W1	4187.0	6285.0	8342.0 8343.5	12422.0 12453.0	16619.0 16650.0 16681.0	22242.0 22273.0	25161.5
W2	4187.5	6285.5	8342.5 8344.0	12422.5 12453.5	16619.5 16650.5 16681.5	22242.5 22273.5	25162.0
W3	4188.0	6286.0	8343.0 8344.5	12423.0 12454.0	16620.0 16651.0 16682.0	22243.0 22274.0	25162.5
W4	4188.5	6286.5	8343.5 8345.0	12423.5 12454.5	16620.5 16651.5 16682.5	22243.5 22274.5	25163.0
W5	4189.0	6287.0	8344.0 8345.5	12424.0 12455.0	16621.0 16652.0 16683.0	22244.0 22275.0	25163.5
W6	4189.5	6287.5	8344.5 8346.0	12424.5 12455.5	16621.5 16652.5 16619.0	22244.5 22275.5	25164.0
W7	4190.0	6288.0	8345.0 8346.5	12425.0 12456.0	16622.0 16653.0 16619.5	22245.0 22276.0	25164.5
W8	4190.5	6288.5	8345.5 8347.0	12425.5 12456.5	16622.5 16653.5 16620.0	22245.5 22276.5	25165.0
W9	4191.0	6289.0	8346.0 8347.5	12426.0 12457.0	16623.0 16654.0 16620.5	22246.0 22277.0	25165.5

W10	4191.5	6289.5	8346.5 8348.0	12426.5 12457.5	16623.5 16654.5 16621.0	22246.5 22270.5	25166.0
W11	4192.0	6290.0	8347.0 8348.5	12427.0 12458.0	16624.0 16655.0 16621.5	22247.0 22278.0	25166.5
W12	4192.5	6290.5	8347.5 8349.0	12427.5 12458.5	16624.5 16655.5 16622.0	22247.5 22278.5	25167.0
W13	4193.0	6291.0	8348.0 8349.5	12428.0 12459.0	16625.0 16656.0 16622.5	22248.0 22279.0	25167.5
W14	4193.5	6291.5	8348.5 8350.0	12428.5 12459.5	16625.5 16656.5 16623.0	22248.5 22242.0	25168.0
W15	4194.0	6292.0	8349.0 8350.5	12429.0 12460.0	16626.0 16657.0 16623.5	22249.0 22242.5	25168.5
W16	4194.5	6292.5	8349.5 8351.0	12429.5 12460.5	16626.5 16657.5 16624.0	22249.5 22243.0	25169.0
W17	4195.0	6293.0	8350.0 8351.5	12430.0 12461.0	16627.0 16658.0 16624.5	22250.0 22243.5	25169.5
W18	4195.5	6293.5	8350.5 8352.0	12430.5 12461.5	16627.5 16658.5 16625.0	22250.5 22244.0	25170.0
W19	4196.0	6294.0	8351.0 8352.5	12431.0 12462.0	16628.0 16659.0 16625.5	22251.0 22244.5	25170.5
W20	4196.5	6294.5	8351.5 8353.0	12431.5 12462.5	16628.5 16659.5 16626.0	22251.5 22245.0	25171.0
W21	4197.0	6295.0	8352.0 8353.5	12432.0 12463.0	16629.0 16660.0 16626.5	22252.0 22245.5	25161.5
W22	4197.5	6295.5	8352.5 8354.0	12432.5 12463.5	16629.5 16660.5 16627.0	22252.5 22246.0	25162.0
W23	4198.0	6296.0	8353.0 8354.5	12433.0 12464.0	16630.0 16661.0 16627.5	22253.0 22246.5	25162.5
W24	4198.5	6296.5	8353.5 8355.0	12433.5 12464.5	16630.5 16661.5 16628.0	22253.5 22247.0	25163.0
W25	4199.0	6297.0	8354.0 8355.5	12434.0 12465.0	16631.0 16662.0 16628.5	22254.0 22247.5	25163.5

W26	4199.5	6297.5	8354.5	12434.5	16631.5	22254.5	25164.0
			8356.0	12465.5	16662.5	22248.0	
					16629.0		
W27	4200.0	6298.0	8355.0	12435.0	16632.0	22255.0	25164.5
			8356.5	12466.0	16663.0	22248.5	
					16629.5		
W28	4200.5	6298.5	8355.5	12435.5	16632.5	22255.5	25165.0
			8357.0	12466.5	16663.5	22249.0	
					16630.0		
W29	4201.0	6299.0	8356.0	12436.0	16633.0	22256.0	25165.5
			8357.5	12467.0	16664.0	22249.5	
					16630.5		
W30	4201.5	6299.5	8356.5	12436.5	16633.5	22256.5	25166.0
			8358.0	12467.5	16664.5	22250.0	
					16631.0		
W31	4202.0	6300.0	8357.0	12437.0	16634.0	22257.0	25166.5
			8358.5	12468.0	16665.0	22250.5	
					16631.5		
W32	4202.0	6300.0	8357.5	12437.5	16634.5	22257.5	25167.0
			8359.0	12468.5	16665.5	22251.0	
					16632.0		
W33	4201.5	6299.5	8358.0	12438.0	16635.0	22258.0	25167.5
			8359.5	12469.0	16666.0	22251.5	
					16632.5		
W34	4201.0	6299.0	8358.5	12438.5	16635.5	22258.5	25168.0
			8360.0	12469.5	16666.5	22252.0	
					16633.0		
W35	4200.5	6298.5	8359.0	12439.0	16636.0	22259.0	25168.5
			8360.5	12470.0	16667.0	22252.5	
					16633.5		
W36	4200.0	6298.0	8359.5	12439.5	16636.5	22259.5	25169.0
			8361.0	12470.5	16667.5	22253.0	
					16634.0		
W37	4199.5	6297.5	8360.0	12440.0	16637.0	22260.0	25169.5
			8361.5	12471.0	16668.0	22253.5	
					16634.5		
W38	4199.0	6297.0	8360.5	12440.5	16637.5	22260.5	25170.0
			8362.0	12471.5	16668.5	22254.0	
					16635.0		
W39	4198.5	6296.5	8361.0	12441.0	16638.0	22261.0	25170.5
			8362.5	12472.0	16669.0	22254.5	
					16635.5		
W40	4198.0	6296.0	8361.5	12441.5	16638.5	22261.5	25171.0
			8363.0	12472.5	16669.5	22255.0	
					16636.0		
W41	4197.5	6295.5	8362.0	12442.0	16639.0	22262.0	25161.5
			8363.5	12473.0	16670.0	22255.5	
					16636.5		

W42	4197.0	6295.0	8362.5 8364.0	12442.5 12473.5	16639.5 16670.5 16637.0	22262.5 22256.0	25162.0
W43	4196.5	6294.5	8363.0 8364.5	12443.0 12474.0	16640.0 16671.0 16637.5	22263.0 22256.5	25162.5
W44	4196.0	6294.0	8363.5 8365.0	12443.5 12474.5	16640.5 16671.5 16638.0	22263.5 22257.0	25163.0
W45	4195.5	6293.5	8364.0 8365.5	12444.0 12475.0	16641.0 16672.0 16638.5	22264.0 22257.5	25163.5
W46	4195.0	6293.0	8364.5 8371.0	12444.5 12475.5	16641.5 16672.5 16639.0	22264.5 22258.0	25164.0
W47	4194.5	6292.5	8365.0 8371.5	12445.0 12476.0	16642.0 16673.0 16639.5	22265.0 22258.5	25164.5
W48	4194.0	6292.0	8365.5 8372.0	12445.5 12476.5	16642.5 16673.5 16640.0	22265.5 22259.0	25165.0
W49	4193.5	6291.5	8371.0 8372.5	12446.0 12422.0	16643.0 16674.0 16640.5	22266.0 22259.5	25165.5
W50	4193.0	6291.0	8371.5 8373.0	12446.5 12422.5	16643.5 16674.5 16641.0	22266.5 22260.0	25166.0
W51	4192.5	6290.5	8372.0 8373.5	12447.0 12423.0	16644.0 16675.0 16641.5	22267.0 22260.5	25166.5
W52	4192.0	6290.0	8372.5 8374.0	12447.5 12423.5	16644.5 16675.5 16642.0	22267.5 22261.0	25167.0
W53	4191.5	6289.5	8373.0 8374.5	12448.0 12424.0	16645.0 16676.0 16642.5	22268.0 22261.5	25167.5
W54	4191.0	6289.0	8373.5 8375.0	12448.5 12424.5	16645.5 16676.5 16643.0	22268.5 22262.0	25168.0
W55	4190.5	6288.5	8374.0 8375.5	12449.0 12425.0	16646.0 16677.0 16643.5	22269.0 22262.5	25168.5
W56	4190.0	6288.0	8374.5 8376.0	12449.5 12425.5	16646.5 16677.5 16644.0	22269.5 22263.0	25169.0
W57	4189.5	6287.5	8375.0 8342.0	12450.0 12426.0	16647.0 16678.0 16644.5	22270.0 22263.5	25169.5

W58	4189.0	6287.0	8375.5 8342.5	12450.5 12426.5	16647.5 16678.5 16645.0	22270.5 22264.0	25170.0
W59	4188.5	6286.5	8376.0 8343.0	12451.0 12427.0	16648.0 16679.0 16645.5	22271.0 22264.5	25170.5
W60	4188.0	6286.0	8342.0 8343.5	12451.5 12427.5	16648.5 16679.5 16646.0	22271.5 22265.0	25171.0
W61	4187.5	6285.5	8342.5 8344.0	12452.0 12428.0	16649.0 16680.0 16646.5	22272.0 22265.5	25161.5
W62	4187.0	6285.0	8343.0 8344.5	12452.5 12428.5	16649.5 16680.5 16678.0	22272.5 22266.0	25162.0

(ii) If the frequencies listed in paragraph (3)(i) of this section are not adequate for communications, ship stations may use any of the non-paired narrow-band direct-printing frequencies listed in § 80.361(b) of this part for A1A or J2A radiotelegraphy.

(b) Coast station frequencies.

(1) Frequencies in the 100-27500 kHz band. The following table describes the working carrier frequencies in the 100-27500 kHz band which are assignable to coast stations located in the designated geographical areas. The exclusive maritime mobile HF bands listed in the table contained in § 80.363(b) of this part are also available for assignment to public coast stations for A1A or J2A radiotelegraphy following coordination with government users.

Area	Coast Morse working frequencies (kHz)								
	100-160 kHz	405-525 kHz	2 MHz	4 MHz	6 MHz	8 MHz	12 MHz	16 MHz	22 MHz
Central Pacific..								17016.8	22479.0
								17026.0	22515.0
								17088.8	22557.0
				* * *				....	22675.5
								....	....
South Pacific....								17064.8	22467.0
								17088.8	22663.5
								17218.4	....
								....	....
Gulf of Mexico...								17117.6	22467.0
								17170.4	22569.0
								17172.4	22570.5
								17208.8	22681.0
								....	....
Great Lakes......								....	....
Hawaii...........								16978.4	22509.0
Puerto Rico......								....	....
North Atlantic...								16933.2	22485.0
								16968.8	22503.0
								16973.6	22521.0
								16997.6	22366.5
								17021.6	22599.0
								17093.6	22657.0
								16904.9	....
								....	....
Central Atlantic.								....	....
South Atlantic...								16918.8	22503.0
								17093.6	22569.0
								17160.8	22681.0
								17170.4	....
								17199.2	....
								....	....
North Pacific....								17007.2	22539.0
Alaska...........								....	....

(2) * * *

(i) * * *

(ii) Frequencies above 5 MHz may be assigned primarily to stations serving the high seas and secondarily to stations serving inland waters of the United States, including the Great Lakes, under the condition that interference will not be caused to any coast station serving the high seas. Applicants for these frequencies must submit a substantial showing of need based on the following factors:

(A) a schedule of each currently licensed Morse working frequency and the expected use of the proposed frequencies;

(B) for additional frequencies within the same MHz band, a factual showing of the 3 busiest hours of any 4 days within a consecutive 10 day period for each of the 2 months immediately preceding the filing of the application indicating that the applicant has used its currently assigned frequencies within the same MHz band an aggregate average of at least 40% of the 3 busiest hours of each day for exchanging communications; and

(C) any other facts that support the need for the proposed assignment, _e.g._, evidence of radio interference by another station located near enough to render a currently licensed frequency substantially unusable.

* * * * *

6. Section 80.359 is amended by revising paragraphs (a) and (b) in their entirety to read as follows:

§ 80.359 Frequencies for digital selective calling (DSC).

(a) General purpose calling. The following table describes the calling frequencies for use by authorized ship and coast stations for general purpose DSC. There are three series of paired frequencies. One series is for worldwide use; the other two series are for regional use. The "Series A" designation includes coast stations along, and ship stations in, the Atlantic Ocean, the Gulf of Mexico, and the Caribbean Sea. The "Series B" designation includes stations in any remaining areas. Stations must initiate contact on the appropriate regional frequency depending upon the location of the called station and propagation conditions. Acknowledgement is made on the paired frequency. The worldwide frequencies may be used for international calling, if calls on the appropriate regional frequencies are unsuccessful, or the regional series does not contain the appropriate band (*e.g.*, 2 MHz). During normal working hours, all public coast stations capable of DSC operations must monitor the worldwide and regional frequencies appropriate for its location. The specific frequencies to be monitored will vary with propagation conditions.

General Purpose DSC (in kHz unless otherwise noted)					
Worldwide		Series A		Series B	
Ship	Coast	Ship	Coast	Ship	Coast
458.5	455.5	---	---	---	---
2189.5	2177.0[1]	---	---	---	---
4208.0	4219.5	4208.5	4220.0	4209.0	4220.5
6312.5	6331.0	6313.0	6331.5	6313.5	6332.0
8415.0	8436.5	8415.5	8437.0	8416.0	8437.5
12577.5	12657.0	12578.0	12657.5	12578.5	12658.0
16805.0	16903.0	16805.5	16903.5	16806.0	16904.0
18898.5	19703.5	18899.0	19704.0	18899.5	19704.5
22374.5	22444.0	22375.0	22444.5	22375.5	22445.0
25208.5	26121.0	25209.0	26121.5	25209.5	26122.0
156.525 MHz	156.525 MHz	---	---	---	---

[1] The frequency 2177.0 kHz is also available to ship stations for intership calling and acknowledgement of such calls only.

(b) Distress and safety calling. The frequencies 2187.5 kHz, 4207.5 kHz, 6312.0 kHz, 8414.5 kHz. 12577.0 kHz, 16804.5 kHz, and 156.525 MHz may be used for DSC by coast and ship stations on a simplex basis for distress and safety purposes. The provisions and procedures for distress and safety calling are contained in CCIR Recommendation 541 as modified by § 80.103(c) of this part.

* * * * *

7. In Section 80.361, paragraphs (a) and (b) are revised in their entirety and a new paragraph (c) is added to read as follows:

§ 80.361 Frequencies for narrow-band direct-printing (NBDP) and data transmissions.

(a) The following frequencies are available for assignment to public coast stations for narrow-band direct-printing (NBDP) and data transmissions. The paired ship frequencies are available for use by authorized ship stations for NBDP and data transmissions.

Ch.	Paired frequencies for NBDP and data transmissions (kHz)															
	4 MHz		6 MHz		8 MHz		12 MHz		16 MHz		18/19 MHz		22 MHz		25/26 MHz	
No.	Coast	Ship	Coast	Ship	Coast	Ship	Coast	Ship	Coast	Ship	Coast	Ship	Coast	Ship	Coast	Ship
1	4210.5	4172.5	6314.5	6263.0	——	——	12579.5	12477.0	16807.0	16683.5	19681.0	18870.5	22376.5	22284.5	26101.0	25173.0
2	4211.0	4173.0	6315.0	6263.5	8417.0	8377.0	12580.0	12477.5	16807.5	16684.0	19681.5	18871.0	22377.0	22285.0	26101.5	25173.5
3	4211.5	4173.5	6315.5	6264.0	8417.5	8377.5	12580.5	12478.0	16808.0	16684.5	19682.0	18871.5	22377.5	22285.5	26102.0	25174.0
4	4212.0	4174.0	6316.0	6264.5	8418.0	8378.0	12581.0	12478.5	16808.5	16685.0	19682.5	18872.0	22378.0	22286.0	26102.5	25174.5
5	4212.5	4174.5	6316.5	6265.0	8418.5	8378.5	12581.5	12479.0	16809.0	16685.5	19683.0	18872.5	22378.5	22286.5	26103.0	25175.0
6	4213.0	4175.0	6317.0	6265.5	8419.0	8379.0	12582.0	12479.5	16809.5	16686.0	19683.5	18873.0	22379.0	22287.0	26103.5	25175.5
7	4213.5	4175.5	6317.5	6266.0	8419.5	8379.5	12582.5	12480.0	16810.0	16686.5	19684.0	18873.5	22379.5	22287.5	26104.0	25176.0
8	4214.0	4176.0	6318.0	6266.5	8420.0	8380.0	12583.0	12480.5	16810.5	16687.0	19684.5	18874.0	22380.0	22288.0	26104.5	25176.5
9	4214.5	4176.5	6318.5	6267.0	8420.5	8380.5	12583.5	12481.0	16811.0	16687.5	19685.0	18874.5	22380.5	22288.5	26105.0	25177.0
10	4215.0	4177.0	6319.0	6267.5	8421.0	8381.0	12584.0	12481.5	16811.5	16688.0	19685.5	18875.0	22381.0	22289.0	26105.5	25177.5
11	——	——	——	——	8421.5	8381.5	12584.5	12482.0	16812.0	16688.5	19686.0	18875.5	22381.5	22289.5	26106.0	25178.0
12	4215.5	4178.0	6319.5	6268.5	8422.0	8382.0	12585.0	12482.5	16812.5	16689.0	19686.5	18876.0	22382.0	22290.0	26106.5	25178.5
13	4216.0	4178.5	6320.0	6269.0	8422.5	8382.5	12585.5	12483.0	16813.0	16689.5	19687.0	18876.5	22382.5	22290.5	26107.0	25179.0
14	4216.5	4179.0	6320.5	6269.5	8423.0	8383.0	12586.0	12483.5	16813.5	16690.0	19687.5	18877.0	22383.0	22291.0	26107.5	25179.5
15	4217.0	4179.5	6321.0	6270.0	8423.5	8383.5	12586.5	12484.0	16814.0	16690.5	19688.0	18877.5	22383.5	22291.5	26108.0	25180.0
16	4217.5	4180.0	6321.5	6270.5	8424.0	8384.0	12587.0	12484.5	16814.5	16691.0	19688.5	18878.0	22384.0	22292.0	26108.5	25180.5
17	4218.0	4180.5	6322.0	6271.0	8424.5	8384.5	12587.5	12485.0	16815.0	16691.5	19689.0	18878.5	22384.5	22292.5	26109.0	25181.0
18			6322.5	6271.5	8425.0	8385.0	12588.0	12485.5	16815.5	16692.0	19689.5	18879.0	22385.0	22293.0	26109.5	25181.5
19			6323.0	6272.0	8425.5	8385.5	12588.5	12486.0	16816.0	16692.5	19690.0	18879.5	22385.5	22293.5	26110.0	25182.0
20			6323.5	6272.5	8426.0	8386.0	12589.0	12486.5	16816.5	16693.0	19690.5	18880.0	22386.0	22294.0	26110.5	25182.5
21			6324.0	6273.0	8426.5	8386.5	12589.5	12487.0	16817.0	16693.5	19691.0	18880.5	22386.5	22294.5		
22			6324.5	6273.5	8427.0	8387.0	12590.0	12487.5	16817.5	16694.0	19691.5	18881.0	22387.0	22295.0		
23			6325.0	6274.0	8427.5	8387.5	12590.5	12488.0	16818.0	16694.5			22387.5	22295.5		
24			6325.5	6274.5	8428.0	8388.0	12591.0	12488.5	——	——			22388.0	22296.0		
25			6326.0	6275.0	8428.5	8388.5	12591.5	12489.0	16818.5	16695.5			22388.5	22296.5		
26			6326.5	6275.5	8429.0	8389.0	12592.0	12489.5	16819.0	16696.0			22389.0	22297.0		
27			6327.0	6281.0	8429.5	8389.5	12592.5	12490.0	16819.5	16696.5			22389.5	22297.5		
28			6327.5	6281.5	8430.0	8390.0	12593.0	12490.5	16820.0	16697.0			22390.0	22298.0		
29			6328.0	6282.0	8430.5	8390.5	12593.5	12491.0	16820.5	16697.5			22390.5	22298.5		
30					8431.0	8391.0	12594.0	12491.5	16821.0	16698.0			22391.0	22299.0		
31					8431.5	8391.5	12594.5	12492.0	16821.5	16698.5			22391.5	22299.5		
32					8432.0	8392.0	12595.0	12492.5	16822.0	16699.0			22392.0	22300.0		
33					8432.5	8392.5	12595.5	12493.0	16822.5	16699.5			22392.5	22300.5		
34					8433.0	8393.0	12596.0	12493.5	16823.0	16700.0			22393.0	22301.0		

Ch. No.	Paired frequencies for NBDP and data transmissions (kHz)															
	4 MHz		6 MHz		8 MHz		12 MHz		16 MHz		18/19 MHz		22 MHz		25/26 MHz	
	Coast	Ship	Coast	Ship	Coast	Ship	Coast	Ship	Coast	Ship	Coast	Ship	Coast	Ship	Coast	Ship
35							12596.5	12494.0	16823.5	16700.5			22393.5	22301.5		
36							12597.0	12494.5	16824.0	16701.0			22394.0	22302.0		
37							12597.5	12495.0	16824.5	16701.5			22394.5	22302.5		
38							12598.0	12495.5	16825.0	16702.0			22395.0	22303.0		
39							12598.5	12496.0	16825.5	16702.5			22395.5	22303.5		
40							12599.0	12496.5	16826.0	16703.0			22396.0	22304.0		
41							12599.5	12497.0	16826.5	16703.5			22396.5	22304.5		
42							12600.0	12497.5	16827.0	16704.0			22397.0	22305.0		
43							12600.5	12498.0	16827.5	16704.5			22397.5	22305.5		
44							12601.0	12498.5	16828.0	16705.0			22398.0	22306.0		
45							12601.5	12499.0	16828.5	16705.5			22398.5	22306.5		
46							12602.0	12499.5	16829.0	16706.0			22399.0	22307.0		
47							12602.5	12500.0	16829.5	16706.5			22399.5	22307.5		
48							12603.0	12500.5	16830.0	16707.0			22400.0	22308.0		
49							12603.5	12501.0	16830.5	16707.5			22400.5	22308.5		
50							12604.0	12501.5	16831.0	16708.0			22401.0	22309.0		
51							12604.5	12502.0	16831.5	16708.5			22401.5	22309.5		
52							12605.0	12502.5	16832.0	16709.0			22402.0	22310.0		
53							12605.5	12503.0	16832.5	16709.5			22402.5	22310.5		
54							12606.0	12503.5	16833.0	16710.0			22403.0	22311.0		
55							12606.5	12504.0	16833.5	16710.5			22403.5	22311.5		
56							12607.0	12504.5	16834.0	16711.0			22404.0	22312.0		
57							12607.5	12505.0	16834.5	16711.5			22404.5	22312.5		
58							12608.0	12505.5	16835.0	16712.0			22405.0	22313.0		
59							12608.5	12506.0	16835.5	16712.5			22405.5	22313.5		
60							12609.0	12506.5	16836.0	16713.0			22406.0	22314.0		
61							12609.5	12507.0	16836.5	16713.5			22406.5	22314.5		
62							12610.0	12507.5	16837.0	16714.0			22407.0	22315.0		
63							12610.5	12508.0	16837.5	16714.5			22407.5	22315.5		
64							12611.0	12508.5	16838.0	16715.0			22408.0	22316.0		
65							12611.5	12509.0	16838.5	16715.5			22408.5	22316.5		
66							12612.0	12509.5	16839.0	16716.0			22409.0	22317.0		
67							12612.5	12510.0	16839.5	16716.5			22409.5	22317.5		
68							12613.0	12510.5	16840.0	16717.0			22410.0	22318.0		
69							12613.5	12511.0	16840.5	16717.5			22410.5	22318.5		
70							12614.0	12511.5	16841.0	16718.0			22411.0	22319.0		

Paired frequencies for NBDP and data transmissions (kHz)

Ch.	4 MHz		6 MHz		8 MHz		12 MHz		16 MHz		18/19 MHz		22 MHz		25/26 MHz	
No.	Coast	Ship	Coast	Ship	Coast	Ship	Coast	Ship	Coast	Ship	Coast	Ship	Coast	Ship	Coast	Ship
71							12614.5	12512.0	16841.5	16718.5			22411.5	22319.5		
72							12615.0	12512.5	16842.0	16719.0			22412.0	22320.0		
73							12615.5	12513.0	16842.5	16719.5			22412.5	22320.5		
74							12616.0	12513.5	16843.0	16720.0			22413.0	22321.0		
75							12616.5	12514.0	16843.5	16720.5			22413.5	22321.5		
76							12617.0	12514.5	16844.0	16721.0			22414.0	22322.0		
77							12617.5	12515.0	16844.5	16721.5			22414.5	22322.5		
78							12618.0	12515.5	16845.0	16722.0			22415.0	22323.0		
79							12618.5	12516.0	16845.5	16722.5			22415.5	22323.5		
80							12619.0	12516.5	16846.0	16723.0			22416.0	22324.0		
81							12619.5	12517.0	16846.5	16723.5			22416.5	22324.5		
82							12620.0	12517.5	16847.0	16724.0			22417.0	22325.0		
83							12620.5	12518.0	16847.5	16724.5			22417.5	22325.5		
84							12621.0	12518.5	16848.0	16725.0			22418.0	22326.0		
85							12621.5	12519.0	16848.5	16725.5			22418.5	22326.5		
86							12622.0	12519.5	16849.0	16726.0			22419.0	22327.0		
87							——	——	16849.5	16726.5			22419.5	22327.5		
88							12622.5	12520.5	16850.0	16727.0			22420.0	22328.0		
89							12623.0	12521.0	16850.5	16727.5			22420.5	22328.5		
90							12623.5	12521.5	16851.0	16728.0			22421.0	22329.0		
91							12624.0	12522.0	16851.5	16728.5			22421.5	22329.5		
92							12624.5	12522.5	16852.0	16729.0			22422.0	22330.0		
93							12625.0	12523.0	16852.5	16729.5			22422.5	22330.5		
94							12625.5	12523.5	16853.0	16730.0			22423.0	22331.0		
95							12626.0	12524.0	16853.5	16730.5			22423.5	22331.5		
96							12626.5	12524.5	16854.0	16731.0			22424.0	22332.0		
97							12627.0	12525.0	16854.5	16731.5			22424.5	22332.5		
98							12627.5	12525.5	16855.0	16732.0			22425.0	22333.0		
99							12628.0	12526.0	16855.5	16732.5			22425.5	22333.5		
100							12628.5	12526.5	16856.0	16733.0			22426.0	22334.0		
101							12629.0	12527.0	16856.5	16733.5			22426.5	22334.5		
102							12629.5	12527.5	16857.0	16739.0						
103							12630.0	12528.0	16857.5	16739.5						
104							12630.5	12528.5	16858.0	16740.0						
105							12631.0	12529.0	16858.5	16740.5						
106							12631.5	12529.5	16859.0	16741.0						
107							12632.0	12530.0	16859.5	16741.5						

Ch. No.	Paired frequencies for NBDP and data transmissions (kHz)															
	4 MHz		6 MHz		8 MHz		12 MHz		16 MHz		18/19 MHz		22 MHz		25/26 MHz	
	Coast	Ship	Coast	Ship	Coast	Ship	Coast	Ship	Coast	Ship	Coast	Ship	Coast	Ship	Coast	Ship
108									16860.0	16742.0						
109									16860.5	16742.5						
110									16861.0	16743.0						
111									16861.5	16743.5						
112									16862.0	16744.0						
113									16862.5	16744.5						
114									16863.0	16745.0						
115									16863.5	16745.5						
116									16864.0	16746.0						
117									16864.5	16746.5						
118									16865.0	16747.0						
119									16865.5	16747.5						
120									16866.0	16748.0						
121									16866.5	16748.5						
122									16867.0	16749.0						
123									16867.5	16749.5						
124									16868.0	16750.0						
125									16868.5	16750.5						
126									16869.0	16751.0						
127									16869.5	16751.5						
128									16870.0	16752.0						
129									16870.5	16752.5						
130									16871.0	16753.0						
131									16871.5	16753.5						
132									16872.0	16754.0						

(1) Applicants for these frequencies must submit a substantial showing of need based on the following factors:

(i) a schedule of each currently licensed NBDP frequency and the expected use of the proposed frequencies;

(ii) for additional frequencies within the same MHz band, a factual showing of the 3 busiest hours of any 4 days within a consecutive 10 day period for each of the 2 months immediately preceding the filing of the application indicating that the applicant has used its currently assigned frequencies within the same MHz band an aggregate average of at least 40% of the 3 busiest hours of each day for exchanging communications; and

(iii) any other facts that support the need for the proposed assignment, e.g., evidence of radio interference by another station located near enough to render a currently licensed frequency substantially unusable.

(b) The following frequencies are available for use by authorized ship stations for NBDP and data transmissions with public coast stations. Public coast stations may receive only on these frequencies.

Ch. Ser.	Non-Paired NBDP Channels (kHz)							
1	4202.5	6300.5	8396.5	12560.0	16785.0	18893.0	22352.0	25193.0
2	4203.0	6301.0	8397.0	12560.5	16785.5	18893.5	22352.5	25193.5
3	4203.5	6301.5	8397.5	12561.0	16786.0	18894.0	22353.0	25194.0
4	4204.0	6302.0	8398.0	12561.5	16786.5	18894.5	22353.5	25194.5
5	4204.5	6302.5	8398.5	12562.0	16787.0	18895.0	22354.0	25195.0
6	4205.0	6303.0	8399.0	12562.5	16787.5	18895.5	22354.5	25195.5
7	4205.5	6303.5	8399.5	12563.0	16788.0	18896.0	22355.0	25196.0
8	4206.0	6304.0	8400.0	12563.5	16788.5	18896.5	22355.5	25196.5
9	4206.5	6304.5	8400.5	12564.0	16789.0	18897.0	22356.0	25197.0
10	4207.0	6305.0	8401.0	12564.5	16789.5	18897.5	22356.5	25197.5
11		6305.5	8401.5	12565.0	16790.0	18898.0	22357.0	25198.0
12		6306.0	8402.0	12565.5	16790.5		22357.5	25198.5
13		6306.5	8402.5	12566.0	16791.0		22358.0	25199.0
14		6307.0	8403.0	12566.5	16791.5		22358.5	25199.5
15		6307.5	8403.5	12567.0	16792.0		22359.0	25200.0
16		6308.0	8404.0	12567.5	16792.5		22359.5	25200.5
17		6308.5	8404.5	12568.0	16793.0		22360.0	25201.0
18		6309.0	8405.0	12568.5	16793.5		22360.5	25201.5
19		6309.5	8405.5	12569.0	16794.0		22361.0	25202.0
20		6310.0	8406.0	12569.5	16794.5		22361.5	25202.5
21		6310.5	8406.5	12570.0	16795.0		22362.0	25203.0
22		6311.0	8407.0	12570.5	16795.5		22362.5	25203.5
23		6311.5	8407.5	12571.0	16796.0		22363.0	25204.0
24			8408.0	12571.5	16796.5		22363.5	25204.5

25			8408.5	12572.0	16797.0		22364.0	25205.0
26			8409.0	12572.5	16797.5		22364.5	25205.5
27			8409.5	12573.0	16798.0		22365.0	25206.0
28			8410.0	12573.5	16798.5		22365.5	25206.5
29			8410.5	12574.0	16799.0		22366.0	25207.0
30			8411.0	12574.5	16799.5		22366.5	25207.5
31			8411.5	12575.0	16800.0		22367.0	25208.0
32			8412.0	12575.5	16800.5		22367.5	
33			8412.5	12576.0	16801.0		22368.0	
34			8413.0	12576.5	16801.5		22368.5	
35			8413.5		16802.0		22369.0	
36			8414.0		16802.5		22369.5	
37					16803.0		22370.0	
38					16803.5		22370.5	
39					16804.0		22371.0	
40							22371.5	
41							22372.0	
42							22372.5	
43							22373.0	
44							22373.5	
45							22374.0	

(c) Distress and calling. The frequencies 2174.5 kHz, 4177.5 kHz, 6268.0 kHz, 8376.5 kHz, 12520.0 kHz, and 16695.0 kHz may be used for NBDP and data transmissions by coast and ship stations on a simplex basis for distress and safety purposes.

* * * * *

8. In Section 80.363, paragraphs (a) and (b) are revised in their entirety to read as follows:

§ 80.363 Frequencies for facsimile.

* * * * *

(a) Ship station frequencies. The following frequencies are available for use by authorized ship stations for facsimile.

Assignable ship frequencies for facsimile (kHz)								
2070.5	4154.5	6235.5	8302.5	12370.5	16551.5	18847.5	22181.5	25123.5
2072.5	4169.5	6259.5	8338.5	12418.5	16614.5	18868.5	22238.5	25159.5
2074.5								
2076.5								

(b) Coast station frequencies.

The following table describes the exclusive maritime mobile HF frequency bands that are available for assignment to coast stations using 3 kHz channels for facsimile. However, any frequency in the 2000-27500 kHz bands listed in Part 2 of the Commission's Rules as available for shared use by the maritime mobile service and other radio services, except for the 4000-4063 kHz and the 8100-8195 kHz bands, is available for assignment to coast stations for facsimile. Frequency assignments are subject to coordination with government users.

Frequency bands for Coast facsimile (kHz)	
4221.0 - 4351.0	16904.5 - 17242.0
6332.5 - 6501.0	19705.0 - 19755.0
8438.0 - 8707.0	22445.5 - 22696.0
12658.5 - 13077.0	26122.5 - 26145.0

9. In Section 80.369, paragraphs (b) and (d) are revised to read as follows:

§ 80.369 Distress, urgency, safety, call and reply frequencies.

* * * * *

(b) The frequencies 4125.0 kHz, 6215 kHz, 8291 kHz, 12290 kHz, and 16420 kHz may be used by coast and ship stations on a simplex basis for distress and safety communications. The frequency 4125.0 kHz may also be used for distress and safety communications between aircraft and maritime mobile stations.

* * * * *

(d) In the 4000-27500 kHz band, the following coast frequencies are available for assignment to public coast stations for call and reply communications. The paired ship frequencies are available for use by authorized ship stations.

Call and reply frequency pairs in the 4000-27500 kHz Carrier Frequencies (kHz)		
Channel No.	Ship transmit	Coast transmit
421	4125 [1,2,3]	4417 [1]
606	6215 [2,3]	6516 [1]
821	8255	8779
1221	12290 [3]	13137
1621	16420 [3]	17302
1806	18795	19770
2221	22060	22756
2510	25097	26172

[1] The frequencies 4125 kHz, 4417 kHz, and 6516 kHz are also available on a simplex basis for private communications, see § 80.373(c) of this part.

[2] The frequencies 4125 kHz and 6215 kHz are also available on a simplex basis to ship and coast stations for call and reply, provided that the peak envelope power does not exceed 1 kW.

[3] The frequencies 4125 kHz, 6215 kHz, 8291 kHz, 12290 kHz, and 16420 kHz are also available on a simplex basis for distress and safety traffic, see paragraph (b) of this section.

* * * * *

10. In Section 80.371, paragraphs (b) and (d) are revised in their entirety to read as follows:

§ 80.371 Public correspondence frequencies.

* * * * *

(b) Working frequencies in the 4000-25700 kHz band. This paragraph describes the working carrier frequencies in the 4000-27500 kHz band.

(1) The following table specifies the carrier frequencies available for assignment to public coast stations. The paired ship frequencies are available for use by authorized ship stations.

TABLE A - PUBLIC CORRESPONDENCE (DUPLEX CHANNELS)
Working carrier frequency pairs in the 4000-27500 kHz band
Carrier frequencies (kHz)

Region	Channel No.	Ship transmit	Coast transmit
East Coast..........	403	4071.0	4363.0
	410	4092.0	4384.0
	411	4095.0	4387.0
	412	4098.0	4390.0
	416	4110.0	4402.0
	417	4113.0	4405.0
	422	4128.0	4420.0
	423	4131.0	4423.0
	802	8198.0	8722.0
	805	8207.0	8731.0
	808	8216.0	8740.0
	810	8222.0	8746.0
	811	8225.0	8749.0
	814	8234.0	8758.0
	815	8237.0	8761.0
	825	8267.0	8791.0
	826	8270.0	8794.0
	831	8285.0	8809.0
	1203	12236.0	13083.0
	1206	12245.0	13092.0
	1208	12251.0	13098.0
	1209	12254.0	13101.0
	1210	12257.0	13104.0
	1211	12260.0	13107.0
	1215	12272.0	13119.0
	1222	12293.0	13140.0
	1223	12296.0	13143.0
	1228	12311.0	13158.0
	1230	12317.0	13164.0
	1601	16360.0	17242.0

	1605	16372.0	17254.0
	1609	16384.0	17266.0
	1610	16387.0	17269.0
	1611	16390.0	17272.0
	1616	16405.0	17287.0
	1620	16417.0	17299.0
	1626	16435.0	17317.0
	1631	16450.0	17332.0
	2201	22000.0	22696.0
	2205	22012.0	22708.0
	2210	22027.0	22723.0
	2215	22042.0	22738.0
	2216	22045.0	22741.0
	2222	22063.0	22759.0
	2236	22105.0	22801.0
West Coast..........	401	4065.0	4357.0
	416	4110.0	4402.0
	417	4113.0	4405.0
	804	8204.0	8728.0
	809	8219.0	8743.0
	814	8234.0	8758.0
	1201	12230.0	13077.0
	1202	12233.0	13080.0
	1203	12236.0	13083.0
	1229	12314.0	13161.0
	1230	12317.0	13164.0
	1602	16363.0	17245.0
	1603	16366.0	17248.0
	1624	16429.0	17311.0
	2214	22039.0	22735.0
	2223	22066.0	22762.0
	2228	22081.0	22777.0
	2236	22105.0	22801.0
Gulf Coast..........	404	4074.0	4366.0
	405	4077.0	4369.0
	414	4104.0	4396.0
	419	4119.0	4411.0
	824	8264.0	8788.0
	829	8279.0	8803.0
	830	8282.0	8806.0
	1212	12263.0	13110.0
	1225	12302.0	13149.0
	1226	12305.0	13152.0
	1607	16378.0	17260.0
	1632	16453.0	17335.0
	1641	16480.0	17362.0
	2227	22078.0	22774.0
	2231	22090.0	22786.0
	2237	22108.0	22804.0
Great Lakes.........	405	4077.0	4369.0
	409	4089.0	4381.0
	418	4116.0	4408.0
	826	8270.0	8794.0

Hawaii.............	418	4116.0	4408.0
	808	8216.0	8740.0
	1222	12293.0	13140.0
	1601	16360.0	17242.0
Caribbean..........	604	6209.0	6510.0
	605	6212.0	6513.0
	1602	16363.0	17245.0
	1603	16366.0	17248.0
	2223	22066.0	22762.0

(2) The following table specifies the additional carrier frequencies available for assignment to public coast stations for public correspondence. The paired ship frequencies are available for use by authorized ship stations. The specific frequency assignment available to public coast stations for a particular geographic area is indicated by an "x" under the appropriate column. Table B is based on the initial Appendix 25 Allotment Arrangement published by the International Frequency Registration Board (IFRB) (see IFRB Circular-letter No. 836, dated September 28, 1990). The allotment areas are in accordance with the "Standard Defined Areas" as identified in the Appendix 25 Planning System and indicated in the Preface to the International Frequency List (IFL) (see IFRB Circular-letter No. 843, dated October 31, 1990).

TABLE B - PUBLIC CORRESPONDENCE (ADDITIONAL DUPLEX CHANNELS)
Working carrier frequency pairs in the 4000-27500 kHz band
Carrier frequencies (kHz)

Channel	Ship Transmit	Coast Transmit	USA-E	USA-W	USA-S	USA-C	VIR	HWA	ALS	PTR	GUM
427	4143.0	4435.0	x	x	x	x	x	x	x	-	x
428	4060.0	4351.0	x	x	x	x	x	x	x	x	x
607	6218.0	6519.0	x	x	x	x	x	x	x	x	x
836	8113.0	8713.0	x	x	x	x	x	x	x	x	x
837	8128.0	8716.0	x	x	x	x	x	x	x	x	x
1233	12326.0	13173.0	x	x	x	x	x	x	x	x	x
1234	12329.0	13176.0	-	x	x	-	-	x	x	-	x
1235	12332.0	13179.0	x	x	x	x	x	x	x	x	x
1236	12335.0	13182.0	-	x	x	-	-	x	-	-	-
1237	12338.0	13185.0	x	-	x	x	x	-	-	x	-
1642	16483.0	17365.0	x	x	x	x	x	x	x	x	x
1643	16486.0	17368.0	x	x	x	x	x	x	x	x	x
1644	16489.0	17371.0	x	x	x	x	-	x	x	-	x
1645	16492.0	17374.0	x	x	x	x	x	x	x	x	x
1646	16495.0	17377.0	-	x	-	-	-	-	-	-	-
1647	16498.0	17380.0	x	x	x	x	-	x	x	-	x
1648	16501.0	17383.0	-	x	-	x	x	x	x	x	x

1801	18780.0	19755.0	x	x	x	x	x	x	x	x	x
1802	18783.0	19758.0	x	-	x	x	x	-	-	x	-
1803	18786.0	19761.0	x	x	-	x	x	x	x	x	x
1804	18789.0	19764.0	-	x	x	-	-	x	x	-	-
1805	18792.0	19767.0	-	x	-	-	-	x	x	-	-
1807	18798.0	19773.0	x	x	x	x	x	x	x	x	x
1808	18801.0	19776.0	x	x	x	x	x	x	x	x	x
2241	22120.0	22816.0	x	x	x	x	x	x	x	x	x
2242	22123.0	22819.0	x	x	x	x	x	x	x	x	x
2243	22126.0	22822.0	x	x	x	x	x	x	x	x	-
2244	22129.0	22825.0	-	x	-	-	-	x	x	-	-
2245	22132.0	22828.0	-	x	x	-	-	x	x	-	-
2246	22135.0	22831.0	x	x	x	x	-	x	x	-	x
2247	22138.0	22834.0	x	x	x	x	x	x	x	-	x
2501	25070.0	26145.0	x	x	x	x	-	x	x	-	x
2502	25073.0	26148.0	x	x	x	x	x	x	x	x	-
2503	25076.0	26151.0	x	x	x	x	x	x	x	-	-
2504	25079.0	26154.0	x	x	x	x	x	x	x	x	x

(3) The following table specifies the non-paired carrier frequencies that are available for assignment to public coast stations for simplex operations subject to the provisions of paragraph (b)(4) of this section. These frequencies are available for use by authorized ship stations for transmissions to coast stations (simplex operations). Assignments on these frequencies must accept interference. They are shared with government users and are considered "common use" frequencies under the international Radio Regulations. They cannot be notified for inclusion in the Master International Frequency Register, which provides stations with interference protection, but may be listed in the international List of Coast Stations. (See Radio Regulation No. 1220 and Recommendation 304.)

PUBLIC CORRESPONDENCE (SIMPLEX) Non-paired radiotelephony frequencies in the 4000-27500 kHz Band[1] Carrier Frequencies (kHz)			
16537	18825	22174	25100
16540	18828	22177	25103
	18831		25106
	18834		25109
	18837		25112

[1] Coast stations limited to a maximum transmitter power of 1 kW (PEP).

(4) Applicants for these public coast frequencies specified in this section must submit a substantial showing of need based on the following factors:

(i) a schedule of each currently licensed working frequency in the 4000-27500 kHz band and the expected use of the proposed frequencies;

(ii) for additional frequencies within the same MHz band, a factual showing of the 3 busiest hours of any 4 days within a consecutive 10 day period for each of the 2 months immediately preceding the filing of the application indicating that the applicant has used its currently assigned frequencies within the same MHz band an aggregate average of at least 40% of the 3 busiest hours of each day for exchanging communications;

(iii) any other facts that support the need for the proposed assignment, e.g., evidence of radio interference by another station located near enough to render a currently licensed frequency substantially unusable; and

(iv) for simplex frequencies listed in paragraph (b)(3) of this section, an additional showing supporting the use of simplex rather than duplex frequencies for the proposed situation.

* * * * *

(d) Working frequencies in the Mississippi River System. The Mississippi River System includes the Mississippi River and connecting navigable waters other than the Great Lakes. The following simplex frequencies are available for assignment to public coast stations serving the Mississippi River System for radiotelephony communications. These simplex frequencies also are available for use by authorized ship stations within communication service range, whether or not the ship is operating within the confines of the Mississippi River System.

Mississippi River System Working Frequencies Carrier Frequencies (kHz)					
2086[1]	4065	6209	8201	12362	16543
2782	4089	6212	8213	12365	16546
	4116	6510	8725		
	4408	6513	8737		

[1] Limited to a maximum transmitter output of 150 watts (PEP).

* * * * *

11. In Section 80.373, paragraphs (c) and (i) are revised in their entirety to read as follows:

§ 80.373 Private communications frequencies.

* * * * *

(c) Frequencies in the 2000-27500 kHz bands for business and operational communications.

(1) The following simplex frequencies in the 2000-27500 kHz band are available for assignment to private coast stations for business and operational radiotelephone communications. These simplex frequencies also are available for use by authorized ship stations for business and operational radiotelephone communications.

Business and Operational Frequencies in the 2000-27500 kHz Band Carrier Frequencies (kHz)								
2065.0[1,3]	4146	6224	8294	12353	16528	18840	22159	25115
2079.0[1,3]	4149	6227	8297	12356	16531	18843	22162	25118
2096.5[1]	4125[2]	6230		12359	16534		22165	
3023.0[4]	4417[5]	6516[5]					22168	
	5680[4]						22171	

1 Limited to peak envelope power of 150 watts.

2 The frequency 4125 kHz is also available for distress and safety, and calling and reply, see § 80.369(b) and (d) of this part.

3 The frequencies 2065.0 kHz and 2079.0 kHz must be coordinated with Canada.

4 The frequencies 3023.0 kHz and 5680.0 kHz are available to private coast stations licensed to state and local governments and any scene-of-action ships for the purpose of search and rescue scene-of-action coordination including communications with any scene-of-action aircraft.

5 The frequency 6516 kHz is limited to daytime operations. The frequencies 4417 kHz and 6516 kHz are also available for calling and reply, see § 80.369(d) of this part.

* * * * *

(i) Frequencies in the 1600-5450 kHz band for private communications in Alaska. The following simplex frequencies are available for assignment to private fixed stations located in the State of Alaska for radiotelephony communications with ship stations. These simplex frequencies are available for use by authorized ship stations for radiotelephony communications with private fixed stations located in the State of Alaska.

Private communications in Alaska Carrier frequencies (kHz)		
1619.0	2382.0	2563.0
1622.0	2419.0	2566.0
1643.0	2422.0	2590.0
1646.0	2427.0	2616.0
1649.0	2430.0	3258.0
1652.0	2447.0	3261.0[1]
1705.0	2450.0	4366.0
1709.0	2479.0	4369.0
1712.0	2482.0	4396.0
2003.0	2506.0	4402.0
2006.0	2509.0	4420.0
2115.0	2512.0	4423.0
2118.0	2535.0	5167.5
2379.0	2538.0	

[1] Ship stations must limit use of 3261.0 kHz to communications over distances which cannot be reached by the use of a frequency below 2700 kHz or above 156.000 MHz.

* * * * *

12. A new Section 80.374 and heading are added to read as follows:

§ 80.374 Special provisions for frequencies in the 4000-4063 kHz and the 8100-8195 kHz bands shared with the fixed service.

Until implementation procedures and schedules are determined by a conference of the International Telecommunications Union (ITU), the bands 4000-4063 kHz and 8100-8195 kHz are allocated on a shared primary basis between the fixed service and the maritime mobile service; see § 2.106, note US236, of the Commission's Rules. Frequency assignments in the 4000-4063 kHz and 8100-8195 kHz bands are subject to coordination with government users. Additionally, coast station assignments in the 4000-4063 kHz band deviate from international provisions. Coast station assignments in the 4000-4063 kHz band are permitted provided that harmful interference is not caused to, and must accept interference from, stations operated by other countries in accordance with the Radio Regulations (see Radio Regulation Nos. 342 and 517).

(a) Application requirements. Applicants for public coast station frequencies described in this section must submit a substantial showing of need based on the following factors:

(i) a schedule of each currently licensed 4, 6, and 8 MHz frequency and the expected use of the proposed frequencies;

(ii) for additional frequencies within the same MHz band, a factual showing of the 3 busiest hours of any 4 days within a consecutive 10 day period for each of the 2 months immediately preceding the filing of the application indicating that the applicant has used its currently assigned frequencies within the same MHz band an aggregate average of at least 40% of the 3 busiest hours of each day for exchanging communications; and

(iii) any other facts that support the need for the proposed assignment, e.g., evidence of radio interference by another station located near enough to render a currently licensed frequency substantially unusable.

(b) Frequencies in the 4000-4063 kHz band.

(1) The frequencies in the 4000-4063 kHz bands are available to ship and public coast stations for:

(i) supplementary ship-to-shore duplex operations with coast stations assigned the frequencies described in § 80.371(b) of this part;

(ii) intership simplex operations and cross-band operations;

(iii) ship-to-shore or shore-to-ship simplex operations; or

(iv) duplex operations with coast stations assigned in the band 4438-4650 kHz, as described in § 80.373(d) of this part.

(2) The following table describes the channelization of carrier frequencies in the 4000-4063 kHz band.

Carrier Frequencies (kHz)			
4000	4015	4030	4045
4003	4018	4033	4048
4006	4021	4036	4051
4009	4024	4039	4054
4012	4027	4042	4057

(c) Frequencies in the 8100-8195 kHz band.

(1) The frequencies in the 8100-8195 kHz bands are available to ship and public coast stations for:

(i) supplementary ship-to-shore duplex operations with coast stations assigned the frequencies described in § 80.371(b) of this part;

(ii) intership simplex operations and cross-band operations; or

(iii) ship-to-shore or shore-to-ship simplex operations.

(2) The following table describes the channelization of carrier frequencies in the 8100-8195 kHz band.

Carrier frequencies (kHz)		
8101	8137	8167
8104	8140	8170
8107	8143	8173
8110	8146	8176
8116	8149	8179
8119	8152	8182
8122	8155	8185
8125	8158	8188
8131	8161	8191
8134	8164	

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: February 6, 1991

FREQUENCY CHANGES FOR MARITIME MOBILE STATIONS OPERATING ON FREQUENCIES BETWEEN 4000 kHz and 27500 kHz

(Report and Order, PR Docket 90-133, adopted January 10, 1991)

This Public Notice indicates the new frequencies to which authorized ship and *public and private* coast stations that operate in the high frequency (HF) bands between 4000 kHz and 27500 kHz must switch effective 0001 hours Coordinated Universal Time (UTC) on July 1, 1991. The HF band frequencies are used for long range radio communication on the high seas. This Public Notice also includes additional digital selective calling (DSC), narrow-band direct-printing (NBDP), and radiotelephony (HF-SSB) frequencies that will be effective July 1, 1991.

These changes were adopted by the Commission on January 10. 1991. (see *Report and Order*, PR Docket No. 90-133). The revisions are required to incorporate in the Commission's Rules the changes adopted by the Final Acts of the World Administrative Radio Conference for Mobile Services, Geneva, 1987. These revisions to the international Radio Regulations changed the maritime channeling plans in the HF bands between 4000-27500 kHz allocated exclusively to the maritime mobile service. No changes to maritime frequencies in the 156-174 MHz (VHF) or 2000-3000 kHz (MF) bands were made.

The HF band revisions reflect a worldwide decrease in manual Morse code telegraphy (CW) ship frequencies and an increase in coast and ship frequencies for DSC, NBDP, and HF-SSB radio communications. To accomplish the shift from manual to automated systems, the existing maritime frequencies were also rearranged. Consequently, at 0001 hours UTC on July 1, 1991, virtually every maritime station worldwide, coast and ship, public and private, operating on frequencies between 4000-27500 kHz must change frequencies.

There are over 9,000 public and private coast stations currently licensed by the Commission that are authorized frequencies in the HF bands. Those coast station licenses (renewed, modified, or new licenses) that were issued in the past year include both sets of frequencies (*i.e.,* one valid until June 30, 1991, and the other effective July 1, 1991). On or about April 1, 1991, the remaining public and private coast station licensees will be sent a direct mailing of this Public Notice which indicates the frequencies that are effective as of July 1, 1991, in accordance with *Report and Order* in PR Docket No. 90-133. They do not need to apply for a modification of their licenses.

Ship stations also must change to the new operating frequencies at 0001 hours UTC on July 1, 1991, as denoted in the *Report and Order* and summarized herein. A direct mailing will not be sent to the approximately 40,000 ship licensees. This Public Notice indicates all HF frequencies available to authorized ship stations. Ship stations that are authorized HF-SSB operations (denoted on the license as "Radiotelephone 4000-23000 kHz") do not need to apply for an updated license. They may use the new 25 MHz HF-SSB frequencies without applying for a modification of their license. (The license will be updated to "Radiotelephone 4000-27500 kHz" upon renewal.) Any ship that does not have a "Radiotelephone 4000-23000 kHz" authorization and desires to use SSB frequencies 4000 kHz or greater must apply to the Federal Communications Commission (FCC) for a modification of its license.

For completeness, the additional DSC, NBDP, and HF-SSB frequencies that become effective as of July 1, 1991, have been included in the appropriate tables. Because these are new and do not replace existing frequencies, we have placed a dash (----) in the "Frequency prior to July 1, 1991" column. We emphasize that these additional frequencies are included here for information only. *Coast stations are authorized to operate on their replacement frequency only*. Any coast station that desires additional frequency authorizations must apply to the FCC. Coast station applications for the additional DSC, NBDP, and HF-SSB frequencies may be filed with the Commission as of March 1, 1991, but they cannot be used until July 1, 1991 (see *Report and Order*, PR Docket No. 90-133, for details).

This Public Notice supersedes previous Public Notices, DA 90-407, 5 FCC Rcd 1682 (1990) and DA 90-408, 5 FCC Rcd 1683 (1990), both released March 16, 1990. Further, this Public Notice is only a summary of the frequency changes adopted by the Commission's *Report and Order* in PR Docket No. 90-133.

For further information about licensing contact: Consumer Assistance Branch, Licensing Division, Private Radio Bureau, Federal Communications Commission, Gettysburg, PA 17325-7245; or telephone 717-337-1212. For further information about technical matters, contact: Katy Hosford, Special Services Division, Private Radio Bureau, Federal Communications Commission, Washington, D.C. 20554; or telephone 202-632-7197.

FEDERAL COMMUNICATIONS COMMISSION

ATTACHMENT A

HF Frequencies for Distress and Safety

The following table describes the distress and safety frequencies between 4000-27500 kHz for ship and coast stations, public and private, operating radiotelephony (HF-SSB), narrow-band direct-printing (NBDP), and digital selective calling (DSC).

Frequency (kHz) prior to July 1, 1991	Frequency (kHz) as of July 1, 1991
HF-SSB:	
4125.0	no change
6215.5	6215.0
8257.0	8291.0
12392.0	12290.0
16522.0	16420.0
NBDP:	
4177.5	no change
6268.0	no change
8357.5	no change
12520.0	no change
16695.0	no change
DSC:	
4188.0	4207.5
6282.0	6312.0
8375.0	8414.5
12563.0	12577.0
16750.0	16804.5

This Public Notice is for informational purposes only. For complete discussion of amendments to 47 C.F.R. Part 80 for the maritime radio service, see Report and Order, PR Docket No. 90-133.

ATTACHMENT B

HF Frequencies for Radiotelegraphy

Call and reply Morse code frequencies: The following table supersedes the previous arrangement of frequency families (Family Series Nos. 1 to 18) as prescribed in 47 C.F.R. § 80.355. It describes the new calling frequencies (ITU Designators 1 to 10, A, B, and C) in the 4000-27500 kHz band which are available for use by authorized ship stations equipped with crystal controlled oscillators for A1A or J2A radiotelegraphy. There are two series of frequencies for worldwide use and two series of frequencies for each geographic region. Ship stations with synthesized transmitters may operate on every full 100 Hz increment in the 0.5 kHz channel for the frequencies listed, except for 100 Hz above and below those designated for worldwide use. During normal business hours when not communicating on other frequencies, all U.S. public coast radiotelegraph stations must monitor the worldwide frequencies and the initial calling frequencies for the region in which it is located. The specific frequencies which must be monitored by a coast station will vary with propagation conditions. The calling frequencies which are routinely monitored by specific coast stations can be determined by reference to the ITU publication entitled "List of Coast Stations". Initial calls by ship stations must be made on the appropriate initial calling frequency first. Calls on the worldwide frequencies may be made only after calls on the appropriate initial calling frequency are unsuccessful.

		Ship Morse calling frequencies (kHz)							
Region	ITU							ITU	
Worldwide	3	4184.0	6276.0	8368.0	12552.0	16736.0	22280.5	C	25172.0
	4	4184.5	6276.5	8369.0	12553.5	16738.0	22281.0	C	25172.0
Atlantic									
initial	1	4182.0	6277.0	8366.0	12550.0	16734.0	22279.5	A	25171.5
alternate	2	4182.5	6277.5	8366.5	12550.5	16734.5	22280.0	A	25171.5
Caribbean									
initial	1	4182.0	6277.0	8366.0	12550.0	16734.0	22279.5	A	25171.5
alternate	2	4182.5	6277.5	8366.5	12550.5	16734.5	22280.0	A	25171.5
Gulf-Mexico									
initial	5	4183.0	6278.0	8367.0	12551.0	16735.0	22281.5	A	25171.5
alternate	6	4183.5	6278.5	8367.5	12551.5	16735.5	22282.0	A	25171.5
N Pacific									
initial	7	4185.0	6279.0	8368.5	12552.5	16736.5	22282.5	B	25172.5
alternate	8	4185.5	6279.5	8369.5	12553.0	16737.0	22283.0	B	25172.5

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S Pacific									
initial	9	4186.0	6280.0	8370.0	12554.0	16737.5	22283.5	B	25172.5
alternate	10	4186.5	6280.5	8370.5	12554.5	16738.5	22284.0	B	25172.5

Ship Morse code working (CW) frequencies: The following table supersedes the previous arrangement of 62 Channel Series as prescribed in 47 C.F.R. § 80.357(a). Ship stations must use these new frequencies for the particular Channel Series that they are assigned. For example, if a ship station is authorized Channel Series W1 and W32, then the 4 MHz frequencies of 4187.0 kHz and 4202.0 kHz as denoted in the table below replace their previous frequencies of 4188.5 kHz and 4204.0 kHz. If the frequencies listed in the table below are not adequate for communications, ship stations may use any of the non-paired NBDP frequencies listed later in this document for A1A or J2A radiotelegraphy.

Channel Series	Ship Morse working frequencies (kHz)						
W1	4187.0	6285.0	8342.0 8343.5	12422.0 12453.0	16619.0 16650.0 16681.0	22242.0 22273.0	25161.5
W2	4187.5	6285.5	8342.5 8344.0	12422.5 12453.5	16619.5 16650.5 16681.5	22242.5 22273.5	25162.0
W3	4188.0	6286.0	8343.0 8344.5	12423.0 12454.0	16620.0 16651.0 16682.0	22243.0 22274.0	25162.5
W4	4188.5	6286.5	8343.5 8345.0	12423.5 12454.5	16620.5 16651.5 16682.5	22243.5 22274.5	25163.0
W5	4189.0	6287.0	8344.0 8345.5	12424.0 12455.0	16621.0 16652.0 16683.0	22244.0 22275.0	25163.5
W6	4189.5	6287.5	8344.5 8346.0	12424.5 12455.5	16621.5 16652.5 16619.0	22244.5 22275.5	25164.0
W7	4190.0	6288.0	8345.0 8346.5	12425.0 12456.0	16622.0 16653.0 16619.5	22245.0 22276.0	25164.5
W8	4190.5	6288.5	8345.5 8347.0	12425.5 12456.5	16622.5 16653.5 16620.0	22245.5 22276.5	25165.0
W9	4191.0	6289.0	8346.0 8347.5	12426.0 12457.0	16623.0 16654.0 16620.5	22246.0 22277.0	25165.5
W10	4191.5	6289.5	8346.5	12426.5	16623.5	22246.5	25166.0

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			8348.0	12457.5	16654.5	22270.5	
					16621.0		
W11	4192.0	6290.0	8347.0	12427.0	16624.0	22247.0	25166.5
			8348.5	12458.0	16655.0	22278.0	
					16621.5		
W12	4192.5	6290.5	8347.5	12427.5	16624.5	22247.5	25167.0
			8349.0	12458.5	16655.5	22278.5	
					16622.0		
W13	4193.0	6291.0	8348.0	12428.0	16625.0	22248.0	25167.5
			8349.5	12459.0	16656.0	22279.0	
					16622.5		
W14	4193.5	6291.5	8348.5	12428.5	16625.5	22248.5	25168.0
			8350.0	12459.5	16656.5	22242.0	
					16623.0		
W15	4194.0	6292.0	8349.0	12429.0	16626.0	22249.0	25168.5
			8350.5	12460.0	16657.0	22242.5	
					16623.5		
W16	4194.5	6292.5	8349.5	12429.5	16626.5	22249.5	25169.0
			8351.0	12460.5	16657.5	22243.0	
					16624.0		
W17	4195.0	6293.0	8350.0	12430.0	16627.0	22250.0	25169.5
			8351.5	12461.0	16658.0	22243.5	
					16624.5		
W18	4195.5	6293.5	8350.5	12430.5	16627.5	22250.5	25170.0
			8352.0	12461.5	16658.5	22244.0	
					16625.0		
W19	4196.0	6294.0	8351.0	12431.0	16628.0	22251.0	25170.5
			8352.5	12462.0	16659.0	22244.5	
					16625.5		
W20	4196.5	6294.5	8351.5	12431.5	16628.5	22251.5	25171.0
			8353.0	12462.5	16659.5	22245.0	
					16626.0		
W21	4197.0	6295.0	8352.0	12432.0	16629.0	22252.0	25161.5
			8353.5	12463.0	16660.0	22245.5	
					16626.5		
W22	4197.5	6295.5	8352.5	12432.5	16629.5	22252.5	25162.0
			8354.0	12463.5	16660.5	22246.0	
					16627.0		
W23	4198.0	6296.0	8353.0	12433.0	16630.0	22253.0	25162.5
			8354.5	12464.0	16661.0	22246.5	
					16627.5		
W24	4198.5	6296.5	8353.5	12433.5	16630.5	22253.5	25163.0
			8355.0	12464.5	16661.5	22247.0	
					16628.0		
W25	4199.0	6297.0	8354.0	12434.0	16631.0	22254.0	25163.5
			8355.5	12465.0	16662.0	22247.5	
					16628.5		
W26	4199.5	6297.5	8354.5	12434.5	16631.5	22254.5	25164.0
			8356.0	12465.5	16662.5	22248.0	

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					16629.0		
W27	4200.0	6298.0	8355.0	12435.0	16632.0	22255.0	25164.5
			8356.5	12466.0	16663.0	22248.5	
					16629.5		
W28	4200.5	6298.5	8355.5	12435.5	16632.5	22255.5	25165.0
			8357.0	12466.5	16663.5	22249.0	
					16630.0		
W29	4201.0	6299.0	8356.0	12436.0	16633.0	22256.0	25165.5
			8357.5	12467.0	16664.0	22249.5	
					16630.5		
W30	4201.5	6299.5	8356.5	12436.5	16633.5	22256.5	25166.0
			8358.0	12467.5	16664.5	22250.0	
					16631.0		
W31	4202.0	6300.0	8357.0	12437.0	16634.0	22257.0	25166.5
			8358.5	12468.0	16665.0	22250.5	
					16631.5		

Channel Series	Ship Morse working frequencies (kHz) (table continued)						
W32	4202.0	6300.0	8357.5	12437.5	16634.5	22257.5	25167.0
			8359.0	12468.5	16665.5	22251.0	
					16632.0		
W33	4201.5	6299.5	8358.0	12438.0	16635.0	22258.0	25167.5
			8359.5	12469.0	16666.0	22251.5	
					16632.5		
W34	4201.0	6299.0	8358.5	12438.5	16635.5	22258.5	25168.0
			8360.0	12469.5	16666.5	22252.0	
					16633.0		
W35	4200.5	6298.5	8359.0	12439.0	16636.0	22259.0	25168.5
			8360.5	12470.0	16667.0	22252.5	
					16633.5		
W36	4200.0	6298.0	8359.5	12439.5	16636.5	22259.5	25169.0
			8361.0	12470.5	16667.5	22253.0	
					16634.0		
W37	4199.5	6297.5	8360.0	12440.0	16637.0	22260.0	25169.5
			8361.5	12471.0	16668.0	22253.5	
					16634.5		
W38	4199.0	6297.0	8360.5	12440.5	16637.5	22260.5	25170.0
			8362.0	12471.5	16668.5	22254.0	
					16635.0		
W39	4198.5	6296.5	8361.0	12441.0	16638.0	22261.0	25170.5
			8362.5	12472.0	16669.0	22254.5	
					16635.5		
W40	4198.0	6296.0	8361.5	12441.5	16638.5	22261.5	25171.0
			8363.0	12472.5	16669.5	22255.0	
					16636.0		
W41	4197.5	6295.5	8362.0	12442.0	16639.0	22262.0	25161.5

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			8363.5	12473.0	16670.0	22255.5	
					16636.5		
W42	4197.0	6295.0	8362.5	12442.5	16639.5	22262.5	25162.0
			8364.0	12473.5	16670.5	22256.0	
					16637.0		
W43	4196.5	6294.5	8363.0	12443.0	16640.0	22263.0	25162.5
			8364.5	12474.0	16671.0	22256.5	
					16637.5		
W44	4196.0	6294.0	8363.5	12443.5	16640.5	22263.5	25163.0
			8365.0	12474.5	16671.5	22257.0	
					16638.0		
W45	4195.5	6293.5	8364.0	12444.0	16641.0	22264.0	25163.5
			8365.5	12475.0	16672.0	22257.5	
					16638.5		
W46	4195.0	6293.0	8364.5	12444.5	16641.5	22264.5	25164.0
			8371.0	12475.5	16672.5	22258.0	
					16639.0		
W47	4194.5	6292.5	8365.0	12445.0	16642.0	22265.0	25164.5
			8371.5	12476.0	16673.0	22258.5	
					16639.5		
W48	4194.0	6292.0	8365.5	12445.5	16642.5	22265.5	25165.0
			8372.0	12476.5	16673.5	22259.0	
					16640.0		
W49	4193.5	6291.5	8371.0	12446.0	16643.0	22266.0	25165.5
			8372.5	12422.0	16674.0	22259.5	
					16640.5		
W50	4193.0	6291.0	8371.5	12446.5	16643.5	22266.5	25166.0
			8373.0	12422.5	16674.5	22260.0	
					16641.0		
W51	4192.5	6290.5	8372.0	12447.0	16644.0	22267.0	25166.5
			8373.5	12423.0	16675.0	22260.5	
					16641.5		
W52	4192.0	6290.0	8372.5	12447.5	16644.5	22267.5	25167.0
			8374.0	12423.5	16675.5	22261.0	
					16642.0		
W53	4191.5	6289.5	8373.0	12448.0	16645.0	22268.0	25167.5
			8374.5	12424.0	16676.0	22261.5	
					16642.5		
W54	4191.0	6289.0	8373.5	12448.5	16645.5	22268.5	25168.0
			8375.0	12424.5	16676.5	22262.0	
					16643.0		
W55	4190.5	6288.5	8374.0	12449.0	16646.0	22269.0	25168.5
			8375.5	12425.0	16677.0	22262.5	
					16643.5		
W56	4190.0	6288.0	8374.5	12449.5	16646.5	22269.5	25169.0
			8376.0	12425.5	16677.5	22263.0	
					16644.0		
W57	4189.5	6287.5	8375.0	12450.0	16647.0	22270.0	25169.5
			8342.0	12426.0	16678.0	22263.5	

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					16644.5		
W58	4189.0	6287.0	8375.5	12450.5	16647.5	22270.5	25170.0
			8342.5	12426.5	16678.5	22264.0	
					16645.0		
W59	4188.5	6286.5	8376.0	12451.0	16648.0	22271.0	25170.5
			8343.0	12427.0	16679.0	22264.5	
					16645.5		
W60	4188.0	6286.0	8342.0	12451.5	16648.5	22271.5	25171.0
			8343.5	12427.5	16679.5	22265.0	
					16646.0		
W61	4187.5	6285.5	8342.5	12452.0	16649.0	22272.0	25161.5
			8344.0	12428.0	16680.0	22265.5	
					16646.5		
W62	4187.0	6285.0	8343.0	12452.5	16649.5	22272.5	25162.0
			8344.5	12428.5	16680.5	22266.0	
					16678.0		

Coast Morse code working (CW) frequencies: The following public coast station frequencies for A1A or J2A radiotelegraphy must be replaced on July 1, 1991, in accordance with 47 C.F.R. § 80.357(b). The remaining coast stations frequencies for Morse code telegraphy were not affected.

Public Coast Stations Working Carrier Frequencies (kHz)	
Frequency prior to July 1, 1991	Frequency as of July 1, 1991
16861.7	17199.2
16871.3	17208.8
16880.9	17218.4
22318.5	22569.0
22320.0	22570.5
22348.5	22599.0
22407.0	22657.0
22413.0	22663.5
22425.0	22675.5
22431.0	22681.0

Frequencies for DSC: The following table supercedes the previous arrangement of frequencies available for use by authorized ship and coast stations for general purpose DSC in accordance with 47 C.F.R. § 80.359. There are three series of

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paired frequencies. One series is for worldwide use and it replaces previous DSC frequency authorizations (e.g., frequencies 4208.0 kHz and 4219.5 kHz replace previous frequencies 4187.5 kHz and 4357.0 kHz for ship and coast stations, respectively). The other two series are new and they are designated for regional use. The "Series A" designation includes coast stations along, and ship stations in, the Atlantic Ocean, the Gulf of Mexico, and the Caribbean Sea. The "Series B" designation includes stations in any remaining areas. Stations must initiate contact on the appropriate regional frequency depending upon the location of the called station and propagation conditions. Acknowledgement is made on the paired frequency. The worldwide frequencies may be used for international calling, if calls on the appropriate regional frequencies are unsuccessful, or the regional series does not contain the appropriate band (e.g., 2 MHz). During normal working hours, all public coast stations capable of DSC operations must monitor the worldwide and regional frequencies appropriate for its location. The specific frequencies to be monitored will vary with propagation conditions.

Reminder - Coast stations are authorized to operate on their frequency equivalent only. Coast stations that operate DSC must apply to the Federal Communications Commission for authority to use the additional DSC frequencies.

General Purpose DSC
(in kHz unless otherwise noted)

Worldwide		Series A		Series B	
Ship	Coast	Ship	Coast	Ship	Coast
458.5	455.5	---	---	---	---
2189.5	2177.0[1]	---	---	---	---
4208.0	4219.5	4208.5	4220.0	4209.0	4220.5
6312.5	6331.0	6313.0	6331.5	6313.5	6332.0
8415.0	8436.5	8415.5	8437.0	8416.0	8437.5
12577.5	12657.0	12578.0	12657.5	12578.5	12658.0
16805.0	16903.0	16805.5	16903.5	16806.0	16904.0
18898.5	19703.5	18899.0	19704.0	18899.5	19704.5
22374.5	22444.0	22375.0	22444.5	22375.5	22445.0
25208.5	26121.0	25209.0	26121.5	25209.5	26122.0
156.525 MHz	156.525 MHz	---	---	---	---

[1] The frequency 2177.0 kHz is also available to ship stations for intership calling and acknowledgement of such calls only.

Paired frequencies for NBDP and data transmissions: The following table describes both the frequency changes and the additional NBDP frequenies that are available for stations operating paired NBDP and data transmissions in accordance with 47 C.F.R. § 80.361(a). Because the revised Radio Regulations includes distress and safety NBDP frequencies within its Appendix 32 list, there are no direct transfer frequencies for four of the existing NBDP

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frequency pairs. In these instances, we have substituted frequencies from the expanded NBDP band in accordance with instructions from the International Frequency Registration Board (IFRB) in Circular-letter No. 830, dated July 11, 1990. For clarity, the distress and safety NBDP channel numbers have been included in the table and identified by an asterisk (*).

Reminder -- Coast stations are authorized to operate on their frequency equivalent only. Any coast station that desires additional frequencies must apply to the Federal Communications Commission.

Paired frequencies for NBDP and data transmissions (kHz)

Channel Number	Coast Transmit		Ship Transmit	
	Frequency prior to July 1, 1991	Frequency as of July 1, 1991	Frequency prior to July 1, 1991	Frequency as of July 1, 1991
401	4350.0	4210.5	4170.5	4172.5
402	4350.5	4211.0	4171.0	4173.0
403	4351.0	4211.5	4171.5	4173.5
404	4351.5	4212.0	4172.0	4174.0
405	4352.0	4212.5	4172.5	4174.5
406	4352.5	4213.0	4173.0	4175.0
407	4353.0	4213.5	4173.5	4175.5
408	4353.5	4214.0	4174.0	4176.0
409	4354.0	4214.5	4174.5	4176.5
410	4354.5	4215.0	4175.0	4177.0
411*	4355.0	use Ch. 415	4175.5	use Ch. 415
412	4355.5	4215.5	4176.0	4178.0
413	4356.0	4216.0	4176.5	4178.5
414	4356.5	4216.5	4177.0	4179.0
415	----	4217.0	----	4179.5
416	----	4217.5	----	4180.0
417	----	4218.0	----	4180.5
601	6494.5	6314.5	6256.5	6263.0
602	6495.0	6315.0	6257.0	6263.5
603	6495.5	6315.5	6257.5	6264.0
604	6496.0	6316.0	6258.0	6264.5
605	6496.5	6316.5	6258.5	6265.0
606	6497.0	6317.0	6259.0	6265.5
607	6497.5	6317.5	6259.5	6266.0
608	6498.0	6318.0	6260.0	6266.5
609	6498.5	6318.5	6260.5	6267.0
610	6499.0	6319.0	6261.0	6267.5
611*	6499.5	use Ch. 624	6261.5	use Ch. 624
612	6500.0	6319.5	6262.0	6268.5
613	6500.5	6320.0	6262.5	6269.0

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614	6501.0	6320.5	6263.0	6269.5
615	6501.5	6321.0	6263.5	6270.0
616	6502.0	6321.5	6264.0	6270.5
617	6502.5	6322.0	6264.5	6271.0
618	6503.0	6322.5	6265.0	6271.5
619	6503.5	6323.0	6265.5	6272.0
620	6504.0	6323.5	6266.0	6272.5
621	6504.5	6324.0	6266.5	6273.0
622	6505.0	6324.5	6267.0	6273.5
623	6505.5	6325.0	6267.5	6274.0
624	----	6325.5	----	6274.5
625	----	6326.0	----	6275.0
626	----	6326.5	----	6275.5
627	----	6327.0	----	6281.0
628	----	6327.5	----	6281.5
629	----	6328.0	----	6282.0
801*	8705.0	use Ch. 828	8344.0	use Ch. 828
802	8705.5	8417.0	8344.5	8377.0
803	8706.0	8417.5	8345.0	8377.5
804	8706.5	8418.0	8345.5	8378.0
805	8707.0	8418.5	8346.0	8378.5
806	8707.5	8419.0	8346.5	8379.0
807	8708.0	8419.5	8347.0	8379.5
808	8708.5	8420.0	8347.5	8380.0
809	8709.0	8420.5	8348.0	8380.5
810	8709.5	8421.0	8348.5	8381.0
811	8710.0	8421.5	8349.0	8381.5
812	8710.5	8422.0	8349.5	8382.0
813	8711.0	8422.5	8350.0	8382.5
814	8711.5	8423.0	8350.5	8383.0
815	8712.0	8423.5	8351.0	8383.5
816	8712.5	8424.0	8351.5	8384.0
817	8713.0	8424.5	8352.0	8384.5
818	8713.5	8425.0	8352.5	8385.0
819	8714.0	8425.5	8353.0	8385.5
820	8714.5	8426.0	8353.5	8386.0
821	8715.0	8426.5	8354.0	8386.5
822	8715.5	8427.0	8354.5	8387.0
823	8716.0	8427.5	8355.0	8387.5
824	8716.5	8428.0	8355.5	8388.0
825	8717.0	8428.5	8356.0	8388.5
826	8717.5	8429.0	8356.5	8389.0
827	8718.0	8429.5	8357.0	8389.5
828	----	8430.0	----	8390.0
829	----	8430.5	----	8390.5
830	----	8431.0	----	8391.0
831	----	8431.5	----	8391.5
832	----	8432.0	----	8392.0

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833	----	8432.5	----	8392.5
834	----	8433.0	----	8393.0

Paired frequencies for NBDP and data transmissions (kHz)
(table continued)

Channel Number	Coast Transmit Frequency prior to July 1, 1991	Coast Transmit Frequency as of July 1, 1991	Ship Transmit Frequency prior to July 1, 1991	Ship Transmit Frequency as of July 1, 1991
1201	13071.5	12579.5	12491.5	12477.0
1202	13072.0	12580.0	12492.0	12477.5
1203	13072.5	12580.5	12492.5	12478.0
1204	13073.0	12581.0	12493.0	12478.5
1205	13073.5	12581.5	12493.5	12479.0
1206	13074.0	12582.0	12494.0	12479.5
1207	13074.5	12582.5	12494.5	12480.0
1208	13075.0	12583.0	12495.0	12480.5
1209	13075.5	12583.5	12495.5	12481.0
1210	13076.0	12584.0	12496.0	12481.5
1211	13076.5	12584.5	12496.5	12482.0
1212	13077.0	12585.0	12497.0	12482.5
1213	13077.5	12585.5	12497.5	12483.0
1214	13078.0	12586.0	12498.0	12483.5
1215	13078.5	12586.5	12498.5	12484.0
1216	13079.0	12587.0	12499.0	12484.5
1217	13079.5	12587.5	12499.5	12485.0
1218	13080.0	12588.0	12500.0	12485.5
1219	13080.5	12588.5	12500.5	12486.0
1220	13081.0	12589.0	12501.0	12486.5
1221	13081.5	12589.5	12501.5	12487.0
1222	13082.0	12590.0	12502.0	12487.5
1223	13082.5	12590.5	12502.5	12488.0
1224	13083.0	12591.0	12503.0	12488.5
1225	13083.5	12591.5	12503.5	12489.0
1226	13084.0	12592.0	12504.0	12489.5
1227	13084.5	12592.5	12504.5	12490.0
1228	13085.0	12593.0	12505.0	12490.5
1229	13085.5	12593.5	12505.5	12491.0
1230	13086.0	12594.0	12506.0	12491.5
1231	13086.5	12594.5	12506.5	12492.0
1232	13087.0	12595.0	12507.0	12492.5
1233	13087.5	12595.5	12507.5	12493.0
1234	13088.0	12596.0	12508.0	12493.5
1235	13088.5	12596.5	12508.5	12494.0
1236	13089.0	12597.0	12509.0	12494.5
1237	13089.5	12597.5	12509.5	12495.0

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1238	13090.0	12598.0	12510.0	12495.5
1239	13090.5	12598.5	12510.5	12496.0
1240	13091.0	12599.0	12511.0	12496.5
1241	13091.5	12599.5	12511.5	12497.0
1242	13092.0	12600.0	12512.0	12497.5
1243	13092.5	12600.5	12512.5	12498.0
1244	13093.0	12601.0	12513.0	12498.5
1245	13093.5	12601.5	12513.5	12499.0
1246	13094.0	12602.0	12514.0	12499.5
1247	13094.5	12602.5	12514.5	12500.0
1248	13095.0	12603.0	12515.0	12500.5
1249	13095.5	12603.5	12515.5	12501.0
1250	13096.0	12604.0	12516.0	12501.5
1251	13096.5	12604.5	12516.5	12502.0
1252	13097.0	12605.0	12517.0	12502.5
1253	13097.5	12605.5	12517.5	12503.0
1254	13098.0	12606.0	12518.0	12503.5
1255	13098.5	12606.5	12518.5	12504.0
1256	13099.0	12607.0	12519.0	12504.5
1257	13099.5	12607.5	12519.5	12505.0
1258	----	12608.0	----	12505.5
1259	----	12608.5	----	12506.0
1260	----	12609.0	----	12506.5
1261	----	12609.5	----	12507.0
1262	----	12610.0	----	12507.5
1263	----	12610.5	----	12508.0
1264	----	12611.0	----	12508.5
1265	----	12611.5	----	12509.0
1266	----	12612.0	----	12509.5
1267	----	12612.5	----	12510.0
1268	----	12613.0	----	12510.5
1269	----	12613.5	----	12511.0
1270	----	12614.0	----	12511.5
1271	----	12614.5	----	12512.0
1272	----	12615.0	----	12512.5
1273	----	12615.5	----	12513.0
1274	----	12616.0	----	12513.5
1275	----	12616.5	----	12514.0
1276	----	12617.0	----	12514.5
1277	----	12617.5	----	12515.0
1278	----	12618.0	----	12515.5
1279	----	12618.5	----	12516.0
1280	----	12619.0	----	12516.5
1281	----	12619.5	----	12517.0
1282	----	12620.0	----	12517.5
1283	----	12620.5	----	12518.0
1284	----	12621.0	----	12518.5
1285	----	12621.5	----	12519.0
1286	----	12622.0	----	12519.5

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1287*	----	----	----	----
1288	----	12622.5	----	12520.5
1289	----	12623.0	----	12521.0
1290	----	12623.5	----	12521.5
1291	----	12624.0	----	12522.0
1292	----	12624.5	----	12522.5
1293	----	12625.0	----	12523.0
1294	----	12625.5	----	12523.5
1295	----	12626.0	----	12524.0
1296	----	12626.5	----	12524.5
1297	----	12627.0	----	12525.0
1298	----	12627.5	----	12525.5
1299	----	12628.0	----	12526.0
1300	----	12628.5	----	12526.5
1301	----	12629.0	----	12527.0
1302	----	12629.5	----	12527.5
1303	----	12630.0	----	12528.0
1304	----	12630.5	----	12528.5
1305	----	12631.0	----	12529.0
1306	----	12631.5	----	12529.5
1307	----	12632.0	----	12530.0

Paired frequencies for NBDP and data transmissions (kHz)
(table continued)

Channel Number	Coast Transmit Frequency prior to July 1, 1991	Coast Transmit Frequency as of July 1, 1991	Ship Transmit Frequency prior to July 1, 1991	Ship Transmit Frequency as of July 1, 1991
1601	17197.5	16807.0	16660.5	16683.5
1602	17198.0	16807.5	16661.0	16684.0
1603	17198.5	16808.0	16661.5	16684.5
1604	17199.0	16808.5	16662.0	16685.0
1605	17199.5	16809.0	16662.5	16685.5
1606	17200.0	16809.5	16663.0	16686.0
1607	17200.5	16810.0	16663.5	16686.5
1608	17201.0	16810.5	16664.0	16687.0
1609	17201.5	16811.0	16664.5	16687.5
1610	17202.0	16811.5	16665.0	16688.0
1611	17202.5	16812.0	16665.5	16688.5
1612	17203.0	16812.5	16666.0	16689.0
1613	17203.5	16813.0	16666.5	16689.5
1614	17204.0	16813.5	16667.0	16690.0
1615	17204.5	16814.0	16667.5	16690.5
1616	17205.0	16814.5	16668.0	16691.0
1617	17205.5	16815.0	16668.5	16691.5
1618	17206.0	16815.5	16669.0	16692.0

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1619	17206.5	16816.0	16669.5	16692.5
1620	17207.0	16816.5	16670.0	16693.0
1621	17207.5	16817.0	16670.5	16693.5
1622	17208.0	16817.5	16671.0	16694.0
1623	17208.5	16818.0	16671.5	16694.5
1624*	17209.0	use Ch. 1670	16672.0	use Ch. 1670
1625	17209.5	16818.5	16672.5	16695.5
1626	17210.0	16819.0	16673.0	16696.0
1627	17210.5	16819.5	16673.5	16696.5
1628	17211.0	16820.0	16674.0	16697.0
1629	17211.5	16820.5	16674.5	16697.5
1630	17212.0	16821.0	16675.0	16698.0
1631	17212.5	16821.5	16675.5	16698.5
1632	17213.0	16822.0	16676.0	16699.0
1633	17213.5	16822.5	16676.5	16699.5
1634	17214.0	16823.0	16677.0	16700.0
1635	17214.5	16823.5	16677.5	16700.5
1636	17215.0	16824.0	16678.0	16701.0
1637	17215.5	16824.5	16678.5	16701.5
1638	17216.0	16825.0	16679.0	16702.0
1639	17216.5	16825.5	16679.5	16702.5
1640	17217.0	16826.0	16680.0	16703.0
1641	17217.5	16826.5	16680.5	16703.5
1642	17218.0	16827.0	16681.0	16704.0
1643	17218.5	16827.5	16681.5	16704.5
1644	17219.0	16828.0	16682.0	16705.0
1645	17219.5	16828.5	16682.5	16705.5
1646	17220.0	16829.0	16683.0	16706.0
1647	17220.5	16829.5	16683.5	16706.5
1648	17221.0	16830.0	16684.0	16707.0
1649	17221.5	16830.5	16684.5	16707.5
1650	17222.0	16831.0	16685.0	16708.0
1651	17222.5	16831.5	16685.5	16708.5
1652	17223.0	16832.0	16686.0	16709.0
1653	17223.5	16832.5	16686.5	16709.5
1654	17224.0	16833.0	16687.0	16710.0
1655	17224.5	16833.5	16687.5	16710.5
1656	17225.0	16834.0	16688.0	16711.0
1657	17225.5	16834.5	16688.5	16711.5
1658	17226.0	16835.0	16689.0	16712.0
1659	17226.5	16835.5	16689.5	16712.5
1660	17227.0	16836.0	16690.0	16713.0
1661	17227.5	16836.5	16690.5	16713.5
1662	17228.0	16837.0	16691.0	16714.0
1663	17228.5	16837.5	16691.5	16714.5
1664	17229.0	16838.0	16692.0	16715.0
1665	17229.5	16838.5	16692.5	16715.5
1666	17230.0	16839.0	16693.0	16716.0
1667	17230.5	16839.5	16693.5	16716.5

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1668	17231.0	16840.0	16694.0	16717.0
1669	17231.5	16840.5	16694.5	16717.5
1670	----	16841.0	----	16718.0
1671	----	16841.5	----	16718.5
1672	----	16842.0	----	16719.0
1673	----	16842.5	----	16719.5
1674	----	16843.0	----	16720.0
1675	----	16843.5	----	16720.5
1676	----	16844.0	----	16721.0
1677	----	16844.5	----	16721.5
1678	----	16845.0	----	16722.0
1679	----	16845.5	----	16722.5
1680	----	16846.0	----	16723.0
1681	----	16846.5	----	16723.5
1682	----	16847.0	----	16724.0
1683	----	16847.5	----	16724.5
1684	----	16848.0	----	16725.0
1685	----	16848.5	----	16725.5
1686	----	16849.0	----	16726.0
1687	----	16849.5	----	16726.5
1688	----	16850.0	----	16727.0
1689	----	16850.5	----	16727.5
1690	----	16851.0	----	16728.0
1691	----	16851.5	----	16728.5
1692	----	16852.0	----	16729.0
1693	----	16852.5	----	16729.5
1694	----	16853.0	----	16730.0
1695	----	16853.5	----	16730.5
1696	----	16854.0	----	16731.0
1697	----	16854.5	----	16731.5
1698	----	16855.0	----	16732.0
1699	----	16855.5	----	16732.5
1700	----	16856.0	----	16733.0
1701	----	16856.5	----	16733.5
1702	----	16857.0	----	16739.0
1703	----	16857.5	----	16739.5
1704	----	16858.0	----	16740.0
1705	----	16858.5	----	16740.5
1706	----	16859.0	----	16741.0
1707	----	16859.5	----	16741.5
1708	----	16860.0	----	16742.0
1709	----	16860.5	----	16742.5
1710	----	16861.0	----	16743.0
1711	----	16861.5	----	16743.5
1712	----	16862.0	----	16744.0
1713	----	16862.5	----	16744.5
1714	----	16863.0	----	16745.0
1715	----	16863.5	----	16745.5
1716	----	16864.0	----	16746.0

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1717	----	16864.5	----	16746.5
1718	----	16865.0	----	16747.0
1719	----	16865.5	----	16747.5
1720	----	16866.0	----	16748.0
1721	----	16866.5	----	16748.5
1722	----	16867.0	----	16749.0
1723	----	16867.5	----	16749.5
1724	----	16868.0	----	16750.0
1725	----	16868.5	----	16750.5
1726	----	16869.0	----	16751.0
1727	----	16869.5	----	16751.5
1728	----	16870.0	----	16752.0
1729	----	16870.5	----	16752.5
1730	----	16871.0	----	16753.0
1731	----	16871.5	----	16753.5
1732	----	16872.0	----	16754.0
1801	----	19681.0	----	18870.5
1802	----	19681.5	----	18871.0
1803	----	19682.0	----	18871.5
1804	----	19682.5	----	18872.0
1805	----	19683.0	----	18872.5
1806	----	19683.5	----	18873.0
1807	----	19684.0	----	18873.5
1808	----	19684.5	----	18874.0
1809	----	19685.0	----	18874.5
1810	----	19685.5	----	18875.0
1811	----	19686.0	----	18875.5
1812	----	19686.5	----	18876.0
1813	----	19687.0	----	18876.5
1814	----	19687.5	----	18877.0
1815	----	19688.0	----	18877.5
1816	----	19688.5	----	18878.0
1817	----	19689.0	----	18878.5
1818	----	19689.5	----	18879.0
1819	----	19690.0	----	18879.5
1820	----	19690.5	----	18880.0
1821	----	19691.0	----	18880.5
1822	----	19691.5	----	18881.0

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Paired frequencies for NBDP and data transmissions (kHz)
(table continued)

Channel Number	Coast Transmit		Ship Transmit	
	Frequency prior to July 1, 1991	Frequency as of July 1, 1991	Frequency prior to July 1, 1991	Frequency as of July 1, 1991
2201	22561.5	22376.5	22192.5	22284.5
2202	22562.0	22377.0	22193.0	22285.0
2203	22562.5	22377.5	22193.5	22285.5
2204	22563.0	22378.0	22194.0	22286.0
2205	22563.5	22378.5	22194.5	22286.5
2206	22564.0	22379.0	22195.0	22287.0
2207	22564.5	22379.5	22195.5	22287.5
2208	22565.0	22380.0	22196.0	22288.0
2209	22565.5	22380.5	22196.5	22288.5
2210	22566.0	22381.0	22197.0	22289.0
2211	22566.5	22381.5	22197.5	22289.5
2212	22567.0	22382.0	22198.0	22290.0
2213	22567.5	22382.5	22198.5	22290.5
2214	22568.0	22383.0	22199.0	22291.0
2215	22568.5	22383.5	22199.5	22291.5
2216	22569.0	22384.0	22200.0	22292.0
2217	22569.5	22384.5	22200.5	22292.5
2218	22570.0	22385.0	22201.0	22293.0
2219	22570.5	22385.5	22201.5	22293.5
2220	22571.0	22386.0	22202.0	22294.0
2221	22571.5	22386.5	22202.5	22294.5
2222	22572.0	22387.0	22203.0	22295.0
2223	22572.5	22387.5	22203.5	22295.5
2224	22573.0	22388.0	22204.0	22296.0
2225	22573.5	22388.5	22204.5	22296.5
2226	22574.0	22389.0	22205.0	22297.0
2227	22574.5	22389.5	22205.5	22297.5
2228	22575.0	22390.0	22206.0	22298.0
2229	22575.5	22390.5	22206.5	22298.5
2230	22576.0	22391.0	22207.0	22299.0
2231	22576.5	22391.5	22207.5	22299.5
2232	22577.0	22392.0	22208.0	22300.0
2233	22577.5	22392.5	22208.5	22300.5
2234	22578.0	22393.0	22209.0	22301.0
2235	22578.5	22393.5	22209.5	22301.5
2236	22579.0	22394.0	22210.0	22302.0
2237	22579.5	22394.5	22210.5	22302.5
2238	22580.0	22395.0	22211.0	22303.0
2239	22580.5	22395.5	22211.5	22303.5
2240	22581.0	22396.0	22212.0	22304.0
2241	22581.5	22396.5	22212.5	22304.5

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2242	22582.0	22397.0	22213.0	22305.0
2243	22582.5	22397.5	22213.5	22305.5
2244	22583.0	22398.0	22214.0	22306.0
2245	22583.5	22398.5	22214.5	22306.5
2246	22584.0	22399.0	22215.0	22307.0
2247	22584.5	22399.5	22215.5	22307.5
2248	22585.0	22400.0	22216.0	22308.0
2249	22585.5	22400.5	22216.5	22308.5
2250	22586.0	22401.0	22217.0	22309.0
2251	22586.5	22401.5	22217.5	22309.5
2252	22587.0	22402.0	22218.0	22310.0
2253	22587.5	22402.5	22218.5	22310.5
2254	22588.0	22403.0	22219.0	22311.0
2255	22588.5	22403.5	22219.5	22311.5
2256	22589.0	22404.0	22220.0	22312.0
2257	22589.5	22404.5	22220.5	22312.5
2258	22590.0	22405.0	22221.0	22313.0
2259	22590.5	22405.5	22221.5	22313.5
2260	22591.0	22406.0	22222.0	22314.0
2261	22591.5	22406.5	22222.5	22314.5
2262	22592.0	22407.0	22223.0	22315.0
2263	22592.5	22407.5	22223.5	22315.5
2264	22593.0	22408.0	22224.0	22316.0
2265	22593.5	22408.5	22224.5	22316.5
2266	22594.0	22409.0	22225.0	22317.0
2267	22594.5	22409.5	22225.5	22317.5
2268	----	22410.0	----	22318.0
2269	----	22410.5	----	22318.5
2270	----	22411.0	----	22319.0
2271	----	22411.5	----	22319.5
2272	----	22412.0	----	22320.0
2273	----	22412.5	----	22320.5
2274	----	22413.0	----	22321.0
2275	----	22413.5	----	22321.5
2276	----	22414.0	----	22322.0
2277	----	22414.5	----	22322.5
2278	----	22415.0	----	22323.0
2279	----	22415.5	----	22323.5
2280	----	22416.0	----	22324.0
2281	----	22416.5	----	22324.5
2282	----	22417.0	----	22325.0
2283	----	22417.5	----	22325.5
2284	----	22418.0	----	22326.0
2285	----	22418.5	----	22326.5
2286	----	22419.0	----	22327.0
2287	----	22419.5	----	22327.5
2288	----	22420.0	----	22328.0
2289	----	22420.5	----	22328.5
2290	----	22421.0	----	22329.0

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2291	----	22421.5	----	22329.5
2292	----	22422.0	----	22330.0
2293	----	22422.5	----	22330.5
2294	----	22423.0	----	22331.0
2295	----	22423.5	----	22331.5
2296	----	22424.0	----	22332.0
2297	----	22424.5	----	22332.5
2298	----	22425.0	----	22333.0
2299	----	22425.5	----	22333.5
2300	----	22426.0	----	22334.0
2301	----	22426.5	----	22334.5
2501	----	26101.0	----	25173.0
2502	----	26101.5	----	25173.5
2503	----	26102.0	----	25174.0
2504	----	26102.5	----	25174.5
2505	----	26103.0	----	25175.0
2506	----	26103.5	----	25175.5
2507	----	26104.0	----	25176.0
2508	----	26104.5	----	25176.5
2509	----	26105.0	----	25177.0
2510	----	26105.5	----	25177.5
2511	----	26106.0	----	25178.0
2512	----	26106.5	----	25178.5
2513	----	26107.0	----	25179.0
2514	----	26107.5	----	25179.5
2515	----	26108.0	----	25180.0
2516	----	26108.5	----	25180.5
2517	----	26109.0	----	25181.0
2518	----	26109.5	----	25181.5
2519	----	26110.0	----	25182.0
2520	----	26110.5	----	25182.5

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Non-paired frequencies for NBDP and data transmissions: The following table supersedes the previous frequencies available for authorized ship stations simplex operations as prescribed in 47 C.F.R. § 80.361(b). Public coast stations may receive only on the frequencies listed here. All frequencies listed after the "line break" are additional frequencies that resulted from expanding the spectrum allocated for simplex NBDP and data transmissions.

Ch. Ser.	Non-Paired NBDP Channels (kHz)							
1	4202.5	6300.5	8396.5	12560.0	16785.0	18893.0	22352.0	25193.0
2	4203.0	6301.0	8397.0	12560.5	16785.5	18893.5	22352.5	25193.5
3	4203.5	6301.5	8397.5	12561.0	16786.0	18894.0	22353.0	25194.0
4	4204.0	6302.0	8398.0	12561.5	16786.5	18894.5	22353.5	25194.5
5	4204.5	6302.5	8398.5	12562.0	16787.0	18895.0	22354.0	25195.0
6	4205.0	6303.0	8399.0	12562.5	16787.5	18895.5	22354.5	25195.5
7	4205.5	6303.5	8399.5	12563.0	16788.0	18896.0	22355.0	25196.0
8	4206.0	6304.0	8400.0	12563.5	16788.5	18896.5	22355.5	25196.5
9	4206.5	6304.5	8400.5	12564.0	16789.0	18897.0	22356.0	25197.0
10	4207.0	6305.0	8401.0	12564.5	16789.5	18897.5	22356.5	25197.5
11		6305.5	8401.5	12565.0	16790.0	18898.0	22357.0	25198.0
12		6306.0	8402.0	12565.5	16790.5		22357.5	25198.5
13		6306.5	8402.5	12566.0	16791.0		22358.0	25199.0
14		6307.0	8403.0	12566.5	16791.5		22358.5	25199.5
15		6307.5	8403.5	12567.0	16792.0		22359.0	25200.0
16		6308.0	8404.0	12567.5	16792.5		22359.5	25200.5
17		6308.5	8404.5	12568.0	16793.0		22360.0	25201.0
18		6309.0	8405.0	12568.5	16793.5		22360.5	25201.5
19		6309.5	8405.5	12569.0	16794.0		22361.0	25202.0
20		6310.0	8406.0	12569.5	16794.5		22361.5	25202.5
21		6310.5	8406.5	12570.0	16795.0		22362.0	25203.0
22		6311.0	8407.0	12570.5	16795.5		22362.5	25203.5
23		6311.5	8407.5	12571.0	16796.0		22363.0	25204.0
24			8408.0	12571.5	16796.5		22363.5	25204.5
25			8408.5	12572.0	16797.0		22364.0	25205.0
26			8409.0	12572.5	16797.5		22364.5	25205.5
27			8409.5	12573.0	16798.0		22365.0	25206.0
28			8410.0	12573.5	16798.5		22365.5	25206.5
29			8410.5	12574.0	16799.0		22366.0	25207.0
30			8411.0	12574.5	16799.5		22366.5	25207.5
31			8411.5	12575.0	16800.0		22367.0	25208.0
32			8412.0	12575.5	16800.5		22367.5	
33			8412.5	12576.0	16801.0		22368.0	
34			8413.0	12576.5	16801.5		22368.5	
35			8413.5		16802.0		22369.0	
36			8414.0		16802.5		22369.5	
37					16803.0		22370.0	
38					16803.5		22370.5	

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39					16804.0		22371.0	
40							22371.5	
41							22372.0	
42							22372.5	
43							22373.0	
44							22373.5	
45							22374.0	

Ship frequencies for facsimile: The following table describes the frequency changes for ship stations operating facsimile in accordance with 47 C.F.R. § 80.363(a).

Ship Facsimile Carrier Frequencies (kHz)	
Frequency prior to July 1, 1991	Frequency as of July 1, 1991
2069.1	2070.5
----	2074.5
4159.2	4154.5
6327.2	6235.5
8324.6	8302.5
12483.6	12370.4
16652.6	16551.5
----	18847.5
22184.6	22181.5
----	25123.5
2075.1	2072.5
----	2076.5
4166.6	4169.5
6241.2	6259.5
8340.1	8338.5
12487.6	12418.5
16656.6	16614.5
----	18868.5
22188.6	22238.5
----	25159.5

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Coast frequencies for facsimile: The following table describes the exclusive maritime mobile HF frequency bands that are available for assignment to coast stations using 3 kHz channels for facsimile in accordance with 47 C.F.R. § 80.363(b). However, any frequency in the 2000-27500 kHz bands listed in Part 2 of the Commission's Rules as available for shared use by the maritime mobile service and other radio services, except for the 4000-4063 kHz and the 8100-8195 kHz bands, is available for assignment to coast stations for facsimile. Frequency assignments are subject to coordination with government users.

Frequency bands for Coast facsimile (kHz)	
4221.0 - 4351.0	16904.5 - 17242.0
6332.5 - 6501.0	19705.0 - 19755.0
8438.0 - 8707.0	22445.5 - 22696.0
12658.5 - 13077.0	26122.5 - 26145.0

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ATTACHMENT C

HF-SSB Frequencies for Public Correspondence (Public Coast)

Call and reply HF-SSB frequencies: The following table describes the frequency changes for stations operating call and reply radiotelephony in accordance with 47 C.F.R. § 80.369(d).

	Call and Reply Radiotelephony Carrier Frequencies (kHz)			
	Coast Transmit		Ship Transmit	
Channel Number	Frequency prior to July 1, 1991	Frequency as of July 1, 1991	Frequency prior to July 1, 1991	Frequency as of July 1, 1991
421	----	4417 [1]	----	4125 [1,2,3]
606	----	6516 [1]	----	6215 [2,3]
821	8780.9	8779	8257.0	8255
1221	13162.8	13137	12392.0	12290 [3]
1621	17294.9	17302	16522.0	16420 [3]
1806	----	19770	----	18795
2221	22658.0	22756	22062.0	22060
2510	----	26172	----	25097

[1] The frequencies 4125 kHz, 4417 kHz, and 6516 kHz are also available on a simplex basis for private communications.

[2] The frequencies 4125 kHz and 6215 kHz are also available on a simplex basis to ship and coast stations for call and reply, provided that the peak envelope power does not exceed 1 kW.

[3] The frequencies 4125 kHz, 6215 kHz, 8291 kHz, 12290 kHz, and 16420 kHz are also available on a simplex basis for distress and safety traffic.

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For complete discussion of amendments to 47 C.F.R. Part 80 for the maritime radio service, see Report and Order, PR Docket No. 90-133.

HF-SSB frequencies for public correspondence: The following table describes the frequency changes for stations operating duplex radiotelephony for public correspondence in accordance with 47 C.F.R. § 80.371(b).

Reminder -- Coast stations are authorized to operate on their frequency equivalent only. Any coast station that desires additional frequencies must apply to the Federal Communications Commission.

	Duplex Public Correspondence Channels Carrier Frequencies (kHz)			
	Coast Transmit		Ship Transmit	
Channel Number	Frequency prior to July 1, 1991	Frequency as of July 1, 1991	Frequency prior to July 1, 1991	Frequency as of July 1, 1991
401	4357.4	4357.0	4063.0	4065.0
403	4363.6	4363.0	4069.2	4071.0
404	4366.7	4366.0	4072.3	4074.0
405	4369.8	4369.0	4075.4	4077.0
409	4382.2	4381.0	4087.8	4089.0
410	4385.3	4384.0	4090.9	4092.0
411	4388.4	4387.0	4094.0	4095.0
412	4391.5	4390.0	4097.1	4098.0
414	4397.7	4396.0	4103.3	4104.0
416	4403.9	4402.0	4109.5	4110.0
417	4407.0	4405.0	4112.6	4113.0
418	4410.1	4408.0	4115.7	4116.0
419	4413.2	4411.0	4118.8	4119.0
422	4422.5	4420.0	4128.1	4128.0
423	4425.6	4423.0	4131.2	4131.0
604	6515.7	6510.0	6209.3	6209.0
605	6518.8	6513.0	6212.4	6212.0
802	8722.0	8722.0	8198.1	8198.0
803	8725.1	8725.0	8201.2	8201.0
804	8728.2	8728.0	8204.3	8204.0
805	8731.3	8731.0	8207.4	8207.0
807	8737.5	8737.0	8213.6	8213.0
808	8740.6	8740.0	8216.7	8216.0
809	8743.0	8743.0	8219.8	8219.0
810	8746.8	8746.0	8222.9	8222.0
811	8749.9	8749.0	8226.0	8225.0
814	8759.2	8758.0	8235.3	8234.0
815	8762.3	8761.0	8238.4	8237.0
822	8784.0	8782.0	8260.1	8258.0
824	8790.2	8788.0	8266.3	8264.0

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825	8793.3	8791.0	8269.4	8267.0
826	8796.4	8794.0	8272.5	8270.0
829	8805.7	8803.0	8281.8	8279.0
830	8808.8	8806.0	8284.9	8282.0
831	8811.9	8809.0	8288.0	8285.0
1201	13100.8	13077.0	12330.0	12230.0
1202	13103.9	13080.0	12333.1	12233.0
1203	13107.0	13083.0	12336.2	12236.0
1206	13116.3	13092.0	12345.5	12245.0
1208	13122.5	13098.0	12351.7	12251.0
1209	13125.6	13101.0	12354.8	12254.0
1210	13128.7	13104.0	12357.9	12257.0
1211	13131.8	13107.0	12361.0	12260.0
1212	13134.9	13110.0	12364.1	12263.0
1215	13144.2	13119.0	12373.4	12272.0
1222	13165.9	13140.0	12395.1	12293.0
1223	13169.0	13143.0	12398.2	12296.0
1225	13175.2	13149.0	12404.4	12302.0
1226	13178.2	13152.0	12407.5	12305.0
1228	13184.5	13158.0	12413.7	12311.0
1229	13187.6	13161.0	12416.8	12314.0
1230	13190.7	13164.0	12419.9	12317.0
1601	17232.9	17242.0	16460.0	16360.0
1602	17236.0	17245.0	16463.1	16363.0
1603	17239.1	17248.0	16466.2	16366.0
1605	17245.3	17254.0	16472.4	16372.0
1607	17251.5	17260.0	16478.6	16378.0
1609	17257.7	17266.0	16484.8	16384.0
1610	17260.8	17269.0	16487.9	16387.0
1611	17263.9	17272.0	16491.0	16390.0
1616	17279.4	17287.0	16506.5	16405.0
1620	17291.8	17299.0	16518.9	16417.0
1624	17304.2	17311.0	16531.3	16429.0
1626	17310.4	17317.0	16537.5	16435.0
1631	17325.9	17332.0	16553.0	16450.0
1632	17329.0	17335.0	16556.1	16453.0
1641	17356.9	17362.0	16584.0	16480.0
2201	22596.0	22696.0	22000.0	22000.0
2205	22608.4	22708.0	22012.4	22012.0
2210	22623.9	22723.0	22027.9	22027.0
2214	22636.3	22735.0	22040.3	22039.0
2215	22639.4	22738.0	22043.4	22042.0
2216	22642.5	22741.0	22046.5	22045.0
2222	22661.1	22759.0	22065.1	22063.0
2223	22664.2	22762.0	22068.2	22066.0
2227	22676.6	22774.0	22080.6	22078.0

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2228	22679.7	22777.0	22083.7	22081.0
2231	22689.0	22786.0	22093.0	22090.0
2236	22704.5	22801.0	22108.5	22105.0
2237	22707.6	22804.0	22111.6	22108.0

Additional HF-SSB frequencies for public correspondence. The following table specifies the additional carrier frequencies available to public coast stations for public correspondence. These additional coast station frequencies must be authorized by the Commission before use. The paired ship frequencies are available for use by any ship station authorized to use HF-SSB frequencies (Radiotelephone 4000-23000 kHz). The specific frequency assignment available to public coast stations for a particular geographic area is indicated by an "x" under the appropriate column. Table B is based on the initial Appendix 25 Allotment Arrangement published by the International Frequency Registration Board (IFRB) (see IFRB Circular-letter No. 836, dated September 28, 1990). The allotment areas are in accordance with the "Standard Defined Areas" as identified in the Appendix 25 Planning System (see IFRB letter to the Federal Communications Commission dated March 16, 1990, and IFRB Circular-letter No. 843, dated October 31, 1990).

NOTE: Additionally, frequencies in the 18, 16, 22, and 25 MHz bands were adopted for assignment to public coast stations for shared simplex operations with other U.S. government and foreign users. Frequencies in the 4000-4063 kHz and the 8100-8195 kHz bands were also provided subject to coordination with government users. See Report and Order, PR Docket No. 90-131, for details.

TABLE B - PUBLIC CORRESPONDENCE (ADDITIONAL DUPLEX CHANNELS)
Working carrier frequency pairs in the 4000-27500 kHz band

	Carrier frequencies (kHz)										
Channel	Ship Transmit	Coast Transmit	USA-E	USA-W	USA-S	USA-C	VIR	HWA	ALS	PTR	GUM
427	4143.0	4435.0	x	x	x	x	x	x	x	–	x
428	4060.0	4351.0	x	x	x	x	x	x	x	x	x
607	6218.0	6519.0	x	x	x	x	x	x	x	x	x
836	8113.0	8713.0	x	x	x	x	x	x	x	x	x
837	8128.0	8716.0	x	x	x	x	x	x	x	x	x
1233	12326.0	13173.0	x	x	x	x	x	x	x	x	x
1234	12329.0	13176.0	–	x	x	–	–	x	x	–	x
1235	12332.0	13179.0	x	x	x	x	x	x	x	x	x
1236	12335.0	13182.0	–	x	x	–	–	x	–	–	–
1237	12338.0	13185.0	x	–	x	x	x	–	–	x	–

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1642	16483.0	17365.0	x	x	x	x	x	x	x	x	x
1643	16486.0	17368.0	x	x	x	x	x	x	x	x	x
1644	16489.0	17371.0	x	x	x	x	-	x	x	-	x
1645	16492.0	17374.0	x	x	x	x	x	x	x	x	x
1646	16495.0	17377.0	-	x	-	-	-	-	-	-	-
1647	16498.0	17380.0	x	x	x	x	-	x	x	-	x
1648	16501.0	17383.0	-	x	-	x	x	x	x	x	x
1801	18780.0	19755.0	x	x	x	x	x	x	x	x	x
1802	18783.0	19758.0	x	-	x	x	x	-	-	x	-
1803	18786.0	19761.0	x	x	-	x	x	x	x	x	x
1804	18789.0	19764.0	-	x	x	-	-	x	x	-	-
1805	18792.0	19767.0	-	x	-	-	-	x	x	-	-
1807	18798.0	19773.0	x	x	x	x	x	x	x	x	x
1808	18801.0	19776.0	x	x	x	x	x	x	x	x	x
2241	22120.0	22816.0	x	x	x	x	x	x	x	x	x
2242	22123.0	22819.0	x	x	x	x	x	x	x	x	x
2243	22126.0	22822.0	x	x	x	x	x	x	x	x	-
2244	22129.0	22825.0	-	x	-	-	-	x	x	-	-
2245	22132.0	22828.0	-	x	x	-	-	x	x	-	-
2246	22135.0	22831.0	x	x	x	x	-	x	x	-	x
2247	22138.0	22834.0	x	x	x	x	x	x	x	-	x
2501	25070.0	26145.0	x	x	x	x	-	x	x	-	x
2502	25073.0	26148.0	x	x	x	x	x	x	x	x	-
2503	25076.0	26151.0	x	x	x	x	x	x	x	-	-
2504	25079.0	26154.0	x	x	x	x	x	x	x	x	x

Public correspondence on the Mississippi River: The following table describes the frequency changes for stations operating public correspondence within the Mississippi River System in accordance with 47 C.F.R. § 80.371(d). In a few instances, the Commission substituted different frequencies than those indicated in previous documents (i.e., Notice of Proposed Rule Making, PR Docket No. 90-133, or Public Notices released March 16, 1990). We have indicated those frequencies with an asterisk (*).

Mississippi River System Working Carrier Frequencies (kHz)	
Frequency prior to July 1, 1991	Frequency as of July 1, 1991
4063.0	4065
4087.8	4089
4115.7	4116

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4410.1	4408
6209.3	6209
6212.4	6212
6515.7	6510
6518.8	6513
8201.2	8201
8213.6	8213
8725.1	8725
8737.5	8737
12333.1	12362*
13103.9	12365*
16518.9	16543*
17291.8	16546*

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ATTACHMENT D

HF-SSB Frequencies for Private Communications (Private Coast)

SSB frequencies for private communications: The following table describes the frequencies between 2000-27500 kHz that are available for stations conducting private communications in accordance with 47 C.F.R. § 80.373(c). The additional frequencies adopted for private communications effective July 1, 1991, are indicated with an asterisk (*). See Report and Order, PR Docket No. 90-133, for details.

Reminder -- Coast stations are authorized to operate on their frequency equivalent only. They need not file an application to modify of their license. Any ship authorized to use MF-SSB (Radiotelephone 1600-4000 kHz) and HF-SSB (Radiotelephone 4000-23000 kHz) may operate on the frequencies listed below, including frequencies 25115 kHz and 25118 kHz. Any coast station that desires additional frequencies, or ship stations that desire to add the HF-SSB authorization to its license, must apply to the Federal Communications Commission. For further information contact: Consumer Assistance Branch, Licensing Division, Private Radio Bureau, Federal Communications Commission, Gettysburg, PA 17325-7245; or telephone 717-337-1212.

Business and Operational Carrier Frequencies (kHz)	
Frequency prior to July 1, 1991	Frequency as of July 1, 1991
2065.0 [1,3]	no change
2079.0 [1,3]	no change
2096.5 [1]	no change
3023.0 [4]	no change
4125.0 [2]	no change
4143.6	4146
4419.4	4149
----	*4417 [5]
5680.0 [4]	no change
6218.6	6224
6221.6	6227
6521.9	6230
----	*6516 [5]
8291.1	8294
8294.2	8297
12429.2	12353
12432.3	12356
12435.4	12359
16587.1	16528
16590.2	16531

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----	*18840
----	*18843
16593.3	16534
22124.0	22159
22127.1	22162
22130.2	22165
22133.3	22168
22136.4	22171
----	*25115
----	*25118

1 Limited to peak envelope power of 150 watts.

2 Available domestically for distress and safety and internationally for calling purposes.

3 The frequencies 2065.0 kHz and 2079.0 kHz must be coordinated with Canada.

4 The frequencies 3023.0 kHz and 5680.0 kHz are available to private coast stations licensed to state and local governments and any scene-of-action ships for the purpose of search and rescue scene-of-action coordination including communications with any scene-of-action aircraft.

5 The frequency 6516 kHz is limited to daytime operations. The frequencies 4417 kHz and 6516 kHz are also available for calling and reply.

Private communications in Alaska: Stations authorized in the 4 MHz frequency band for private radiotelephony communications in Alaska, 47 C.F.R. § 80.373(i), must change frequency in accordance with the following table:

Alaska Private Communications Carrier Frequencies (kHz)	
Frequency prior to July 1, 1991	Frequency as of July 1, 1991
4366.7	4366
4369.8	4369
4397.7	4396
4403.9	4402
4422.5	4420
4425.6	4423

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